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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12 UNLIMITED CIVIL JURISDICTION
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14 MICHAEL DIPIRRO,
15 Plaintiff,
16 v.
17 EVERGREEN ENTERPRISES, INC.; and
DOES 1-150,
18 Defendants.
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Case No. **23CV045163**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code. § 25249.6 *et seq.*)

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff MICHAEL
3 DIPIRRO in the public interest of the citizens of the State of California to enforce the People’s
4 right to be informed of the presence of Diethylhexyl phthalate (“DEHP”), a toxic chemical, for
5 exposures created by the use of PVC Bottle Openers sold in California, including but not limited
6 to the Cheesehead PVC Bottle Opener.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
8 warn California citizens about the risk of exposure to DEHP from the use of the PRODUCTS
9 that are manufactured, distributed, and/or offered for sale or use to consumers throughout the
10 State of California without the requisite health hazard warnings.

11 3. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
12 warn California citizens about the risk of exposure to DEHP in PRODUCTS that are
13 manufactured, distributed, and/or offered for sale or use to consumers throughout the State of
14 California.

15 4. Exposure to high levels of DEHP are commonly produced through the normal and
16 foreseeable use of the PRODUCTS that defendants manufacture, distribute, and/or offer for sale
17 to consumers throughout the State of California without requisite health hazard warnings.

18 5. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
19 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
20 doing business shall knowingly and intentionally expose any individual to a chemical known to
21 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
22 warning to such individual” Health & Safety Code § 25249.6.

23 6. Pursuant to Proposition 65, on January 1, 1988, California identified and listed
24 DEHP as a chemical known to cause cancer. DEHP became subject to the “clear and
25 reasonable warning” requirements of the act one year later on January 1, 1988, for cancer. On
27 October 24, 2003, California identified and listed DEHP as a chemical known to cause

1 developmental toxicity (male). DEHP became subject to the “clear and reasonable warning”
2 requirements of the act one year later on October 24, 2004, for developmental toxicity (male).
3 Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). DEHP is
4 referred to hereinafter as the “LISTED CHEMICAL.”

5 7. Defendants manufacture or otherwise process for sale, distribute, and sell
6 PVC Bottle Openers including, but not limited to the Cheesehead Bottle Opener,
7 the normal and foreseeable use of which results in exposure to DEHP at levels that require
8 health hazard warnings under Proposition 65. All such products are referred to collectively
9 hereinafter as the “PRODUCTS.”

10 8. Defendants’ failure to warn consumers and other individuals in the State of
11 California about their exposure to the LISTED CHEMICAL in conjunction with defendants’
12 sales of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder
13 of such conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a)
14 & (b)(1).

15 9. For defendants’ violations of Proposition 65, plaintiff seeks preliminary and
16 permanent injunctive relief to compel defendants to provide purchasers or users of the
17 PRODUCTS with the required warning regarding the health hazards of the LISTED
18 CHEMICAL. Health & Safety Code § 25249.7(a).

19 10. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
20 penalties against defendants for their violations of Proposition 65.

21 **PARTIES**

22 11. Plaintiff MICHAEL DIPIRRO is a citizen of the State of California who is
23 dedicated to protecting the health of California citizens through the elimination or reduction of
24 toxic exposures from consumer products; and he brings this action in the public interest
25 pursuant to Health and Safety Code section 25249.7(d).

1 12. Defendant EVERGREEN ENTERPRISES, INC. ("EVERGREEN")
2 is a person in the course of doing business within the meaning of Health and Safety Code
3 section 25249.11.

4 13. EVERGREEN manufactures (or otherwise processes for sale),
5 distributes, and/or offers the PRODUCTS for sale or use in the State of California, or implies by
6 its conduct that it manufactures, distributes, and/or offers the PRODUCTS for sale or use in the
7 State of California.

8 14. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each a
9 person in the course of doing business within the meaning of Health and Safety Code section
10 25249.11.

11 15. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
12 cultivate, harvest and/or manufacture, or imply by their conduct that they research, test, design,
13 assemble, fabricate, cultivate, harvest and/or manufacture one or more of the PRODUCTS
14 offered for sale or use in the State of California.

15 16. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person
16 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

17 17. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
18 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
19 in the State of California.

20 18. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in
21 the course of doing business within the meaning of Health and Safety Code section 25249.11.

22 19. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
23 State of California.

24 20. At this time, the true names of defendants DOES 1 through 150, inclusive, are
25 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
26 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
27 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
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1 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
2 Specifically named defendants and all “Doe” Defendants are hereinafter collectively referred to
3 as “DEFENDANTS”.

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5 **VENUE AND JURISDICTION**

6 21. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
7 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
8 because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda
9 County, and/or because DEFENDANTS conducted, and continue to conduct, business in this
10 county with respect to the PRODUCTS.

11 22. The California Superior Court has jurisdiction over this action pursuant to
12 California Constitution Article VI, section 10, which grants the Superior Court “original
13 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
14 which this action is brought does not specify any other basis of subject matter jurisdiction.

15 23. The California Superior Court has jurisdiction over DEFENDANTS based on
16 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
17 association that is a citizen of the State of California, has sufficient minimum contacts in the
18 State of California, and/or otherwise purposefully avails itself of the California market.
19 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
20 California courts consistent with traditional notions of fair play and substantial justice.

21 **FIRST CAUSE OF ACTION**

22 **(Violation of Proposition 65 - Against All Defendants)**

23 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
24 Paragraphs 1 through 48, inclusive.

25 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
26 Enforcement Act of 1986, the People of California expressly declare their right “[t]o be
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1 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
2 harm.”

3 26. Proposition 65 states, “[n]o person in the course of doing business shall
4 knowingly and intentionally expose any individual to a chemical known to the state to cause
5 cancer or reproductive toxicity without first giving clear and reasonable warning to such
6 individual” Health & Safety Code § 25249.6.

7 27. On April 8, 2022, plaintiff’s 60-Day Notice of Violation, together with the
8 requisite certificate of merit, was provided to EVERGREEN and certain
9 public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
10 PRODUCTS containing the LISTED CHEMICAL, purchasers and users in the State of
11 California were being exposed to the LISTED CHEMICAL resulting from the reasonably
12 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having
13 been provided with a “clear and reasonable warning” regarding such toxic exposures, as
14 required by Proposition 65.

15 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
16 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
17 such violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s 60-Day
18 Notices of Violation. As such, DEFENDANTS’ violations are ongoing and continuous in
19 nature, and will continue to occur in the future.

20 29. After receiving the claims asserted in the 60-day Notices of Violation, the
21 appropriate public enforcement agencies have failed to commence and diligently prosecute a
22 cause of action against DEFENDANTS under Proposition 65.

23 30. The PRODUCTS manufactured, distributed, and offered for sale or use in
24 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the
25 allowable state limits, such that they require a “clear and reasonable” warning under Proposition
26 65.

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1 31. DEFENDANTS knew or should have known that the PRODUCTS they
2 manufacture, distribute, and offer for sale or use in California contain the LISTED
3 CHEMICAL.

4 32. The exposures to the LISTED CHEMICAL result from the normal use of the
5 PRODUCTS in such a way as to expose individuals through dermal contact during reasonably
6 foreseeable use.

7 33. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
8 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
9 defined by California Code of Regulations title 27, section 25602(b).

10 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
11 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact.

12 35. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
13 the reasonably foreseeable uses of the PRODUCTS would occur by their deliberate, non-
14 accidental participation in the manufacture, distribution, and/or offering of the PRODUCTS for
15 sale or use to individuals in the State of California.

16 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
17 consumers and other individuals in the State of California who were or who would become
18 exposed to the LISTED CHEMICAL through dermal contact during the reasonably foreseeable
19 uses of the PRODUCTS.

20 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
21 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
22 contact resulting from the reasonably foreseeable use of the PRODUCTS sold by
23 DEFENDANTS without a “clear and reasonable warning”, have suffered, and continue to
24 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

25 38. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
26 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
27 for each violation.

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