

1 Evan J. Smith, Esquire (SBN 242352)  
2 Ryan P. Cardona, Esquire (SBN 302113)  
3 BRODSKY & SMITH, LLC  
4 9595 Wilshire Blvd., Ste. 900  
5 Beverly Hills, CA 90212  
6 Telephone: (877) 534-2590  
7 Facsimile: (310) 247-0160

ENDORSED  
FILED  
ALAMEDA COUNTY

JAN 23 2017

SUE PESKO

By \_\_\_\_\_

8 *Attorneys for Plaintiff*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 EMA BELL,

12 Plaintiff,

13 v.

14 RITE AID CORPORATION,

15 Defendant.

Case No.: DC170-00000

COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF

(Violation of Health & Safety Code §25249.5  
*et seq.*)

BY FAX

16  
17 Plaintiff Ema Bell, by and through her attorneys, alleges the following cause of action in  
18 the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

20 1. Plaintiff Ema Bell ("Plaintiff" or "Bell"), brings this representative action on  
21 behalf of all California citizens to enforce relevant portions of Safe Drinking Water and Toxic  
22 Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 *et seq* ("Proposition  
23 65"), which reads, in relevant part, "[n]o person in the course of doing business shall knowingly  
24 and intentionally expose any individual to a chemical known to the state to cause cancer or  
25 reproductive toxicity without first giving clear and reasonable warning to such individual ...".  
26 Health & Safety Code § 25249.6.

27  
28

1           2.       This complaint is a representative action brought by Plaintiff in the public interest  
2 of the citizens of the State of California to enforce the People’s right to be informed of the health  
3 hazards caused by exposure to Diisononyl phthalate (DINP), a toxic chemical found in earwax  
4 removal kits sold and/or distributed by defendant Rite Aid Corporation (“Rite Aid” or  
5 “Defendant”) in California.

6           3.       DINP is a harmful chemical known to the State of California to cause cancer. On  
7 December 20, 2014, the State of California listed DINP as a chemical known to the State to  
8 cause cancer and it has come under the purview of Proposition 65 regulations since that time.  
9 Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On

10          4.       Proposition 65 requires all businesses with ten (10) or more employees that  
11 operate within California or sell products therein to comply with Proposition 65 regulations.  
12 Included in such regulations is the requirement that businesses must label any product containing  
13 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and  
14 intentionally” exposing any person to it.

15          5.       Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
16 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety  
17 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin  
18 the actions of a defendant which “violate[s] or threaten[s] to violate” the statute. Health &  
19 Safety Code § 25249.7.

20          6.       Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,  
21 and/or offers for sale, without the required warning, Rite Aid Earwax Removal Kits, UPC No. 0  
22 11822 33711 3 (“Product” or “Products”) in California containing DINP.

23          7.       Defendant’s failure to warn consumers and other individuals in California of the  
24 health hazards associated with exposure to DINP in conjunction with the sale, manufacture,  
25 and/or distribution of the Product is a violation of Proposition 65 and subjects Defendant to the  
26 enjoinder and civil penalties described herein.

27          8.       Plaintiff seeks civil penalties against Defendant for its violations of Proposition  
28 65 in accordance with Health and Safety Code § 25249.7(b).



1 with the California Secretary of State as foreign corporations authorized to do business in the  
2 State of California, and/or has otherwise purposefully availed itself of the California market.  
3 Such purposeful availment has rendered the exercise of jurisdiction by California courts  
4 consistent and permissible with traditional notions of fair play and substantial justice.

5 **SATISFACTION OF NOTICE REQUIREMENTS**

6 16. On October 19, 2016, Plaintiff gave notice of alleged violation of Health and  
7 Safety Code § 25249.6 (the "Notice") to Rite Aid concerning the exposure of California citizens  
8 to DINP contained in the Product without proper warning, subject to a private action to Rite Aid  
9 and to the California Attorney General's office and the offices of the County District attorneys  
10 and City Attorneys for each city with a population greater than 750,000 persons wherein the  
11 herein violations allegedly occurred.

12 17. The Notice complied with all procedural requirements of Proposition 65 including  
13 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at  
14 least one person with relevant and appropriate expertise who reviewed relevant data regarding  
15 DINP exposure, and that counsel believed there was meritorious and reasonable cause for a  
16 private action.

17 18. After receiving the Notice, and to Plaintiff's best information and belief, none of  
18 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted  
19 a cause of action against Rite Aid under Proposition 65 to enforce the alleged violations which  
20 are the subject of Plaintiff's notice of violation.

21 19. Plaintiff is commencing this action more than sixty (60) days from the date of the  
22 Notice to Rite Aid, as required by law.

23 **FIRST CAUSE OF ACTION**

24 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

25 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of  
26 this complaint as though fully set forth herein.

27 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
28 and/or retailer of the Product.

1           22.     The Product contains DINP, a hazardous chemical found on the Proposition 65  
2 list of chemicals known to be hazardous to human health.

3           23.     The Product does not comply with the Proposition 65 warning requirements.

4           24.     Plaintiff, based on his best information and belief, avers that at all relevant times  
5 herein, and at least since October 5, 2016 continuing until the present, that Rite Aid has  
6 continued to knowingly and intentionally expose California users and consumers of the Product  
7 to DINP without providing required warnings under Proposition 65.

8           25.     The exposures that are the subject of the Notice result from the purchase,  
9 acquisition, handling and recommended use of the product. Consequently, the primary route of  
10 exposure to these chemicals is through direct skin exposure. The blue suction bulb is intended to  
11 be inserted within the user's ear during normal expected use and direct dermal exposure to DINP  
12 through the ear is likely to occur. Direct skin exposure through direct contact with bulb and the  
13 user's hands is possible during manipulation of the bulb. The bulb is used to apply the 6.5%  
14 aqueous carbamide peroxide solution and other directions include "Any was remaining after the  
15 4 day treatment may be removed by gently flushing the ear with warm (body temperature) water,  
16 using a soft rubber bulb ear syringe." Thus, the introduction of water and aqueous solutions that  
17 are contaminated with DINP that has migrated from the bulb is expected, and aqueous HMWP  
18 skin permeation rates have been reported to be faster than neat HMWP permeation. The bulb is  
19 expected to emit gas phase DINP within the sealed ear canal during normal use of the product.  
20 This gas phase DINP can potentially permeate skin and membranes of the eardrum, middle ear,  
21 and inner ear. Finally, while mouthing of the product does not seem likely, some amount of  
22 exposure through ingestion can occur by handling the product with subsequent touching of the  
23 users hand to mouth.

24           26.     Plaintiff, based on her best information and belief, avers that such exposures will  
25 continue every day until clear and reasonable warnings are provided to Product purchasers and  
26 users or until this known toxic chemical is removed from the Product.

27           27.     Defendant has knowledge that the normal and reasonably foreseeable use of the  
28 Product exposes individuals to DINP, and Defendant intends that exposures to DINP will occur

1 by their deliberate, non-accidental participation in the manufacture, importation, distribution,  
2 sale and offering of the Product to consumers in California

3 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
4 Complaint.

5 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above  
6 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

7 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically  
8 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.


9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff demands judgment against Defendant and requests the  
11 following relief:

- 12 A. That the court assess civil penalties against Defendant in the amount of
- 13 \$2,500 per day for each violation in accordance with Health and Safety
- 14 Code § 25249.7(b);
- 15 B. That the court preliminarily and permanently enjoin Defendant mandating
- 16 Proposition 65 compliant warnings on the Product;
- 17 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 18 D. That the court grant any further relief as may be just and proper.

19  
20 Dated: January 23, 2017

BRODSKY & SMITH, LLC

21 By:   
22 Evan J. Smith (SBN242352)  
23 Ryan P. Cardona (SBN302113)  
24 9595 Wilshire Boulevard, Suite 900  
25 Beverly Hills, CA 90212  
26 Telephone: (877) 534-2590  
27 Facsimile: (310) 247-0160

*Attorneys for Plaintiff*

28