

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

8 *Attorneys for Plaintiff*

**ENDORSED  
FILED  
ALAMEDA COUNTY**

NOV - 1 2017

CLERK OF THE SUPERIOR COURT,  
By Lanette Buffin, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

EMA BELL,

Plaintiff,

v.

D.M. MERCHANDISING, INC.,

Defendant.

Case No.: RG17880125

**AMENDED COMPLAINT FOR CIVIL  
PENALTIES AND INJUNCTIVE RELIEF**

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

BY FAX

Plaintiff Ema Bell ("Plaintiff"), by and through her attorneys, alleges the following cause of action in the public interest of the citizens of the State of California.

**BACKGROUND OF THE CASE**

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

2. This amended complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California to enforce the People's right to be

1 informed of the health hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic  
2 chemical found in Soothie Ice Packs manufactured, sold and/or distributed in California by  
3 defendant D.M. Merchandising, Inc. (“DM” or “Defendant”) in California.

4 3. DEHP is a harmful chemical known to the State of California to cause cancer. On  
5 December 20, 2013, the State of California listed DEHP as a chemical known to the State to  
6 cause cancer and it has come under the purview of Proposition 65 regulations since that time.  
7 Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On  
8 October 24, 2003, the State of California listed DEHP as a chemical known to cause  
9 reproductive toxicity. *Id.*

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 in California, without the required warning, Soothie Ice Packs, including  
22 but not limited to UPC No. 7 22950 25718 0 (“Product” or “Products”), that contain DEHP.

23 7. Defendant’s failure to warn consumers and other individuals in California of the  
24 health hazards associated with exposure to DEHP 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 State of California, and/or has otherwise purposefully availed itself of the California market,  
2 Such purposeful availment has rendered the exercise of jurisdiction by California courts  
3 consistent and permissible with traditional notions of fair play and substantial justice.

4 **SATISFACTION OF NOTICE REQUIREMENTS**

5 16. On April 27, 2017, Plaintiff gave notice of alleged violation of Health and Safety  
6 Code § 25249.6 (the "Notice") to DM concerning the exposure of California citizens to DEHP  
7 contained in the Product without proper warning, subject to a private action to DM and to the  
8 California Attorney General's office and the offices of the County District attorneys and City  
9 Attorneys for each city with a population greater than 750,000 persons wherein the herein  
10 violations allegedly occurred.

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

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

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

22 **FIRST CAUSE OF ACTION**

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

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

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

1           22.     The Product contains DEHP, 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 her best information and belief, avers that at all relevant times  
5 herein, and at least since March 22, 2017, continuing until the present, that DM has continued to  
6 knowingly and intentionally expose California users and consumers of the Product to DEHP  
7 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 dermal exposure. DEHP can leach from the plastic bag  
11 and contaminate water contained within the ice pack. The ice pack can be filled with either hot  
12 or cold water and DEHP leaching is expected to increase with elevated water temperature.  
13 Should the user's hands become wet with the interior DEHP contaminated water, aqueous DEHP  
14 skin permeation rates are faster than net DEHP permeation. When the plastic bag is placed in  
15 contact with bare skin, dermal exposure to DEHP is possible. The ice pack can be expected to  
16 emit gas phase DEHP into the air over the lifetime of the product. If the ice pack is stored or  
17 transported in a carrier, DEHP that leaches from the ice pack may contaminate other articles  
18 contained within these closed spaces are subsequently handled, worn, mouthed, or consume.  
19 Finally, while mouthing of the product does not seem likely, some amount of exposure through  
20 ingestion can occur by touching the product with subsequent touching of the user's hand to  
21 mouth.

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

25           27.     Defendant has knowledge that the normal and reasonably foreseeable use of the  
26 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur  
27 by their deliberate, non-accidental participation in the manufacture, importation, distribution,  
28 sale and offering of the Product to consumers in California

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

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

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

7  
8 **PRAYER FOR RELIEF**

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

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

19 Dated: November 1, 2017

BRODSKY & SMITH, LLC

20 By: 

21 Evan J. Smith (SBN242352)  
22 Ryan P. Cardona (SBN302113)  
23 9595 Wilshire Boulevard, Suite 900  
24 Beverly Hills, CA 90212  
25 Telephone: (877) 534-2590  
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*Attorneys for Plaintiff*