

COPY

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  
MAY 9 12010

CLERK OF THE SUPERIOR COURT  
-By Lenette Dunin, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 Case No.:

12 *Handwritten signature*  
13 19021084

14 PRECILA BALABBO,

15 Plaintiff,

16 **COMPLAINT FOR CIVIL PENALTIES AND  
17 INJUNCTIVE RELIEF**

18 vs.

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

21 DAY TO DAY IMPORTS, INC., THE  
22 TJX COMPANIES, INC.,

23 Defendants.

24 Plaintiff Precila Balabbo ("Plaintiff"), by and through her attorneys, alleges the following  
25 cause of action in the public interest of the citizens of the State of California.

26 **BACKGROUND OF THE CASE**

27 1. Plaintiff brings this representative action on behalf of all California citizens to  
28 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 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 informed of the health  
hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in

1 Paws & Pals Pet Carriers sold and/or distributed by defendants Day To Day Imports, Inc. (“Day  
2 To Day”) and The TJX Companies, Inc. (“TJX”) (collectively, “Defendants”) in California.

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

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

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

19 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,  
20 without a requisite exposure warning, Paws & Pals Pet Carriers (the “Products”) that expose  
21 persons to DEHP.

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

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

28

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

5 **PARTIES**

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

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

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

20 **VENUE AND JURISDICTION**

21 13. Venue is proper in the County of Alameda because one or more of the instances  
22 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants  
23 conducted, and continue to conduct, business in the County of Alameda with respect to the  
24 Products.

25 14. This Court has jurisdiction over this action pursuant to California Constitution  
26 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those  
27 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the  
28

1 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,  
2 this Court has jurisdiction over this lawsuit.

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

9 **SATISFACTION OF NOTICE REQUIREMENTS**

10 16. On November 21, 2018, Plaintiff gave notice of alleged violation of Health and  
11 Safety Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California  
12 citizens to DEHP contained in the Products without proper warning, subject to a private action to  
13 Defendants and to the California Attorney General’s office and the offices of the County District  
14 attorneys and City Attorneys for each city with a population greater than 750,000 persons  
15 wherein the herein violations allegedly occurred.

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

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

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

27 **FIRST CAUSE OF ACTION**

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

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

3           21.     Defendants have, at all times mentioned herein, acted as distributors and/or  
4 retailers of the Product.

5           22.     The Products contain DEHP, a hazardous chemical found on the Proposition 65  
6 list of chemicals known to be hazardous to human health.

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

8           24.     Plaintiff, based on her best information and belief, avers that at all relevant times  
9 herein, and at least since September 21, 2018, continuing until the present, that Defendants have  
10 continued to knowingly and intentionally expose California users and consumers of the Product  
11 to DEHP without providing required warnings under Proposition 65.

12           25.     The exposures that are the subject of the Notice result from the purchase,  
13 acquisition, handling and recommended use of the Product. Consequently, the primary route of  
14 exposure to these chemicals is through dermal absorption. Users may be exposed to DEHP by  
15 dermal absorption through direct skin contact with Product when it is handled. Concentrations  
16 of gas phase DEHP can be expected to build within the interior of the Product. Items placed in  
17 the Product can absorb DEHP and these items can be subsequently handled, held in direct  
18 contact with skin, mouthed, or ingested. Finally, while mouthing of the Product does not seem  
19 likely, some amount of exposure through ingestion can occur by touching the Product with  
20 subsequent touching of the user's hand to mouth.

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

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

28

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, Defendants 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 Defendants.


7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff demands judgment against Defendants and requests the  
9 following relief:

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

17  
18 Dated: May 31, 2019

BRODSKY & SMITH, LLC

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

26  
27 *Attorneys for Plaintiff*

28