

ENDORSED
FILED
AT ALAMEDA COUNTY
JAN 16 2020
CLERK OF THE SUPERIOR COURT
By Roni Gil

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

11 ANTHONY FERREIRO,
12 Plaintiff,
13 vs.
14 MACY'S CORPORATE SERVICES,
15 INC.,
16 Defendant.

17 Case No.: RG18897226
18 **FIRST AMENDED COMPLAINT FOR
19 CIVIL PENALTIES AND INJUNCTIVE
20 RELIEF**
21 (Violation of Health & Safety Code §25249.5
22 et seq.)
23 Judge: Dennis Hayashi
24 Dept.: 518

25 Plaintiffs Anthony Ferreiro ("Ferreiro") and Ema Bell ("Bell") (collectively, "Plaintiffs"),
26 by and through their attorneys, allege the following cause of action in the public interest of the
27 citizens of the State of California.

28 **BACKGROUND OF THE CASE**

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

Filed By Fox

1 2. This complaint is a representative action brought by Plaintiffs in the public
2 interest of the citizens of the State of California to enforce the People’s right to be informed of
3 the health hazards caused by exposure di(2-ethylhexyl) phthalate (DEHP), a toxic chemical
4 found in handbags, purses, clutches, and totes supplied by defendant Dani Accessories, Inc.
5 (“Dani”) to be sold and/or distributed in California by defendants Macy’s Corporate Services,
6 Inc., Bloomingdales, Inc., Macy’s Inc. and Macy’s Retail Holdings, Inc. (collectively,
7 “Macy’s”). Macy’s and Dani are collectively referred to herein as, “Defendants.”.

8 3. DEHP is a harmful chemical known to the State of California to cause cancer and
9 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical
10 known to the State to cause cancer and it has come under the purview of Proposition 65
11 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
12 25249.8 & 25249.10(b). On October 24, 2003, the State of California DEHP as a chemical
13 known to cause reproductive toxicity.

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

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

24 6. Plaintiffs allege that Defendants manufacture, distribute and/or offer for sale in
25 California, without a requisite exposure warning, handbags, purses, clutches, and totes (the
26 “Products”) that expose persons to DEHP.

27 7. Defendants’ failure to warn consumers and other individuals in California of the
28 health hazards associated with exposure to DEHP in conjunction with the sale and/or distribution

1 of the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and
2 civil penalties described herein.

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

5 9. Plaintiffs also seeks injunctive relief, preliminarily and permanently, requiring
6 Defendants to provide purchasers or users of the Products with 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. Plaintiffs Ferreiro and Bell are citizens of the State of California acting in the
11 interest of the general public to promote awareness of exposures to toxic chemicals in products
12 sold in California and to improve human health by reducing hazardous substances contained in
13 such items. Plaintiffs bring this action in the public interest pursuant to Health and Safety Code §
14 25249.7(d).

15 11. Defendant Macy's, through its business, effectively manufactures, imports,
16 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
17 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale
18 or use in the State of California. Plaintiffs allege that defendant Macy's is a "person" in the
19 course of doing business within the meaning of Health & Safety Code sections 25249.6 and
20 25249.11.

21 12. Defendant Dani, through its business, effectively manufactures, imports,
22 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
23 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale
24 or use in the State of California. Plaintiffs allege that defendant Dani is a "person" in the course
25 of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

26 VENUE AND JURISDICTION

27 13. Venue is proper in the County of Alameda because one or more of the instances
28 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants

1 conducted, and continue to conduct, business in the County of Alameda with respect to the
2 Products.

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

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

14 **SATISFACTION OF NOTICE REQUIREMENTS**

15 16. On or about October 3, 2017, Ferreiro served Macy's Corporate Services, Inc.,
16 and various public enforcement agencies with a document entitled "60-Day Notice of Violation"
17 pursuant to Health & Safety Code §25249.7(d) (the "2017 Notice"), alleging that Macy's
18 violated Proposition 65 for failing to warn consumers and customers that use of Rich's Heritage
19 totes expose users in California to DEHP. No public enforcer has brought and is diligently
20 prosecuting the claims alleged in the 2017 Notice.

21 17. Thereafter, on or about August 7, 2018, Ferreiro served Dani Accessories, and
22 various public enforcement agencies with documents entitled "60-Day Notice of Violation"
23 pursuant to Health & Safety Code §25249.7(d) (the "2018 Notice"), alleging that Dani
24 Accessories similarly violated Proposition 65 for failing to warn consumers and customers that
25 use of Rich's Heritage totes expose users in California to DEHP.

26 18. On or about March 26, 2019, Ferreiro served Macy's, Inc., Macy's Retail
27 Holdings, Inc., and various public enforcement agencies with documents entitled "60-Day Notice
28 of Violation" pursuant to Health & Safety Code §25249.7(d) (the "March 26, 2019 Notice"),

1 alleging that Macy's violated Proposition 65 for failing to warn consumers and customers that
2 use of Mark Tetro totes exposes users in California to DEHP.

3 19. On or about May 6, 2019, Bell served Dani Accessories, Bloomingdales, Inc.
4 (erroneously named as Federated Department Stores, Inc.), Macy's West Stores, Inc., and
5 various public enforcement agencies with documents entitled "60-Day Notice of Violation"
6 pursuant to Health & Safety Code §25249.7(d) (the "May 2019 Notice"), alleging that Macy's
7 violated Proposition 65 for failing to warn consumers and customers that use of Bloomingdale's
8 floral beach bag exposes users in California to DEHP.

9 20. The 2017 Notice, the 2018 Notice, the March 2019 Notice, and the May 26, 2019
10 Notice shall be referred to collectively as the "Notices."

11 21. The Notices complied with all procedural requirements of Proposition 65
12 including the attachment of a Certificate of Merit affirming that Plaintiffs' counsel had consulted
13 with at least one person with relevant and appropriate expertise who reviewed relevant data
14 regarding DEHP exposure, and that counsel believed there was meritorious and reasonable cause
15 for a private action.

16 22. After receiving the Notices, and to Plaintiffs best information and belief, none of
17 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
18 a cause of action against Defendants under Proposition 65 to enforce the alleged violations which
19 are the subject of the Notices.

20 23. Plaintiffs are commencing this action more than sixty (60) days from the date of
21 the Notices to Defendants, as required by law.

22 **FIRST CAUSE OF ACTION**

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

24 24. Plaintiffs hereby repeat and incorporate by reference paragraphs 1 through 23 of
25 this amended complaint as though fully set forth herein.

26 25. Defendants have, at all times mentioned herein, acted as either a manufacturer,
27 distributor, and/or retailer of the Products.

28

1 26. The Products contain DEHP, a hazardous chemical found on the Proposition 65
2 list of chemicals known to be hazardous to human health.

3 27. The Products do not comply with the Proposition 65 warning requirements.

4 28. Plaintiffs, based on their best information and belief, aver that at all relevant times
5 herein, and at least since July 11, 2017, continuing until the present, that Defendants have
6 continued to knowingly and intentionally expose California users and consumers of the Products
7 to DEHP without providing required warnings under Proposition 65.

8 29. The exposures that are the subject of the Notices result from the purchase,
9 acquisition, handling and recommended use of the Products. Consequently, the primary route of
10 exposure to DEHP is through dermal absorption through direct skin contact with the Products.
11 Users may potentially be exposed to DEHP by dermal absorption through direct skin contact
12 with the Products during routine use when the Products are grasped, opened, or manipulated with
13 bare hands. The Products can be expected to emit gas phase DEHP into the air over the lifetime
14 of the Products. Concentrations of gas phase DEHP can be expected to build within the small,
15 enclosed interior of the Products. This gas phase DEHP can potentially be absorbed to the
16 surface of the interior contents. When used, these items can provide an indirect source of dermal
17 transfer of DEHP to the user's hands when the contents are grasped with bare hands. Should the
18 user manipulate the Products or contaminated inner contents with wet hands, or the Products or
19 their contents become wet, aqueous DEHP skin permeation rates are faster than neat DEHP
20 permeation. For instance, exposure to low molecular weight phthalates was reported in urinary
21 metabolites after male showering. If the Products are stored or transported in a carrier, DEHP
22 that leaches from the Products may contaminate other articles contained within the Products that
23 are subsequently handled by the user. Finally, while mouthing of the Products does not seem
24 likely, some amount of exposure through ingestion can occur by touching the Products with
25 subsequent touching of the user's hand to mouth, or if, for example, lip balm becomes
26 contaminated with DEHP and comes into contact with the user's mouth during the application of
27 lip balm.

28

1 30. Plaintiffs, based on their best information and belief, aver that such exposures will
2 continue every day until clear and reasonable warnings are provided to purchasers and users of
3 the Products or until this known toxic chemical is removed from the Products.

4 31. Defendants have knowledge that the normal and reasonably foreseeable use of the
5 Products exposes individuals to DEHP, and Defendants intend that exposures to DEHP will
6 occur by their deliberate, non-accidental participation in the manufacture, importation,
7 distribution, sale and offering of the Products to consumers in California

8 32. Plaintiffs have engaged in good faith efforts to resolve the herein claims prior to
9 this Amended Complaint.

10 33. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
11 described acts, Defendants are each liable for a maximum civil penalty of \$2,500 per day per
12 violation.

13 34. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
14 authorized to grant injunctive relief in favor of Plaintiffs and against Defendants.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiffs demand judgment against Defendants and requests the
17 following relief:

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

25 Dated: January 18, 2020

BRODSKY & SMITH, LLC

26 By:  _____

27 Evan J. Smith (SBN242352)

Ryan P. Cardona (SBN302113)

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PROOF OF SERVICE

I, Evan J. Smith, Esquire, declare:

I am over the age of 18 years and not a party to this action; my business address is 9595 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90212 and 333 E. City Avenue, Suite 510, Bala Cynwyd, PA 19004.

On January 18, 2020, I served the following document:

PLAINTIFFS' FIRST AMENDED COMPLAINT

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL & FEDERAL EXPRESS OVERNIGHT DELIVERY

The above-described documents were transmitted via electronic mail and federal express overnight delivery to the following parties on January 18, 2020:

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Attorneys for Defendants

I declare under penalty of perjury under the laws of California and of the United States of America that the above is true and correct.

Executed on January 18, 2020, at Bala Cynwyd, Pennsylvania.

Evan J. Smith