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ENDORSED
FILED
ALAMEDA COUNTY

NOV 08 2018

SUE PESKO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 PRECILA BALABBO,
11 Plaintiff,
12 vs.
13 UPPER CANADA SOAP AMERICA,
14 INC.,
15 Defendant.

Case No.: **RG18927944**
**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**
**(Violation of Health & Safety Code §25249.5 et
seq.)**

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

BACKGROUND OF THE CASE

18
19 1. Plaintiff brings this representative action on behalf of all California citizens to
20 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
21 at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
22 "[n]o person in the course of doing business shall knowingly and intentionally expose any
23 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
24 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

25 2. This complaint is a representative action brought by Plaintiff in the public interest
26 of the citizens of the State of California to enforce the People's right to be informed of the health
27 hazards caused by exposure di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
28

BY FAX

1 Beauty To Go and TheraWell travel bags/cases sold and/or distributed by defendant Upper
2 Canada Soap America, Inc. (“Upper Canada” or “Defendant”) in California.

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

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

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

19 6. Plaintiff alleges that Defendant manufactures, distributes and/or offers for sale in
20 California, without a requisite exposure warning, Beauty To Go and TheraWell travel bags/cases
21 (the “Products”) that expose persons to DEHP.

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

26 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
27 65 in accordance with Health and Safety Code § 25249.7(b).

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1 in the State of California, and/or has otherwise purposefully availed itself of the California
2 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
3 consistent and permissible with traditional notions of fair play and substantial justice.

4 **SATISFACTION OF NOTICE REQUIREMENTS**

5 16. On March 6, 2018, Plaintiff gave notice of alleged violation of Health and Safety
6 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to
7 DEHP contained in the Products without proper warning, subject to a private action to Defendant
8 and to the California Attorney General’s office and the offices of the County District attorneys
9 and City Attorneys for each city with a population greater than 750,000 persons wherein the
10 herein violations allegedly occurred.

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

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

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

22 **FIRST CAUSE OF ACTION**

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

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

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

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

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

4 24. Plaintiff, based on her best information and belief, avers that at all relevant times
5 herein, and at least since November 14, 2017 (Beauty To Go – bag), and at least since January
6 17, 2018 (Therawell – bag), continuing until the present, that Defendant has continued to
7 knowingly and intentionally expose California users and consumers of the Products to DEHP
8 without providing required warnings under Proposition 65.

9 25. The exposures that are the subject of the Notice result from the purchase,
10 acquisition, handling and recommended use of the Products. Consequently, the primary route of
11 exposure to these chemicals is through dermal absorption. Users may potentially be exposed to
12 DEHP by dermal absorption through direct skin contact with the case during routine use when
13 the Products are manipulated with bare hands. Concentrations of gas phase DEHP can be
14 expected to build within the enclosed interior of the Products. This gas phase DEHP can
15 potentially be absorbed to the surface of the interior contents that include, but are not limited to
16 the Therawell neck pillow, and various size bottles for shampoo, conditioner, hair spray, and
17 lotion. When handled, these items can provide an indirect source of dermal transfer of DEHP to
18 the user’s bare hands. Should the user manipulate the Products or contaminated inner contents
19 with wet hands, or the Products or its contents become wet, aqueous DEHP skin permeation rates
20 are faster than neat DEHP permeation. The heated, contaminated neck pillow will also promote
21 faster DEHP transfer kinetics through skin. DEHP vapor will also be present in the proximity of
22 the user’s eyes that may cause eye irritation. The eyes are particularly sensitive to chemicals.
23 For instance, decreased human corneal endothelial cell line B4G12 proliferation was observed
24 for DBP, BBP, and DEHP, and cell toxicity was observed for DBP and BBP. If the Products are
25 stored or transported in a carrier, DEHP that leaches from the item may contaminate other
26 articles contained within these closed spaces that are subsequently handled, worn, mouthed, or
27 ingested by the user. Finally, while mouthing of the Products does not seem likely, some amount
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1 of exposure through ingestion can occur by touching the Products with subsequent touching of
2 the user's hand to mouth.

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

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

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

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

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

16 **PRAYER FOR RELIEF**

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

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

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27 Dated: November 7, 2018

BRODSKY & SMITH, LLC

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