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ENDORSED
FILED
ALAMEDA COUNTY
MAY 12 2010
CLERK OF THE SUPERIOR COURT
By F. Wilson
Deputy

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10
11 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

12)
13 Plaintiff,)

14 v.)

15 AEROPOSTALE, INC.; AE RETAIL WEST)
LLC; AEROPOSTALE WEST, INC.;)
16 AMERICAN EAGLE OUTFITTERS, INC.;)
THE BUCKLE, INC.; CARA ACCESSORIES)
17 LTD.; CATHERINES, INC.; CATHERINES OF)
CALIFORNIA, INC.; CATHERINES STORES)
CORPORATION; CBI DISTRIBUTING)
18 CORP.; CLAIRE'S BOUTIQUES, INC.;)
CLAIRE'S STORES, INC.; LONG RAP INC.;)
19 SAKS & COMPANY; SAKS)
INCORPORATED; TARGET)
20 CORPORATION; TWEEN BRANDS, INC.;)
and Defendant DOES 1 through 500, inclusive,)

21)
22 Defendants.)
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Case No. RG 10514803

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to cadmium, a chemical known to the State
7 of California to cause birth defects and other reproductive harm. Such exposures have occurred,
8 and continue to occur, through the manufacture, distribution, sale and/or use of Defendants'
9 jewelry ("Jewelry") made of materials containing cadmium. Consumers, including pregnant
10 women, are exposed to cadmium when they wear, use, touch or handle the Jewelry.

11 2. Under California's Proposition 65, Health & Safety Code §25249.5, *et*
12 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
13 to chemicals known to the State to cause birth defects or other reproductive harm without
14 providing clear and reasonable warnings to individuals prior to their exposure. Defendants
15 introduce Jewelry contaminated with significant quantities of cadmium into the California
16 marketplace, exposing consumers of their Jewelry, many of whom are pregnant women, to
17 cadmium.

18 3. Despite the fact that Defendants expose pregnant women and other people
19 who come into contact with the Jewelry to cadmium, Defendants provide no warnings
20 whatsoever about the reproductive hazards associated with these cadmium exposures.
21 Defendants' conduct thus violates the warning provision of Proposition 65. Health & Safety
22 Code §25249.6.

23 **PARTIES**

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
25 non-profit corporation dedicated to protecting the public from environmental health hazards and
26 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
27 State of California. CEH is a "person" within the meaning of Health & Safety Code
28 §25249.11(a) and brings this enforcement action in the public interest pursuant to Health &

1 Safety Code §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
2 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
3 cases have resulted in significant public benefit, including the reformulation of thousands of
4 products to remove toxic chemicals to make them safer. CEH also provides information to
5 Californians about the health risks associated with exposure to hazardous substances, where
6 manufacturers and other responsible parties fail to do so.

7 5. Defendant AE RETAIL WEST LLC is a person in the course of doing
8 business within the meaning of Health & Safety Code §25249.11. AE Retail West LLC
9 manufactures, distributes and/or sells the Jewelry for sale or use in California.

10 6. Defendant AEROPOSTALE, INC. is a person in the course of doing
11 business within the meaning of Health & Safety Code §25249.11. Aeropostale, Inc.
12 manufactures, distributes and/or sells the Jewelry for sale or use in California.

13 7. Defendant AEROPOSTALE WEST, INC. is a person in the course of
14 doing business within the meaning of Health & Safety Code §25249.11. Aeropostale West, Inc.
15 manufactures, distributes and/or sells the Jewelry for sale or use in California.

16 8. Defendant AMERICAN EAGLE OUTFITTERS, INC. is a person in the
17 course of doing business within the meaning of Health & Safety Code §25249.11. American
18 Eagle Outfitters, Inc. manufactures, distributes and/or sells the Jewelry for sale or use in
19 California.

20 9. Defendant THE BUCKLE, INC. is a person in the course of doing
21 business within the meaning of Health & Safety Code §25249.11. The Buckle, Inc.
22 manufactures, distributes and/or sells the Jewelry for sale or use in California.

23 10. Defendant CARA ACCESSORIES LTD. is a person in the course of doing
24 business within the meaning of Health & Safety Code §25249.11. Cara Accessories Ltd.
25 manufactures, distributes and/or sells the Jewelry for sale or use in California.

26 11. Defendant CATHERINES, INC. is a person in the course of doing
27 business within the meaning of Health & Safety Code §25249.11. Catherines, Inc. manufactures,
28 distributes and/or sells the Jewelry for sale or use in California.

1 12. Defendant CATHERINES OF CALIFORNIA, INC. is a person in the
2 course of doing business within the meaning of Health & Safety Code §25249.11. Catherines of
3 California, Inc. manufactures, distributes and/or sells the Jewelry for sale or use in California.

4 13. Defendant CATHERINES STORES CORPORATION is a person in the
5 course of doing business within the meaning of Health & Safety Code §25249.11. Catherines
6 Stores Corporation manufactures, distributes and/or sells the Jewelry for sale or use in California.

7 14. Defendant CBI DISTRIBUTING CORP. is a person in the course of doing
8 business within the meaning of Health & Safety Code §25249.11. CBI Distributing Corp.
9 manufactures, distributes and/or sells the Jewelry for sale or use in California.

10 15. Defendant CLAIRE'S BOUTIQUES, INC. is a person in the course of
11 doing business within the meaning of Health & Safety Code §25249.11. Claire's Boutiques, Inc.
12 manufactures, distributes and/or sells the Jewelry for sale or use in California.

13 16. Defendant CLAIRE'S STORES, INC. is a person in the course of doing
14 business within the meaning of Health & Safety Code §25249.11. Claire's Stores, Inc.
15 manufactures, distributes and/or sells the Jewelry for sale or use in California.

16 17. Defendant LONG RAP INC. is a person in the course of doing business
17 within the meaning of Health & Safety Code §25249.11. Long Rap Inc. manufactures,
18 distributes and/or sells the Jewelry for sale or use in California.

19 18. Defendant SAKS & COMPANY is a person in the course of doing
20 business within the meaning of Health & Safety Code §25249.11. Saks & Company
21 manufactures, distributes and/or sells the Jewelry for sale or use in California.

22 19. Defendant SAKS INCORPORATED is a person in the course of doing
23 business within the meaning of Health & Safety Code §25249.11. Saks Incorporated
24 manufactures, distributes and/or sells the Jewelry for sale or use in California.

25 20. Defendant TARGET CORPORATION is a person in the course of doing
26 business within the meaning of Health & Safety Code §25249.11. Target Corporation
27 manufactures, distributes and/or sells the Jewelry for sale or use in California.

28 21. Defendant TWEEN BRANDS, INC. is a person in the course of doing

1 business within the meaning of Health & Safety Code §25249.11. Tween Brands, Inc.
2 manufactures, distributes and/or sells the Jewelry for sale or use in California.

3 22. DOES 1 through 500 are each a person in the course of doing business
4 within the meaning of Health & Safety Code §25249.11. DOES 1 through 500 manufacture,
5 distribute and/or sell the Jewelry for sale or use in California.

6 23. The true names of DOES 1 through 500 are unknown to CEH at this time.
7 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

8 24. The defendants identified in paragraphs 5 through 21 and DOES 1 through
9 500 are collectively referred to herein as "Defendants."

10 JURISDICTION AND VENUE

11 25. The Court has jurisdiction over this action pursuant to Health & Safety
12 Code §25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
13 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
14 to other trial courts.

15 26. This Court has jurisdiction over the Defendants because each is a business
16 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
17 intentionally avails itself of the California market through the sale, marketing or use of the
18 Jewelry in California and/or by having such other contacts with California so as to render the
19 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
20 play and substantial justice.

21 27. Venue is proper in the Alameda Superior Court because one or more of the
22 violations arise in the County of Alameda.

23 BACKGROUND FACTS

24 28. The People of the State of California have declared by initiative under
25 Proposition 65 their right "[t]o be informed about exposures to chemicals that cause cancer, birth
26 defects, or other reproductive harm." Proposition 65, §1(b).

27 29. To effectuate this goal, Proposition 65 prohibits exposing people to
28 chemicals listed by the State of California as known to cause birth defects or other reproductive

1 harm without a “clear and reasonable warning” unless the business responsible for the exposure
2 can prove that it fits within a statutory exemption. Health & Safety Code §25249.6 states, in
3 pertinent part:

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

7 30. On May 1, 1997, the State of California officially listed cadmium as a
8 chemical known to cause reproductive toxicity. Cadmium became subject to the Proposition 65
9 “clear and reasonable” reproductive toxicity warning one year later beginning on May 1, 1998.
10 27 C.C.R. §27001(c); Health & Safety Code §25249.10(b).

11 31. For over six years, CEH has been extensively investigating the presence of
12 toxic chemicals in Jewelry made available for sale in California. CEH’s investigation has
13 included filing two Proposition 65 lawsuits against manufacturers and re-sellers of Jewelry that
14 contain lead and lead compounds (“Lead”), entitled *Center for Environmental Health v. Hot*
15 *Topic, Inc.* (Alameda County Superior Court Case No. RG-04-162037) and *Center for*
16 *Environmental Health v. Nadri, Inc. et al.* (Alameda County Superior Court Case No. RG 06-
17 269531). CEH’s Lead-in-Jewelry actions have resulted in the entry of dozens of consent
18 judgments restricting the Lead levels permitted in Jewelry as well as the passing of California
19 and federal laws prohibiting the sale of Leaded Jewelry. More recently, CEH’s investigation has
20 expanded to include research and testing regarding the presence of cadmium in Jewelry, which
21 has revealed that some manufacturers of Jewelry appear to be using cadmium as a replacement
22 for Lead in such Jewelry.

23 32. Cadmium in consumer products is of particular concern in light of
24 evidence that cadmium exposure has the potential to negatively impact reproduction and
25 embryonic development in several different ways and at every stage of the reproductive process.
26 *See, e.g.,* Thompson, J., *et al.*, “Review: Cadmium: Toxic Effects on the Reproductive System
27 and the Embryo,” *Reproductive Toxicology* (February 2008) Vol. 25:304; *and* Ji, Yan-Li, *et al.*,
28 “Pubertal Cadmium Exposure Impairs Testicular Development and Spermatogenesis via

1 Disrupting Testicular Testosterone Synthesis in Adult Mice,” *Reproductive Toxicology* (accepted
2 for publication October 2009) (even low levels of cadmium accumulation in semen may
3 contribute to male infertility).

4 33. The Jewelry is made of materials and components that contain cadmium.
5 Cadmium is primarily present in the metallic parts of the Jewelry. For example, metallic
6 components such as beads, pendants, clasps, posts and other parts of the Jewelry often contain
7 cadmium.

8 34. Defendants’ Jewelry contains sufficient quantities of cadmium such that
9 consumers, including pregnant women, who wear, use, touch and/or handle the Jewelry are
10 exposed to cadmium through the average use of the Jewelry. The route of exposure for the
11 violation is ingestion via hand-to-mouth contact after consumers touch or handle the Jewelry;
12 direct ingestion when consumers place the Jewelry in their mouths; and dermal absorption
13 directly through the skin when consumers wear, touch or handle the Jewelry. These exposures
14 occur in homes, workplaces and everywhere else throughout California where such Jewelry is
15 worn, handled or used.

16 35. No clear and reasonable warning is provided with the Jewelry regarding
17 the reproductive hazards of cadmium.

18 36. Any person acting in the public interest has standing to enforce violations
19 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
20 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
21 action within such time. Health & Safety Code §25249.7(d).

22 37. More than sixty days prior to naming each Defendant in this lawsuit, CEH
23 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,
24 the District Attorneys of every county in California, the City Attorneys of every California city
25 with a population greater than 750,000 and to each of the named Defendants. In compliance with
26 Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each of the Notices included the
27 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
28 time period during which violations occurred; (4) specific descriptions of the violations,

1 including (a) the routes of exposure to cadmium from the Jewelry, and (b) the specific type of
2 products sold and used in violation of Proposition 65; and (5) the name of the specific
3 Proposition 65-listed chemical that is the subject of the violations described in each of the
4 Notices (cadmium).

5 38. CEH also sent a Certificate of Merit for each of the Notices to the
6 California Attorney General, the District Attorneys of every county in California, the City
7 Attorneys of every California city with a population greater than 750,000 and to the named
8 Defendants. In compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each
9 of the Certificates certified that CEH's counsel: (1) has consulted with one or more persons with
10 relevant and appropriate experience or expertise who reviewed facts, studies or other data
11 regarding the exposures to cadmium alleged in each of the Notices; and (2) based on the
12 information obtained through such consultations, believes that there is a reasonable and
13 meritorious case for a citizen enforcement action based on the facts alleged in each of the
14 Notices. In compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3102, each of
15 the Certificates served on the Attorney General included factual information – provided on a
16 confidential basis – sufficient to establish the basis for the Certificate, including the identity of
17 the person(s) consulted by CEH's counsel and the facts, studies or other data reviewed by such
18 persons.

19 39. None of the public prosecutors with the authority to prosecute violations
20 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
21 Defendants under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in the
22 Notice.

23 40. Defendants both know and intend that individuals, including pregnant
24 women, will wear, use, touch and/or handle the Jewelry, thus exposing them to cadmium.

25 41. Under Proposition 65, an exposure is “knowing” where the party
26 responsible for such exposure has:

27 knowledge of the fact that a[n] . . . exposure to a chemical listed
28 pursuant to [Health & Safety Code §25249.8(a)] is occurring. No
 knowledge that the . . . exposure is unlawful is required.

1 27 C.C.R. §25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
3 §12201).

4 42. Defendants have been informed of the cadmium in their Jewelry by the 60-
5 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

6 43. Nevertheless, Defendants continue to expose consumers to cadmium
7 without prior clear and reasonable warnings regarding the reproductive hazards of cadmium.

8 44. CEH has engaged in good-faith efforts to resolve the claims alleged herein
9 prior to filing this complaint.

10 45. Any person "violating or threatening to violate" Proposition 65 may be
11 enjoined in any court of competent jurisdiction. Health & Safety Code §25249.7. "Threaten to
12 violate" is defined to mean "to create a condition in which there is a substantial probability that a
13 violation will occur." Health & Safety Code §25249.11(e). Proposition 65 provides for civil
14 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

15 **FIRST CAUSE OF ACTION**

16 **(Violations of the Health & Safety Code §25249.6)**

17 46. CEH realleges and incorporates by reference as if specifically set forth
18 herein Paragraphs 1 through 45, inclusive.

19 47. By placing the Jewelry into the stream of commerce, each Defendant is a
20 person in the course of doing business within the meaning of Health & Safety Code §25249.11.

21 48. Cadmium is a chemical listed by the State of California as known to cause
22 birth defects or other reproductive harm.

23 49. Defendants know that average use of the Jewelry will expose users of the
24 Jewelry to cadmium. Defendants intend that the Jewelry be used in a manner that results in users
25 of the Jewelry being exposed to cadmium contained in the Jewelry.

26 50. The Defendants have failed, and continue to fail, to provide prior clear and
27 reasonable warnings regarding the reproductive toxicity of cadmium to users of the Jewelry.

28 51. By committing the acts alleged above, the Defendants have at all times

1 relevant to this complaint violated Proposition 65 by knowingly and intentionally exposing
2 individuals to cadmium without first giving clear and reasonable warnings to such individuals
3 regarding the reproductive toxicity of cadmium.

4 Wherefore, CEH prays judgment against the Defendants, as set forth hereafter.

5 **PRAYER FOR RELIEF**

6 Wherefore, CEH prays for judgment against Defendants as follows:

7 1. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil
8 penalties against each of the Defendants in the amount of \$2,500 per day for each violation of
9 Proposition 65 according to proof;

10 2. That the Court, pursuant to Health & Safety Code §25249.7(a),
11 preliminarily and permanently enjoin Defendants from offering the Jewelry for sale in California
12 without providing prior clear and reasonable warnings, as CEH shall specify in further
13 application to the Court;

14 3. That the Court, pursuant to Health & Safety Code §25249.7(a), order
15 Defendants to take action to stop ongoing unwarned exposures to cadmium resulting from use of
16 Jewelry sold by Defendants, as CEH shall specify in further application to the Court;

17 4. That the Court, pursuant to Code of Civil Procedure §1021.5 or any other
18 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

19 5. That the Court grant such other and further relief as may be just and
20 proper.

21
22 Dated: May 12, 2010

Respectfully submitted,

23 LEXINGTON LAW GROUP

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26 Eric S. Somers
27 Attorneys for Plaintiff
28 CENTER FOR ENVIRONMENTAL HEALTH