

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY SMITH
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*

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

10/17/2023
Clerk of the Court

BY: AUSTIN LAM
Deputy Clerk

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF SAN FRANCISCO

9 EMA BELL,

10 Plaintiff,

11 vs.

12 MICHAELS STORES, INC.,
13 MICHAELS STORES PROCUREMENT
14 COMPANY, INC.,

Defendants.

Case No.:

CGC-23-609813

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

17 **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 lead, a toxic chemical found in *Ashland*® happy harvest soap
27 dispensers, UPC # 195158711073, sold and/or distributed by defendants Michaels Stores, Inc.

1 and/or Michaels Stores Procurement Company, Inc. (collectively, “Michaels” or “Defendants” and
2 each a “Defendant”) in California.

3 3. Lead is a harmful chemical known to the State of California to cause cancer and
4 birth defects or other reproductive harm. On October 1, 1992, the state of California listed lead as
5 a chemical known to cause cancer and it has come under the purview of Proposition 65 regulations
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
7 25249.10(b). On February 27, 1987, the State of California listed lead as a chemical known to
8 cause birth defects or other reproductive harm.

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

15 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
16 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
17 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
18 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
19 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
20 25249.7.

21 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
22 without a requisite exposure warning, *Ashland*® happy harvest soap dispensers, UPC #
23 195158711073, (the “Products”) that expose persons to lead when used for their intended purpose.

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

1 reproductive harm. In summary, lead was listed under Proposition 65 as a chemical known to the
2 State to cause cancer and birth defects or other reproductive harm.

3 23. The exposures that are the subject of the Notice result from the purchase,
4 acquisition, handling and recommended use of the Products. The primary route of exposure to the
5 is through dermal absorption directly through the skin when consumers use, touch, or handle the
6 Products. Exposure through ingestion will occur by touching the Products with subsequent
7 touching of the user's hand to mouth. No clear and reasonable warning is provided with the
8 Products regarding the health hazards of exposure.

9 24. Defendants have processed, marketed, distributed, offered to sell and/or sold the
10 Products in California since at least October 20, 2022. The Products continue to be distributed and
11 sold in California without the requisite warning information.

12 25. At all times relevant to this action, Defendants have knowingly and intentionally
13 exposed users and/or consumers of the Products to lead without first giving a clear and reasonable
14 exposure warning to such individuals.

15 26. As a proximate result of acts by Defendants, as people in the course of doing
16 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
17 California, including in San Francisco County, have been exposed to lead without a clear and
18 reasonable warning on the Products. The individuals subject to the violative exposures include
19 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
20 the Products.

21 **SATISFACTION OF NOTICE REQUIREMENTS**

22 27. Plaintiff purchased the Product from Michaels. At the time of purchase, Michaels
23 did not provide a Proposition 65 exposure warning for lead or any other Proposition 65 listed
24 chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

25 28. The Product was sent to a testing laboratory to determine if, and what amount of,
26 lead would migrate and/or leach from the Products.

27 29. The laboratory provided the results of its analysis. Results of this test determined
28 the Product exposes users to lead (the "Chemical Test Report").

1 30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
2 to determine if, based on the findings of the Chemical Test Report and the reasonable and
3 foreseeable use of the Product, exposure to lead will occur at levels that require Proposition 65
4 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
5 Code of Regulations.

6 31. On October 20, 2022, Plaintiff received from the analytical chemist an exposure
7 assessment report which concluded that persons in California who use the Products will be exposed
8 to levels of lead that require a Proposition 65 exposure warning.

9 32. On October 20, 2022, Plaintiff gave notice of alleged violation of Health and Safety
10 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
11 lead contained in the Products without proper warning, subject to a private action to Defendants
12 and to the California Attorney General’s office and the offices of the County District attorneys and
13 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
14 violations allegedly occurred.

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

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

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

FIRST CAUSE OF ACTION

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

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

37. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer of the Product.

38. Use of the Products will exposed users to lead, a hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

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

40. Plaintiff, based on her best information and belief, avers that at all relevant times herein, and at least since October 20, 2022, continuing until the present, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Products to lead without providing required warnings under Proposition 65.

41. The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the Products. The primary route of exposure to the is through dermal absorption directly through the skin when consumers use, touch, or handle the Products. Exposure through ingestion will occur by touching the Products with subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided with the Products regarding the health hazards of exposure.

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

43. Defendants have knowledge that the normal and reasonably foreseeable use of the Products exposes individuals to lead, and Defendants intend that exposures to lead will occur by its deliberate, non-accidental participation in the importation, distribution, sale and offering of the Products to consumers in California

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

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

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

6 **PRAYER FOR RELIEF**

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

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

12 B. That the court preliminarily and permanently enjoin Defendants mandating
13 Proposition 65 compliant warnings on the Products;

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

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

17 Dated: October 17, 2023

BRODSKY SMITH

18 By: 

Evan J. Smith (SBN242352)

Ryan P. Cardona (SBN302113)

9595 Wilshire Boulevard, Suite 900

Beverly Hills, CA 90212

Telephone: (877) 534-2590

Facsimile: (310) 247-0160

Attorneys for Plaintiff