

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

ENDORSED
FILED
ALAMEDA COUNTY

DEC 15 2016

CLERK OF THE SUPERIOR COURT

By S. IYAMU Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 PRECILA BALABBO,

12 Plaintiff,

13 v.

14 BETTY DAIN CREATIONS, LLC,

15 Defendant.

Case No.: RG 16 84 26 21

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

17 Plaintiff Precila Balabbo, by and through his attorneys, alleges the following cause of
18 action in the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

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

BY

1 2. This complaint is a representative action brought by Plaintiff in the public interest
2 of the citizens of the State of California to enforce the People’s right to be informed of the health
3 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP) and Diisononyl phthalate
4 (DINP), toxic chemicals found in shampoo hoses, and vinyl head/hair caps sold and/or
5 distributed by defendant Betty Dain Creations, LLC (“Betty Dain” or “Defendant”) in California.

6 3. DEHP and DINP are harmful chemicals known to the State of California to cause
7 cancer and/or reproductive toxicity. On January 1, 1988, and on December 20, 2013, the State of
8 California listed DEHP and DINP, respectively, as chemicals known to the State to cause cancer
9 and each chemical has come under the purview of Proposition 65 regulations since that time.
10 Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On
11 October 24, 2003, the State of California listed DEHP as a chemical known to cause
12 reproductive toxicity.

13 4. Proposition 65 requires all businesses with ten (10) or more employees that
14 operate within California or sell products therein to comply with Proposition 65 regulations.
15 Included in such regulations is the requirement that businesses must label any product containing
16 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and
17 intentionally” exposing any person to it.

18 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
19 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety
20 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
21 the actions of a defendant which “violate[s] or threaten[s] to violate” the statute. Health &
22 Safety Code § 25249.7.

23 6. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
24 and/or offers for sale, without the required warning, (a) shampoo hoses, including but not limited
25 to UPC No. 013534600899, and (b) vinyl head/hair caps, including but not limited to, UPC No.
26 013534600097 and SKU No. 260085 (the “Product” or “Products”) in California containing
27 DEHP and/or DINP.

28

1 7. Defendant’s failure to warn consumers and other individuals in California of the
2 health hazards associated with exposure to DEHP and DINP in conjunction with the sale,
3 manufacture, and/or distribution of the Products is a violation of Proposition 65 and subjects
4 Defendant to the enjoinder and civil penalties described herein.

5 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
6 65 in accordance with Health and Safety Code § 25249.7(b).

7 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
8 Defendant to provide purchasers or users of the Product with the required warnings related to the
9 dangers and health hazards associated with exposure to DEHP and DINP pursuant to Health and
10 Safety Code § 25249.7(a).

11 **PARTIES**

12 10. Plaintiff is a citizen of the State of California acting in the interest of the general
13 public to promote awareness of exposures to toxic chemicals in products sold in California and
14 to improve human health by reducing hazardous substances contained in such items. She brings
15 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

16 11. Defendant Betty Dain is a designer and manufacturer of products for the beauty
17 and salon industry. Through its business, Betty Dain effectively manufactures, imports,
18 distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies
19 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale
20 or use in the State of California.

21 12. Defendant Betty Dain is a “person” in the course of doing business within the
22 meaning of Health & Safety Code sections 25249.6 and 25249.11.

23 **VENUE AND JURISDICTION**

24 13. Venue is proper in the County of Alameda because one or more of the instances
25 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
26 conducted, and continues to conduct, business in the County of Alameda with respect to the
27 Product.

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

6 15. This Court has jurisdiction over Defendant because it is either a citizen of the
7 State of California, has sufficient minimum contacts with the State of California, is registered
8 with the California Secretary of State as foreign corporations authorized to do business in the
9 State of California, and/or has otherwise purposefully availed itself of the California market.
10 Such purposeful availment has rendered the exercise of jurisdiction by California courts
11 consistent and permissible with traditional notions of fair play and substantial justice.

12 **SATISFACTION OF NOTICE REQUIREMENTS**

13 16. On July 18, 2016, Plaintiff gave notice of alleged violation of Health and Safety
14 Code § 25249.6 (the “Notice”) to Betty Dain concerning the exposure of California citizens to
15 DEHP and/or DINP contained in the Products without proper warning, subject to a private action
16 to Betty Dain and to the California Attorney General’s office and the offices of the County
17 District attorneys and City Attorneys for each city with a population greater than 750,000
18 persons wherein the herein violations allegedly occurred.

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

24 18. After receiving the Notice, and to Plaintiff’s best information and belief, none of
25 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
26 a cause of action against Betty Dain under Proposition 65 to enforce the alleged violations which
27 are the subject of Plaintiff’s notice of violation.

28

1 the temperature of the water. Elevated water temperatures can be expected during shampooing
2 that will lead to increased kinetics of DEHP leaching from the hose into the water. If water is
3 held static inside the pressurized hose, levels of DEHP will continue to increase in the water
4 contained within the hose. Finally, while direct mouthing of the product does not seem likely,
5 some amount of exposure through ingestion can occur by touching the product, with subsequent
6 touching of the user's hand to mouth or if discharged water containing DEHP is accidentally
7 ingested during hair washing.

8 26. As regards the vinyl head/hair caps, they are expected to be in direct contact with
9 the scalp, ears, and forehead during its normal, expected use and thus dermal exposure to DINP
10 is possible. Should the product come into contact with water or humidity, as may be expected
11 during hair tipping, or the wearer apply or remove the tipping cap with wet, bare hands, aqueous
12 HMWP skin permeation rates have been reported to be faster than neat HMWP permeation. The
13 product can be expected to emit gas phase DINP into the air over the lifetime of the product.
14 This gas phase DINP can potentially be inhaled or can be absorbed to dust that can be
15 resuspended and potentially ingested. If the tipping cap is stored in a drawer with other items,
16 DINP that leaches from the cap may contaminate other articles contained within the drawer that
17 are subsequently handled by people. Finally, while mouthing of the product does not seem
18 likely, some amount of exposure through ingestion can occur by touching the product, with
19 subsequent touching of the user's hand to mouth.

20 27. Plaintiff, based on his best information and belief, avers that such exposures will
21 continue every day until clear and reasonable warnings are provided to Product purchasers and
22 users or until this known toxic chemical is removed from the Product.

23 28. Defendant has knowledge that the normal and reasonably foreseeable use of the
24 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur
25 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
26 sale and offering of the Product to consumers in California

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

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

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

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
7 following relief:

- 8 A. That the court assess civil penalties against Defendant in the amount of
9 \$2,500 per day for each violation in accordance with Health and Safety
10 Code § 25249.7(b);
- 11 B. That the court preliminarily and permanently enjoin Defendant mandating
12 Proposition 65 compliant warnings on the Product;
- 13 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 14 D. That the court grant any further relief as may be just and proper.

15
16 Dated: December 15, 2016

BRODSKY & SMITH, LLC

17 By: 

18 Evan J. Smith (SBN242352)
19 Ryan P. Cardona (SBN302113)
9595 Wilshire Boulevard, Suite 900
Beverly Hills, CA 90212
20 Telephone: (877) 534-2590
Facsimile: (310) 247-0160

21 *Attorneys for Plaintiff*