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ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco

**03/15/2022**  
Clerk of the Court  
BY: KAREN VALDES  
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 EMA BELL,

12 Plaintiff,

13 vs.

14 MELISSA & DOUG, LLC,

15 Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

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

**CGC-22-598699**

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.

**BACKGROUND OF THE CASE**

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

24 2. This complaint is a representative action brought by Plaintiff in the public interest  
25 of the citizens of the State of California to enforce the People’s right to be informed of the health  
26 hazards caused by exposure to di-isodecyl phthalate (DIDP), a toxic chemical found in Melissa &  
27 Doug children’s puzzle totes, sold and/or distributed by defendant Melissa & Doug, LLC (“Melissa  
28 & Doug” or “Defendant”) in California.

1           3.       DIDP is a harmful chemical known to the State of California to cause reproductive  
2 toxicity. On April 20, 2007, the State of California listed DIDP as a chemical known to the State  
3 to cause reproductive toxicity and it has come under the purview of Proposition 65 regulations  
4 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &  
5 25249.10(b).

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

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

18           6.       Plaintiff alleges that Defendant distributes and/or offers for sale in California,  
19 without a requisite exposure warning, Melissa & Doug children’s puzzle totes (the “Products”)  
20 that expose persons to DIDP when used for their intended purpose.

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

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

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

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

3 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

4 **PARTIES**

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

9 12. Defendant Melissa & Doug, through its business, effectively imports, distributes,  
10 sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct  
11 that it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.

12 13. Plaintiff alleges that defendant Melissa & Doug is a "person" in the course of doing  
13 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 14. Venue is proper in the County of San Francisco because one or more of the  
16 instances of wrongful conduct occurred and continue to occur in this county and/or because  
17 Defendant conducted, and continues to conduct, business in the County of San Francisco with  
18 respect to the Products.

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

24 16. This Court has jurisdiction over Defendant because Defendant is either a citizen of  
25 the State of California, has sufficient minimum contacts with the State of California, is registered  
26 with the California Secretary of State as foreign corporations authorized to do business in the State  
27 of California, and/or has otherwise purposefully availed itself of the California market. Such  
28

1 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and  
2 permissible with traditional notions of fair play and substantial justice.

### 3 STATUTORY BACKGROUND

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

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

10 No person in the course of doing business shall knowingly and intentionally expose any  
11 individual to a chemical known to the state to cause cancer or reproductive toxicity without  
12 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:<sup>1</sup>

- 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.

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25  
26  
27 <sup>1</sup> 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 April 20, 2007, the State of California listed DIDP as a chemical known to the  
16 State to cause reproductive toxicity and it has come under the purview of Proposition 65  
17 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8  
18 & 25249.10(b).

19 23. The exposures that are the subject of the Notice result from the purchase,  
20 acquisition, handling, and recommended use of the Products. Consequently, the primary route of  
21 exposure to these chemicals is through dermal absorption. Dermal absorption of DIDP can occur  
22 through direct skin contact when the Products are contacted with bare hands, exposed skin, or the  
23 Products are inserted into the user's body. Finally, some amount of exposure through ingestion  
24 will occur by touching the Products with subsequent touching of the user's hand to mouth.

25 24. Defendant has manufactured, processed, marketed, distributed, offered to sell  
26 and/or sold the Products in California since at least July 9, 2021. The Products continue to be  
27 distributed and sold in California without the requisite warning information.

1        25.    At all times relevant to this action, Defendant has knowingly and intentionally  
2 exposed users of the Products to DIDP without first giving a clear and reasonable exposure  
3 warning to such individuals.

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

#### 10        **SATISFACTION OF NOTICE REQUIREMENTS**

11        27.    On June 1, 2021, Plaintiff purchased the Product from Marshalls. At the time of  
12 purchase, Melissa & Doug did not provide a Proposition 65 exposure warning for DIDP or any  
13 other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described  
14 *supra*.

15        28.    On or about June 10, 2021, the Product was sent to a testing laboratory for phthalate  
16 testing to determine the phthalate content of the Product.

17        29.    On June 18, 2021, the laboratory provided the results of its analysis. Results of this  
18 test determined the Product exposes users to DIDP (the “Chemical Test Report”).

19        30.    Plaintiff provided the Chemical Test Report and Product to an analytical chemist  
20 to determine if, based on the findings of the Chemical Test Report and the reasonable and  
21 foreseeable use of the Product, exposure to DIDP will occur at levels that require Proposition 65  
22 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California  
23 Code of Regulations.

24        31.    On July 8, 2021, Plaintiff received from the analytical chemist an exposure  
25 assessment report which concluded that persons in California who use the Products will be exposed  
26 to levels of DIDP that require a Proposition 65 exposure warning.

27        32.    On July 9, 2021, Plaintiff gave notice of alleged violation of Health and Safety  
28 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to

1 DIDP from use of the Products without proper warning, subject to a private action to Defendant  
2 and to the California Attorney General's office and the offices of the County District attorneys and  
3 City Attorneys for each city with a population greater than 750,000 persons wherein the herein  
4 violations allegedly occurred.

5 33. The Notice complied with all procedural requirements of Proposition 65 including  
6 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at  
7 least one person with relevant and appropriate expertise who reviewed relevant data regarding  
8 DIDP exposure, and that counsel believed there was meritorious and reasonable cause for a private  
9 action.

10 34. After receiving the Notice, and to Plaintiff's best information and belief, none of  
11 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a  
12 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are  
13 the subject of the Notice.

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

16 **FIRST CAUSE OF ACTION**

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

18 36. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 35 of  
19 this Complaint as though fully set forth herein.

20 37. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of  
21 the Products.

22 38. Use of the Products will expose users and consumers thereof to DIDP, a hazardous  
23 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

24 39. The Products do not comply with the Proposition 65 warning requirements.

25 40. Plaintiff, based on her best information and belief, avers that at all relevant times  
26 herein, and at least since July 9, 2021, continuing until the present, that Defendant has continued  
27 to knowingly and intentionally expose California users and consumers of the Products to DIDP  
28 without providing required warnings under Proposition 65.

1           41.    The exposures that are the subject of the Notice result from the purchase,  
2 acquisition, handling and recommended use of the Products. Consequently, the primary route of  
3 exposure to these chemicals is through dermal absorption. Dermal absorption of DIDP can occur  
4 through direct skin contact when the Products are contacted with bare hands or exposed skin.  
5 Finally, some amount of exposure through ingestion will occur by touching the Products with  
6 subsequent touching of the user's hand to mouth.

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

10          43.    Defendant has knowledge that the normal and reasonably foreseeable use of the  
11 Products exposes individuals to DIDP, and Defendant intends that exposures to DIDP will occur  
12 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of  
13 the Products to consumers in California

14          44.    Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
15 Complaint.

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

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



1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendant and requests the following  
3 relief:

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

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

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

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

12 Dated: March 15, 2022

BRODSKY & SMITH

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

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