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ENDORSED
FILED
ALAMEDA COUNTY
MAR 13 2019

CLERK OF THE SUPERIOR COURT
By Lanette Buffin, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10
11 EMA BELL,
12
13 Plaintiff,
14 v.
15 BH PET GEAR, LLC, TUESDAY
16 MORNING, INC.,
17 Defendants.

Case No.: *JG* 19010802
**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**
*(Violation of Health & Safety Code §25249.5
et seq.)*

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

BACKGROUND OF THE CASE

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

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

1 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
2 Jelly Wellies Rain Boots for Dogs carry cases/bags manufactured, distributed, offered for sale
3 and/or sold by defendants BH Pet Gear, LLC (“BH Pet Gear”) and Tuesday Morning, Inc.
4 (“Tuesday Morning”) (collectively, “Defendants”) in California.

5 3. DEHP is a harmful chemical known to the State of California to cause cancer and
6 birth defects and other reproductive harm. On January 1, 1988, the State of California listed
7 DEHP as a chemical known to the State to cause cancer and DEHP has come under the purview
8 of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health &
9 Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed
10 DEHP as a chemical known to cause birth defects and other reproductive harm.

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

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

21 6. Plaintiff alleges that Defendants manufacture, distribute and/or offer for sale in
22 California, without the required exposure warning, Jelly Wellies Rain Boots for Dogs carry
23 cases/bags (“Product” or “Products”) that contain DEHP.

24 7. Defendants’ failure to warn consumers and other individuals in California of the
25 health hazards associated with exposure to DEHP in conjunction with the sale, manufacture,
26 and/or distribution of the Product is a violation of Proposition 65 and subjects Defendants to the
27 enjoinder and civil penalties described herein.
28

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

3 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
4 Defendants to provide purchasers or users of the Product with the required warnings related to
5 the dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety
6 Code § 25249.7(a).

7 **PARTIES**

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

12 11. Defendant BH Pet Gear, through its business, effectively manufactures, imports,
13 distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies
14 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale
15 or use in the State of California. Plaintiff alleges that defendant BH Pet Gear is a “person” in the
16 course of doing business within the meaning of Health & Safety Code sections 25249.6 and
17 25249.11.

18 12. Defendant Tuesday Morning, through its business, effectively imports, distributes,
19 sells, and/or offers the Product for sale or use in the State of California, or it implies by its
20 conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use
21 in the State of California. Plaintiff alleges that defendant Tuesday Morning is a “person” in the
22 course of doing business within the meaning of Health & Safety Code sections 25249.6 and
23 25249.11.

24 **VENUE AND JURISDICTION**

25 13. Venue is proper in the County of Alameda because one or more of the instances
26 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants
27 conduct, and continue to conduct, business in the County of Alameda with respect to the Product.
28

1 14. This Court has jurisdiction over this action pursuant to California Constitution
2 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
3 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
4 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
5 this Court has jurisdiction over this lawsuit.

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

12 **SATISFACTION OF NOTICE REQUIREMENTS**

13 16. On March 16, 2018, Plaintiff gave notice of alleged violation of Health and Safety
14 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
15 DEHP contained in the Product without proper warning, subject to a private action to Defendants
16 and to the California Attorney General’s office and the offices of the County District attorneys
17 and City Attorneys for each city with a population greater than 750,000 persons wherein the
18 herein violations allegedly occurred.

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

24 18. After receiving the Notice, and to Plaintiff’s best information and belief, none of
25 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
26 a cause of action against Defendants under Proposition 65 to enforce the alleged violations which
27 are the subject of Plaintiff’s notice of violation.
28

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

3 **FIRST CAUSE OF ACTION**

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

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

7 21. Defendants have, at all times mentioned herein, acted as either a manufacturer,
8 distributor, and/or retailer of the Product.

9 22. The Product contains DEHP, a hazardous chemical found on the Proposition 65
10 list of chemicals known to be hazardous to human health.

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

12 24. Plaintiff, based on her best information and belief, avers that at all relevant times
13 herein, and at least since January 17, 2018, continuing until the present, that Defendants have
14 continued to knowingly and intentionally expose California users and consumers of the Product
15 to DEHP without providing required warnings under Proposition 65.

16 25. The exposures that are the subject of the Notice result from the purchase,
17 acquisition, handling and recommended use of the Product. Consequently, the primary route of
18 exposure to these chemicals is through dermal absorption. Users may potentially be exposed to
19 DEHP by dermal absorption through direct skin contact with the Product during routine use
20 when manipulated with bare hands. Concentrations of gas phase DEHP can be expected to build
21 within the small, enclosed interior of the Product. This gas phase DEHP can potentially be
22 absorbed to the surface of the interior contents which includes dog boots. When handled, these
23 boots can provide an indirect source of dermal transfer of DEHP to the user's hands. If the
24 Product is stored or transported in a carrier, DEHP that leaches from the Product may
25 contaminate other articles contained within the carrier bag that are subsequently handled, worn,
26 mouthed, or ingested by the user. Finally, while mouthing of the Product does not seem likely,
27 some amount of exposure through ingestion can occur by touching the Product with subsequent
28 touching of the user's hand to mouth.

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

4 27. Defendants have knowledge that the normal and reasonably foreseeable use of the
5 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
6 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
7 sale and offering of the Product to consumers in California

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

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

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

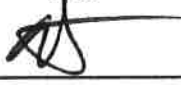
14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff demands judgment against Defendants and requests the
16 following relief:

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

25 Dated: March 13, 2019

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