

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

11/16/2021 at 10:05:19 AM

By: Cheryl Clark, Deputy Clerk

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

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

PRECILA BALABBO,

Plaintiff,

vs.

SUNNY DAYS ENTERTAINMENT,
LLC,

Defendant.

Case No.: **21CV002543**

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

Plaintiff Precila Balabbo ("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 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 9Round boxing gloves sold and/or distributed by defendant Sunny Days Entertainment, LLC ("Sunny Days" or the "Defendant") in California.

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

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

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
14 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
15 imposed upon defendants in a civil action for violations of Proposition 65. Hpealth & Safety Code
16 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
17 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
18 25249.7.

19 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
20 without a requisite exposure warning, 9Round boxing gloves (the “Products”) that expose persons
21 to DEHP when used for their intended purpose.

22 7. Defendant’s 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 Defendant to the enjoinder and civil
25 penalties described herein.

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

1 of California, and/or has otherwise purposefully availed itself of the California market. Such
2 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
3 permissible with traditional notions of fair play and substantial justice.

4 **STATUTORY BACKGROUND**

5 17. The people of the State of California declared in Proposition 65 their right “[t]o be
6 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
7 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

8 18. To effect this goal, Proposition 65 requires that individuals be provided with a
9 “clear and reasonable warning” before being exposed to substances listed by the State of California
10 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

11 No person in the course of doing business shall knowingly and intentionally expose any
12 individual to a chemical known to the state to cause cancer or reproductive toxicity without
first giving clear and reasonable warning to such individual...

13 19. An exposure to a chemical in a consumer product is one “which results from a
14 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
15 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
16 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
17 shall provide a warning to any person to whom the product is sold or transferred unless the product
18 is packaged or labeled with a clear and reasonable warning.”

19 20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
20 more of the following methods individually or in combination:¹

- 21 a. A warning that appears on a product’s label or other labeling.
22 b. Identification of the product at the retail outlet in a manner which provides
23 a warning. Identification may be through shelf labeling, signs, menus, or a combination
24 thereof.
25

26
27 ¹ Alternatively, a person in the course of doing business may elect to comply with the warning
28 requirements set out in the amended version of 27 CCR 25601, *et.seq.* as amended on August 30,
2016, and operative on August 30, 2018.

1 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
2 prominently placed upon a product's labels or other labeling or displayed at the retail outlet
3 with such conspicuousness, as compared with other words, statements, designs, or devices
4 in the label, labeling or display as to render it likely to be read and understood by an
5 ordinary individual under customary conditions of purchase or use.

6 d. A system of signs, public advertising identifying the system and toll-free
7 information services, or any other system that provides clear and reasonable warnings.

8 21. Proposition 65 provides that any "person who violates or threatens to violate" the
9 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
10 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
11 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
12 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
13 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

14 **FACTUAL BACKGROUND**

15 22. On January 1, 1988, the State of California listed DEHP as a chemical known to
16 the State to cause cancer and it has come under the purview of Proposition 65 regulations since
17 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
18 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
19 reproductive toxicity. In summary, the Listed Chemical was listed under Proposition 65 as a
20 chemical known to the State to cause cancer and reproductive toxicity.

21 23. The consumer exposures that are the subject of this Complaint result from through
22 dermal absorption. The primary route of exposure to the DEHP is through dermal absorption
23 directly through the skin when consumers use, touch, or handle the Products. Some amount of
24 exposure through ingestion can occur by touching the Products with subsequent touching of the
25 user's hand to mouth. No clear and reasonable warning is provided with the Products regarding
26 the health hazards of exposure to the DEHP.

1 24. Defendant has manufactured, processed, marketed, distributed, offered to sell
2 and/or sold the Products in California since at least June 1, 2021. The Products continue to be
3 distributed and sold in California without the requisite warning information.

4 25. At all times relevant to this action, Defendant has knowingly and intentionally
5 exposed users and/or consumers of the Products to DEHP without first giving a clear and
6 reasonable exposure warning to such individuals.

7 26. As a proximate result of acts by Defendant, as a person in the course of doing
8 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
9 California, including in Alameda County, have been exposed to DEHP without a clear and
10 reasonable warning on the Products. The individuals subject to the violative exposures include
11 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
12 the Products.

13 **SATISFACTION OF NOTICE REQUIREMENTS**

14 27. On July 7, 2021, Plaintiff gave notice of alleged violation of Health and Safety
15 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to
16 DEHP contained in the Products without proper warning, subject to a private action to Defendant
17 and to the California Attorney General's office and the offices of the County District attorneys and
18 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
19 violations allegedly occurred.

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

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

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

3 **FIRST CAUSE OF ACTION**

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

5 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of
6 this Complaint as though fully set forth herein.

7 32. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
8 the Product.

9 33. The Products contain DEHP, a hazardous chemical found on the Proposition 65 list
10 of chemicals known to be hazardous to human health.

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

12 35. Plaintiff, based on her best information and belief, avers that at all relevant times
13 herein, and at least since July 7, 2021, continuing until the present, that Defendant has continued
14 to knowingly and intentionally expose California users and consumers of the Product to DEHP
15 without providing required warnings under Proposition 65.

16 36. The exposures that are the subject of the Notice result from the purchase,
17 acquisition, handling and recommended use of the Products. Consequently, the primary route of
18 exposure to these chemicals is through dermal absorption. The primary route of exposure to the
19 DEHP is through dermal absorption directly through the skin when consumers use, touch, or
20 handle the Products. Some amount of exposure through ingestion can occur by touching the
21 Products with subsequent touching of the user's hand to mouth. No clear and reasonable warning
22 is provided with the Products regarding the health hazards of exposure to the DEHP.

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

26 38. Defendant has knowledge that the normal and reasonably foreseeable use of the
27 Products exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur
28

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

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

5 40. 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 41. 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 following
11 relief:

12 A. That the court assess civil penalties against each Defendant in the amount of \$2,500
13 per day for each violation for up to 365 days (up to a maximum civil penalty amount per
14 violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);

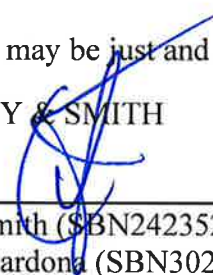
15 B. That the court preliminarily and permanently enjoin Defendant mandating
16 Proposition 65 compliant warnings on the Products;

17 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
18 amount of \$50,000.00.

19 D. That the court grant any further relief as may be just and proper.

20 Dated: November 15, 2021

BRODSKY & SMITH

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

28 *Attorneys for Plaintiff*