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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY
JUL 30 2010
CLERK OF THE SUPERIOR COURT
By Angela Yamsuan Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiff,)

v.)

AEROPOSTALE, INC.; AE RETAIL WEST)
LLC; AEROPOSTALE WEST, INC.;)
AMERICAN EAGLE OUTFITTERS, INC.;)
AZ3, INC.; BCBG MAX AZRIA GROUP,)
INC.; THE BUCKLE, INC.; CARA)
ACCESSORIES LTD.; CATHERINES, INC.;)
CATHERINES OF CALIFORNIA, INC.;)
CATHERINES STORES CORPORATION; CBI)
DISTRIBUTING CORP.; CHARLOTTE)
RUSSE, INC.; CHARLOTTE RUSSE)
HOLDING INC.; CLAIRE'S BOUTIQUES,)
INC.; CLAIRE'S STORES, INC.; FIESTA)
JEWELRY CORPORATION; LONG RAP)
INC.; MJM JEWELRY CORP. DBA BERRY)
JEWELRY COMPANY; OLD NAVY, LLC;)
SAKS & COMPANY; SAKS)
INCORPORATED; TANYA CREATIONS,)
INC.; TARGET CORPORATION; TWEEN)
BRANDS, INC.; WAL-MART STORES INC.;)
THE WET SEAL, INC.; THE WET SEAL)
RETAIL, INC.; and Defendant DOES 1 through)
500, inclusive,)

Defendants.)

Case No. RG 10-514803

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

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

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

24 **PARTIES**

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

1 §25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
2 Safety Code §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
3 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
4 cases have resulted in significant public benefit, including the reformulation of thousands of
5 products to remove toxic chemicals to make them safer. CEH also provides information to
6 Californians about the health risks associated with exposure to hazardous substances, where
7 manufacturers and other responsible parties fail to do so.

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

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

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

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

21 9. Defendant AZ3, INC. is a person in the course of doing business within
22 the meaning of Health & Safety Code §25249.11. AZ3, Inc. manufactures, distributes and/or
23 sells the Jewelry for sale or use in California.

24 10. Defendant BCBG MAX AZRIA GROUP, INC. is a person in the course
25 of doing business within the meaning of Health & Safety Code §25249.11. BCBG Max Azria
26 Group, Inc. manufactures, distributes and/or sells the Jewelry for sale or use in California.

27 11. Defendant THE BUCKLE, INC. is a person in the course of doing
28 business within the meaning of Health & Safety Code §25249.11. The Buckle, Inc.

1 manufactures, distributes and/or sells the Jewelry for sale or use in California.

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

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

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

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

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

18 17. Defendant CHARLOTTE RUSSE, INC. is a person in the course of doing
19 business within the meaning of Health & Safety Code §25249.11. Charlotte Russe, Inc.
20 manufactures, distributes and/or sells the Jewelry for sale or use in California.

21 18. Defendant CHARLOTTE RUSSE HOLDING INC. is a person in the
22 course of doing business within the meaning of Health & Safety Code §25249.11. Charlotte
23 Russe Holding Inc. manufactures, distributes and/or sells the Jewelry for sale or use in
24 California.

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

28 20. Defendant CLAIRE'S STORES, INC. is a person in the course of doing

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

3 21. Defendant FIESTA JEWELRY CORPORATION is a person in the course
4 of doing business within the meaning of Health & Safety Code §25249.11. Fiesta Jewelry
5 Corporation manufactures, distributes and/or sells the Jewelry for sale or use in California.

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

9 23. Defendant MJM JEWELRY CORP. DBA BERRY JEWELRY
10 COMPANY is a person in the course of doing business within the meaning of Health & Safety
11 Code §25249.11. MJM Jewelry Corp. dba Berry Jewelry Company manufactures, distributes
12 and/or sells the Jewelry for sale or use in California.

13 24. Defendant OLD NAVY, LLC is a person in the course of doing business
14 within the meaning of Health & Safety Code §25249.11. Old Navy, LLC manufactures,
15 distributes and/or sells the Jewelry for sale or use in California.

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

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

22 27. Defendant TANYA CREATIONS, INC. is a person in the course of doing
23 business within the meaning of Health & Safety Code §25249.11. Tanya Creations, Inc.
24 manufactures, distributes and/or sells the Jewelry for sale or use in California.

25 28. 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 29. 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 30. Defendant WAL-MART STORES INC. is a person in the course of doing
4 business within the meaning of Health & Safety Code §25249.11. Wal-Mart Stores Inc.
5 manufactures, distributes and/or sells the Jewelry for sale or use in California.

6 31. Defendant THE WET SEAL, INC. is a person in the course of doing
7 business within the meaning of Health & Safety Code §25249.11. The Wet Seal, Inc.
8 manufactures, distributes and/or sells the Jewelry for sale or use in California.

9 32. Defendant THE WET SEAL RETAIL, INC. is a person in the course of
10 doing business within the meaning of Health & Safety Code §25249.11. The Wet Seal Retail,
11 Inc. manufactures, distributes and/or sells the Jewelry for sale or use in California.

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

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

17 35. The defendants identified in paragraphs 5 through 32 and DOES 1 through
18 500 are collectively referred to herein as "Defendants."

19 **JURISDICTION AND VENUE**

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

24 37. This Court has jurisdiction over the Defendants because each is a business
25 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
26 intentionally avails itself of the California market through the sale, marketing or use of the
27 Jewelry in California and/or by having such other contacts with California so as to render the
28 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair

1 play and substantial justice.

2 38. Venue is proper in the Alameda Superior Court because one or more of the
3 violations arise in the County of Alameda.

4 **BACKGROUND FACTS**

5 39. The People of the State of California have declared by initiative under
6 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
7 defects, or other reproductive harm.” Proposition 65, §1(b).

8 40. To effectuate this goal, Proposition 65 prohibits exposing people to
9 chemicals listed by the State of California as known to cause birth defects or other reproductive
10 harm without a “clear and reasonable warning” unless the business responsible for the exposure
11 can prove that it fits within a statutory exemption. Health & Safety Code §25249.6 states, in
12 pertinent part:

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

16 41. On May 1, 1997, the State of California officially listed cadmium as a
17 chemical known to cause reproductive toxicity. Cadmium became subject to the Proposition 65
18 “clear and reasonable” reproductive toxicity warning one year later beginning on May 1, 1998.
19 27 C.C.R. §27001(c); Health & Safety Code §25249.10(b).

20 42. For over six years, CEH has been extensively investigating the presence of
21 toxic chemicals in Jewelry made available for sale in California. CEH’s investigation has
22 included filing two Proposition 65 lawsuits against manufacturers and re-sellers of Jewelry that
23 contain lead and lead compounds (“Lead”), entitled *Center for Environmental Health v. Hot*
24 *Topic, Inc.* (Alameda County Superior Court Case No. RG-04-162037) and *Center for*
25 *Environmental Health v. Nadri, Inc. et al.* (Alameda County Superior Court Case No. RG 06-
26 269531). CEH’s Lead-in-Jewelry actions have resulted in the entry of dozens of consent
27 judgments restricting the Lead levels permitted in Jewelry as well as the passing of California
28 and federal laws prohibiting the sale of Leaded Jewelry. More recently, CEH’s investigation has

1 expanded to include research and testing regarding the presence of cadmium in Jewelry, which
2 has revealed that some manufacturers of Jewelry appear to be using cadmium as a replacement
3 for Lead in such Jewelry.

4 43. Cadmium in consumer products is of particular concern in light of
5 evidence that cadmium exposure has the potential to negatively impact reproduction and
6 embryonic development in several different ways and at every stage of the reproductive process.
7 *See, e.g.,* Thompson, J., *et al.*, “Review: Cadmium: Toxic Effects on the Reproductive System
8 and the Embryo,” *Reproductive Toxicology* (February 2008) Vol. 25:304; *and* Ji, Yan-Li, *et al.*,
9 “Pubertal Cadmium Exposure Impairs Testicular Development and Spermatogenesis via
10 Disrupting Testicular Testosterone Synthesis in Adult Mice,” *Reproductive Toxicology* (accepted
11 for publication October 2009) (even low levels of cadmium accumulation in semen may
12 contribute to male infertility).

13 44. The Jewelry is made of materials and components that contain cadmium.
14 Cadmium is primarily present in the metallic parts of the Jewelry. For example, metallic
15 components such as beads, pendants, clasps, posts and other parts of the Jewelry often contain
16 cadmium.

17 45. Defendants’ Jewelry contains sufficient quantities of cadmium such that
18 consumers, including pregnant women, who wear, use, touch and/or handle the Jewelry are
19 exposed to cadmium through the average use of the Jewelry. The route of exposure for the
20 violation is ingestion via hand-to-mouth contact after consumers touch or handle the Jewelry;
21 direct ingestion when consumers place the Jewelry in their mouths; and dermal absorption
22 directly through the skin when consumers wear, touch or handle the Jewelry. These exposures
23 occur in homes, workplaces and everywhere else throughout California where such Jewelry is
24 worn, handled or used.

25 46. No clear and reasonable warning is provided with the Jewelry regarding
26 the reproductive hazards of cadmium.

27 47. Any person acting in the public interest has standing to enforce violations
28 of Proposition 65 provided that such person has supplied the requisite public enforcers with a

1 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
2 action within such time. Health & Safety Code §25249.7(d).

3 48. More than sixty days prior to naming each Defendant in this lawsuit, CEH
4 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
5 the District Attorneys of every county in California, the City Attorneys of every California city
6 with a population greater than 750,000 and to each of the named Defendants. In compliance
7 with Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each of the Notices included
8 the following information: (1) the name and address of each violator; (2) the statute violated; (3)
9 the time period during which violations occurred; (4) specific descriptions of the violations,
10 including (a) the routes of exposure to cadmium from the Jewelry, and (b) the specific type of
11 products sold and used in violation of Proposition 65; and (5) the name of the specific
12 Proposition 65-listed chemical that is the subject of the violations described in each of the
13 Notices (cadmium).

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

28 50. None of the public prosecutors with the authority to prosecute violations

1 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
2 Defendants under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in the
3 Notice.

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

6 52. Under Proposition 65, an exposure is “knowing” where the party
7 responsible for such exposure has:

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

11 27 C.C.R. §25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
12 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
13 §12201).

14 53. Defendants have been informed of the cadmium in their Jewelry by the
15 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

16 54. Nevertheless, Defendants continue to expose consumers to cadmium
17 without prior clear and reasonable warnings regarding the reproductive hazards of cadmium.

18 55. CEH has engaged in good-faith efforts to resolve the claims alleged herein
19 prior to filing this complaint.

20 56. Any person “violating or threatening to violate” Proposition 65 may be
21 enjoined in any court of competent jurisdiction. Health & Safety Code §25249.7. “Threaten to
22 violate” is defined to mean “to create a condition in which there is a substantial probability that a
23 violation will occur.” Health & Safety Code §25249.11(e). Proposition 65 provides for civil
24 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

25 **FIRST CAUSE OF ACTION**

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

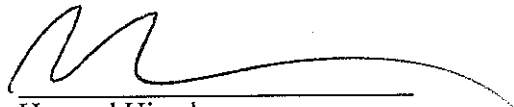
27 57. CEH realleges and incorporates by reference as if specifically set forth
28 herein Paragraphs 1 through 56, inclusive.

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

Dated: July 30, 2010

Respectfully submitted,
LEXINGTON LAW GROUP



Howard Hirsch
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH