

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*

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By: D. OLIVER, Deputy

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

11 EMA BELL,
12 Plaintiff,

13 v.

14 UPPER CANADA SOAP & CANDLE
15 MAKERS CORP.,
16 Defendant.

Case No.: *rt* 17851046

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

BY FAX

17 Plaintiff Ema Bell, by and through her attorneys, alleges the following cause of action in
18 the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

20 1. Plaintiff Ema Bell ("Plaintiff" or "Bell"), brings this representative action on
21 behalf of all California citizens to enforce relevant portions of Safe Drinking Water and Toxic
22 Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 *et seq* ("Proposition
23 65"), which reads, in relevant part, "[n]o person in the course of doing business shall knowingly
24 and intentionally expose any individual to a chemical known to the state to cause cancer or
25 reproductive toxicity without first giving clear and reasonable warning to such individual ...".
26 Health & Safety Code § 25249.6.
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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), a toxic chemical found in
4 cosmetic and toiletry bags sold and/or distributed by defendant Upper Canada Soap & Candle
5 Makers Corporation (“Upper Canada” or “Defendant”) in California.

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

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

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

22 6. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
23 and/or offers for sale in California, without the required warning, cosmetic & toiletry bags,
24 including including those containing beauty and/or bath products (“Product” or “Products”) that
25 contain DEHP.

26 7. Defendant’s failure to warn consumers and other individuals in California of the
27 health hazards associated with exposure to DEHP in conjunction with the sale, manufacture,
28

1 and/or distribution of the Product is a violation of Proposition 65 and subjects Defendant to the
2 enjoinder and civil penalties described herein.

3 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
4 65 in accordance with Health and Safety Code § 25249.7(b).

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

9 PARTIES

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

14 11. Defendant Upper Canada manufactures and markets bath and body care products.
15 Through its business, Upper Canada effectively manufactures, imports, distributes, sells, and/or
16 offers the Product for sale or use in the State of California, or it implies by its conduct that it
17 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
18 California.

19 12. Defendant Upper Canada is a “person” in the course of doing business within the
20 meaning of Health & Safety Code sections 25249.6 and 25249.11.

21 VENUE AND JURISDICTION

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

26 14. This Court has jurisdiction over this action pursuant to California Constitution
27 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
28 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the

1 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
2 this Court has jurisdiction over this lawsuit.

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

9 **SATISFACTION OF NOTICE REQUIREMENTS**

10 16. On December 8, 2016, Plaintiff gave notice of alleged violation of Health and
11 Safety Code § 25249.6 (the "Notice") to Upper Canada concerning the exposure of California
12 citizens to DEHP contained in the Product without proper warning, subject to a private action to
13 Upper Canada and to the California Attorney General's office and the offices of the County
14 District attorneys and City Attorneys for each city with a population greater than 750,000
15 persons wherein the herein violations allegedly occurred.

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

21 18. After receiving the Notice, and to Plaintiff's best information and belief, none of
22 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
23 a cause of action against Upper Canada under Proposition 65 to enforce the alleged violations
24 which are the subject of Plaintiff's notice of violation.

25 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
26 Notice to Upper Canada, as required by law.

27 **FIRST CAUSE OF ACTION**

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

1 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
2 this complaint as though fully set forth herein.

3 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
4 and/or retailer of the Product.

5 22. The Product contains DEHP, a hazardous chemical found on the Proposition 65
6 list of chemicals known to be hazardous to human health.

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

8 24. Plaintiff, based on her best information and belief, avers that at all relevant times
9 herein, and at least since November 2, 2016, continuing until the present, that Upper Canada has
10 continued to knowingly and intentionally expose California users and consumers of the Product
11 to DEHP without providing required warnings under Proposition 65.

12 25. The exposures that are the subject of the Notice result from the purchase,
13 acquisition, handling and recommended use of the product. Consequently, the primary route of
14 exposure to these chemicals is through dermal absorption. Users may potentially be exposed to
15 DEHP by dermal absorption through direct skin contact with the bag during routine use when the
16 bag is grasped, opened, or manipulated with bare hands. The product can be expected to emit
17 gas phase DEHP into the air over the lifetime of the product. Concentrations of gas phase DEHP
18 can be expected to build within the small, enclosed interior of the cosmetic bag. This gas phase
19 DEHP can potentially be absorbed to the surface of the interior contents which includes makeup
20 brush handles, brush hairs, and makeup particles that remain on the brushes. When used to apply
21 makeup, these brushes can provide an indirect source of dermal transfer of DEHP to the user's
22 hands when the handles are grasped with bare hands. The contaminated brushes can also provide
23 an indirect source of dermal transfer of DEHP to the user's facial area when the brush hairs
24 contact the user's facial area and contaminated makeup particles are applied to the user's facial
25 skin. If the cosmetic bag is stored or transported in a carrier, DEHP that leaches from the
26 cosmetic bag may contaminate other articles contained within the carrier bag that are
27 subsequently handled or worn by the user. Finally, while mouthing of the product does not seem
28 likely, some amount of exposure through ingestion can occur by touching the product with

1 subsequent touching of the user's hand to mouth, if the contaminated brush hairs come into
2 contact with the users mouth during the application of makeup, or if makeup that is applied to the
3 lips become contaminated with DEHP that has leached from the cosmetic bag.

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

7 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
8 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur
9 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
10 sale and offering of the Product to consumers in California

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

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

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

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
19 following relief:

- 20 A. That the court assess civil penalties against Defendant in the amount of
21 \$2,500 per day for each violation in accordance with Health and Safety
22 Code § 25249.7(b);
- 23 B. That the court preliminarily and permanently enjoin Defendant mandating
24 Proposition 65 compliant warnings on the Product;
- 25 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 26 D. That the court grant any further relief as may be just and proper.

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28 Dated: March 3, 2017

BRODSKY & SMITH, LLC

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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