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ENDORSED
FILED
ALAMEDA COUNTY

FEB 21 2018

CLERK OF THE SUPERIOR COURT
By: ERICA BAKER, Deputy

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

11 EMA BELL,

12 Plaintiff,

13 v.

14 PRODUCT QUEST MANUFACTURING,
15 LLC,

16 Defendant.

Case No.: **RG18893722**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

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

19 **BACKGROUND OF THE CASE**

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

26 2. This complaint is a representative action brought by Plaintiff in the public interest
27 of the citizens of the State of California to enforce the People's right to be informed of the health
28 hazards caused by exposure to chemicals in consumer goods, including but limited to Diisononyl
phthalate (DINP), a toxic chemical found in earwax removal kits manufactured by Product Quest

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COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF - VIOLATION OF
HEALTH & SAFETY CODE §25249.5

BY FAX

1 Manufacturing, LLC (the “Products”) that have been sold and/or distributed for sale in California
2 by defendant Product Quest Manufacturing, LLC (“Product Quest” or “Defendant”).

3 3. DINP is a harmful chemical known to the State of California to cause cancer. On
4 December 20, 2013, the State of California listed DINP as a chemical known to the State to
5 cause cancer thereby causing DINP to come under the purview of Proposition 65 regulations
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
7 25249.10(b).

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

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

18 6. Plaintiff alleges that Defendant manufactures, distributes, imports, sells, and/or
19 offers for sale in California, without the required Proposition 65 exposure warning, the Products
20 that contain DINP.

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

25 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
26 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
28 Defendant to provide purchasers or users of the Products with the required exposure warnings

1 related to the dangers and health hazards associated with exposure to DINP pursuant to Health
2 and Safety Code § 25249.7(a).

3 **PARTIES**

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

8 11. Defendant Product Quest, through its business, effectively manufactures, imports,
9 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
10 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale
11 or use in the State of California.

12 12. Defendant Product Quest is a “person” in the course of doing business within the
13 meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

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

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

24 15. This Court has jurisdiction over Defendant because it is either a citizen of the
25 State of California, has sufficient minimum contacts with the State of California, is registered
26 with the California Secretary of State as foreign corporations authorized to do business in the
27 State of California, and/or has otherwise purposefully availed itself of the California market.

28

1 Such purposeful availment has rendered the exercise of jurisdiction by California courts
2 consistent and permissible with traditional notions of fair play and substantial justice.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 16. On October 20, 2017, Plaintiff gave notice of alleged violation of Health and
5 Safety Code § 25249.6 (the “Notice”) to Product Quest concerning the exposure of California
6 citizens to DINP contained in the Products without proper warning, subject to a private action to
7 Product Quest and to the California Attorney General’s office and the offices of the County
8 District attorneys and City Attorneys for each city with a population greater than 750,000
9 persons wherein the herein violations allegedly occurred.

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

15 18. After receiving the Notice, and to Plaintiff’s best information and belief, none of
16 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
17 a cause of action against Product Quest under Proposition 65 to enforce the alleged violations
18 which are the subject of Plaintiff’s notice of violation.

19 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
20 Notice to Product Quest, as required by law.

21 **FIRST CAUSE OF ACTION**

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

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

25 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
26 and/or retailer of the Products.

27 22. The Products contain DINP, a hazardous chemical found on the Proposition 65
28 list of chemicals known to be hazardous to human health.

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

2 24. Plaintiff, based on her best information and belief, avers that at all relevant times
3 herein, and at least since October 5, 2016, continuing until the present, that Product Quest has
4 continued to knowingly and intentionally expose California users and consumers of the Products
5 to DINP without providing required warnings under Proposition 65.

6 25. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling and recommended use of the product. Consequently, the primary route of
8 exposure to these chemicals is through direct skin exposure. The blue suction bulb is intended to
9 be inserted within the user’s ear during normal expected use and direct dermal exposure to DINP
10 through the ear is likely to occur. Direct skin exposure through direct contact with bulb and the
11 user’s hands is possible during manipulation of the bulb. The bulb is used to apply the 6.5%
12 aqueous carbamide peroxide solution and other directions include “Any was remaining after the
13 4 day treatment may be removed by gently flushing the ear with warm (body temperature) water,
14 using a soft rubber bulb ear syringe.” Thus, the introduction of water and aqueous solutions that
15 are contaminated with DINP that has migrated from the bulb is expected, and aqueous HMWP
16 skin permeation rates have been reported to be faster than neat HMWP permeation. The bulb is
17 expected to emit gas phase DINP within the sealed ear canal during normal use of the product.
18 This gas phase DINP can potentially permeate skin and membranes of the eardrum, middle ear,
19 and inner ear. Finally, while mouthing of the product does not seem likely, some amount of
20 exposure through ingestion can occur by handling the product with subsequent touching of the
21 users hand to mouth.

22 26. Plaintiff, based on her best information and belief, avers that such exposures will
23 continue every day until clear and reasonable warnings are provided to the purchasers and users
24 of the Products, or until these known toxic chemicals are removed from the Products.

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

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

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

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

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
9 following relief:

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

17 Dated: February 20, 2018

BRODSKY & SMITH, LLC

18 By:  _____

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