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ENDORSED
FILED
ALAMEDA COUNTY

JUN 19 2019

CLERK OF THE SUPERIOR COURT
By ALICIA ESPINOZA
Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
11 Plaintiff,

12 vs.

13 PROFUSION COSMETICS CORP.,
14 BURLINGTON COAT FACTORY
15 WAREHOUSE CORPORATION,
16 Defendant.

Case No.: **RG19023541**
**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**
(Violation of Health & Safety Code § 25249.5 et
seq.)

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

BACKGROUND OF THE CASE

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 to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
28 Profusion Complete Eye Make-Up Collections sold and/or distributed by defendants Profusion

Filed By Fax

1 Cosmetics Corp. (“Profusion Cosmetics”) and Burlington Coat Factory Warehouse Corporation
2 (“Burlington Coat Factory”) (collectively, “Defendants”) 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 Defendants manufacture, distribute and/or offer for sale in
20 California, without a requisite exposure warning, Profusion Complete Eye Make-Up Collections
21 (the “Products”) that expose persons to DEHP.

22 7. Defendants’ 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 Defendants to the enjoinder and
25 civil penalties described herein.

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

28

1 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
2 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
3 this Court has jurisdiction over this lawsuit.

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

10 **SATISFACTION OF NOTICE REQUIREMENTS**

11 16. On June 20, 2018, Plaintiff gave notice of alleged violation of Health and Safety
12 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
13 DEHP contained in the Products without proper warning, subject to a private action to
14 Defendants and to the California Attorney General’s office and the offices of the County District
15 attorneys and City Attorneys for each city with a population greater than 750,000 persons
16 wherein the herein violations allegedly occurred.

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

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

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

28 **FIRST CAUSE OF ACTION**

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

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

4 21. Defendants have, at all times mentioned herein, acted as either a manufacturer,
5 distributor, and/or retailer of the Product.

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

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

9 24. Plaintiff, based on his best information and belief, avers that at all relevant times
10 herein, and at least since April 20, 2018, continuing until the present, that Defendants have
11 continued to knowingly and intentionally expose California users and consumers of the Product
12 to DEHP without providing required warnings under Proposition 65.

13 25. The exposures that are the subject of the Notice result from the purchase,
14 acquisition, handling and recommended use of the Product. Consequently, the primary route of
15 exposure to these chemicals is through dermal absorption. Users may be exposed to DEHP by
16 dermal absorption through direct skin contact with the Product during routine use when the
17 Product is manipulated with bare hands. If the Product is handled with wet hands or the Product
18 is wet, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP
19 permeation. DEHP from the Product can potentially be absorbed to the surface of the interior
20 contents which include eye makeup and brushes. When handled with bare hands, these items can
21 provide an indirect source of dermal transfer of DEHP. Contaminated makeup and contaminated
22 makeup brushes can also provide an indirect source of dermal transfer of DEHP to the user's
23 facial area when the contaminated makeup is applied to the user's facial skin, eyes, or lips. The
24 eyes are particularly sensitive to chemicals. For instance, decreased human corneal endothelial
25 cell line B4G12 proliferation as observed for DBP, BBP and DEHP, and cell toxicity was
26 observed for DBP and BBP. If the Product is stored or transported in a carrier, DEHP that
27 leaches from the item may contaminate other articles contained within these closed spaces that
28 are subsequently handled, worn, mouthed, or ingested by the user. Finally, while mouthing of the

1 Product does not seem likely, some amount of exposure through ingestion can occur by touching
2 the Product with subsequent touching of the user's hand to mouth or through ingestion of
3 contaminated cosmetics or cosmetic brushes applied to the lips.

4 26. Plaintiff, based on his 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. Defendants have knowledge that the normal and reasonably foreseeable use of the
8 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
9 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
10 sale and offering of the Products 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 Defendants and requests the
19 following relief:

- 20 A. That the court assess civil penalties against each Defendant in the amount
21 of \$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 Defendants
24 mandating 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: June 19, 2019

BRODSKY & SMITH, LLC

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