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ENDORSED  
FILED  
ALAMEDA COUNTY

NOV 17 2017

CLERK OF THE SUPERIOR COURT  
By: D. OLIVER, Deputy

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA

10 EMA BELL,

11 Plaintiff,

12 v.

13 AMERICAN SPORTING GOODS  
CORPORATION, SEQUENTIAL  
14 BRANDS GROUP, INC., THE TJX  
OPERATING COMPANIES, INC.,

15 Defendants.

Case No.:

RG-17882342

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

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

18 **BACKGROUND OF THE CASE**

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

25 2. This complaint is a representative action brought by Plaintiff in the public interest  
26 of the citizens of the State of California to enforce the People's right to be informed of the health  
27 hazards caused by exposure to Diisononyl phthalate (DINP), a toxic chemical found in AVIA  
28 armbands sold and/or distributed by defendants American Sporting Goods Corporation

1 (“American Sporting Goods”), Sequential Brands Group, Inc. (“Sequential Brands”), and The  
2 TJX Operating Companies, Inc. (“TJX”) (collectively, the “Defendants”) in California.

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

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

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

17 6. Plaintiff alleges that Defendants manufacture, distribute, import, purchase for  
18 sale, sell, and/or offer for sale in California AVIA armbands (the “Product” or “Products”)  
19 without the required Proposition 65 warning that the Products expose users to DINP.

20 7. Defendants’ failure to warn consumers and other individuals in California of the  
21 health hazards associated with exposure to DINP in conjunction with the sale, manufacture,  
22 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendants to the  
23 enjoinder and civil penalties described herein.

24 8. Plaintiff seeks civil penalties against Defendants for their violations of  
25 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

26 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
27 Defendants to provide purchasers or users of the Product with the required warnings related to  
28

1 the dangers and health hazards associated with exposure to DINP pursuant to Health and Safety  
2 Code § 25249.7(a).

3 **PARTIES**

4 10. Plaintiff is a citizen of the State of California acting in the interest of the general  
5 public to promote awareness of exposures to toxic chemicals in products sold in California and  
6 to improve human health by reducing hazardous substances contained in such items. He brings  
7 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

8 11. Defendant American Sporting Goods, through its business, effectively  
9 manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of  
10 California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or  
11 offers the Products for sale or use in the State of California.

12 12. Defendant Sequential Brands, through its business, effectively manufactures,  
13 imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or  
14 it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the  
15 Products for sale or use in the State of California.

16 13. Defendant TJX, through its business, effectively imports, distributes, purchases  
17 for sale, sells, and/or offers the Products for sale or use in the State of California, or it implies by  
18 its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the State  
19 of California.

20 14. Defendants are each a “person” in the course of doing business within the  
21 meaning of Health & Safety Code sections 25249.6 and 25249.11.

22 **VENUE AND JURISDICTION**

23 15. Venue is proper in the County of Alameda because one or more of the instances  
24 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants  
25 conducted, and continues to conduct, business in the County of Alameda with respect to the  
26 Product.

27 16. This Court has jurisdiction over this action pursuant to California Constitution  
28 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those

1 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the  
2 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,  
3 this Court has jurisdiction over this lawsuit.

4 17. This Court has jurisdiction over Defendants because it is either a citizen of the  
5 State of California, has sufficient minimum contacts with the State of California, is registered  
6 with the California Secretary of State as foreign corporations authorized to do business in the  
7 State of California, and/or has otherwise purposefully availed itself of the California market.  
8 Such purposeful availment has rendered the exercise of jurisdiction by California courts  
9 consistent and permissible with traditional notions of fair play and substantial justice.

10 **SATISFACTION OF NOTICE REQUIREMENTS**

11 18. On August 14, 2017, Plaintiff gave notice of alleged violation of Health and  
12 Safety Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California  
13 citizens to DINP contained in the Product without proper warning, subject to a private action to  
14 Defendants and to the California Attorney General’s office and the offices of the County District  
15 attorneys and City Attorneys for each city with a population greater than 750,000 persons  
16 wherein the herein violations allegedly occurred.

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

22 20. After receiving the Notice, and to Plaintiff’s best information and belief, none of  
23 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted  
24 a cause of action against Defendants under Proposition 65 to enforce the alleged violations which  
25 are the subject of Plaintiff’s notice of violation.

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

28 **FIRST CAUSE OF ACTION**

1                                   **(By Plaintiff against Defendants for the Violation of Proposition 65)**

2           22.     Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 21 of  
3 this complaint as though fully set forth herein.

4           23.     Defendants have, at all times mentioned herein, acted as manufacturer, distributor,  
5 and/or retailer of the Products.

6           24.     The Products contain DINP, a hazardous chemical found on the Proposition 65  
7 list of chemicals known to be hazardous to human health.

8           25.     The Products do not comply with the Proposition 65 warning requirements.

9           26.     Plaintiff, based on her best information and belief, avers that at all relevant times  
10 herein, and at least since June 22, 2017 continuing until the present, that Defendants have  
11 continued to knowingly and intentionally expose California users and consumers of the Products  
12 to DINP without providing required warnings under Proposition 65.

13           27.     The exposures that are the subject of the Notice result from the purchase,  
14 acquisition, handling and recommended use of the product. Consequently, the primary route of  
15 exposure to these chemicals is through dermal absorption. Users may be exposed to DINP by  
16 dermal absorption through direct skin contact with the plastic window during expected use when  
17 the armband is worn on the arm, grasped, or manipulated with bare hands. If the plastic window  
18 becomes wet due to precipitation or sweat and is handled, aqueous HMWP skin permeation rates  
19 have been reported to be faster than neat HMWP permeation. The product can be expected to  
20 emit gas phase DINP into the air and accumulate DINP at the surface over the lifetime of the  
21 product. DINP that leaches from the clear plastic window can contaminate a cell phone  
22 contained within the phone pocket that is subsequently handled. When a cell phone is removed  
23 from the armband pocket and used, dermal absorption of DINP is possible when the user  
24 manipulates the phone or holds the cell phone against an ear. If the armband is stored or  
25 transported in a carrier, DINP that leaches from the armband may contaminate other articles  
26 contained within these closed spaces are subsequently handled, worn, mouthed, or consumed.  
27 Finally, while mouthing of the product does not seem likely, some amount of exposure through  
28 ingestion can occur by touching the product with subsequent touching of the user's hand to

1 mouth, through touching the DINP contaminated smartphone screen after it is removed from the  
2 pocket with subsequent touching of the user's hand to mouth, or if the phone surface is  
3 contaminated with DINP and comes into contact with the user's mouth during use.

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

7 29. Defendants have knowledge that the normal and reasonably foreseeable use of the  
8 Products exposes individuals to DINP, and Defendants intends that exposures to DINP will occur  
9 by their deliberate, non-accidental participation in the manufacture, importation, distribution,  
10 sale and offering of the Products to consumers in California

11 30. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
12 Complaint.

13 31. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above  
14 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per  
15 violation.

16 32. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically  
17 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff demands judgment against Defendants and requests the  
20 following relief:

- 21 A. That the court assess civil penalties against each Defendant in the amount  
22 of \$2,500 per day for each violation in accordance with Health and Safety  
23 Code § 25249.7(b);
- 24 B. That the court preliminarily and permanently enjoin Defendants  
25 mandating Proposition 65 compliant warnings on the Product;
- 26 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 27 D. That the court grant any further relief as may be just and proper.
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Dated: November 16, 2017

BRODSKY & SMITH, LLC

By:  \_\_\_\_\_

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