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Page 5 of 15 10/10/2018 12:21 PM

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ALAMEDA COUNTY
October 10, 2018
CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy
CASE NUMBER:
RG18924043

Attorney for Plaintiff
Center for Advanced Public Awareness, Inc.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
UNLIMITED JURISDICTION**

CENTER FOR ADVANCED PUBLIC
AWARENESS, a California non-profit
corporation,

Plaintiff,

vs.

OMG ACCESSORIES LLC, an Illinois limited
liability company; NORDSTROM, INC., a
Washington corporation, and DOES 1-25,

Defendants.

Case No.:

**COMPLAINT FOR PERMANENT
INJUNCTION, CIVIL PENALTIES, AND
OTHER RELIEF**

Health & Safety Code 25249.5, *et seq.*

1 Plaintiff CENTER FOR ADVANCED PUBLIC AWARENESS (“PLAINTIFF” or
2 “CAPA”) brings this action in the interests of the general public and on information and belief,
3 hereby alleges:

4 **INTRODUCTION**

5 1. This action seeks to remedy the continuing failure of Defendants OMG
6 ACCESSORIES LLC and NORDSTROM, INC., (hereafter individually referred to as
7 “DEFENDANTS”) to warn consumers in California they are being exposed to di-(2-ethylhexyl)
8 phthalate (DEHP), a chemical known to the State of California to cause developmental toxicity and
9 male reproductive toxicity. According to the Safe Drinking Water and Toxics Enforcement Act of
10 1986, Health and Safety Code, section 25249.5 (also known as and referred to hereafter as
11 “Proposition 65”), businesses must provide persons with a “clear and reasonable warning” before
12 exposing individuals to chemicals known to the state to cause developmental toxicity and male
13 reproductive toxicity. DEFENDANTS package, distribute, market, and/or sell in California a certain
14 product containing DEHP known as “UNICORN COSMETICS CASE” (“PRODUCT” or
15 “UNICORN COSMETICS CASE”)

16 2. DEHP (the “LISTED CHEMICAL”) is a substance known to the state of California
17 to cause developmental toxicity and male reproductive toxicity.

18 3. The use and/or handling of the PRODUCT causes exposure to the LISTED
19 CHEMICAL at levels requiring a “clear and reasonable warning” under Proposition 65. (Health and
20 Safety Code § 25249.6). DEFENDANTS exposed consumers, users, and handlers to the LISTED
21 CHEMICAL and failed to provide the health hazard warnings required by Proposition 65.

22 4. DEFENDANTS’ continued packaging, distribution, marketing, and/or sales of the
23 PRODUCT without the required health hazard warnings causes individuals to be involuntarily,
24 unknowingly, and unwittingly exposed to levels of the LISTED CHEMICAL that violate
25 Proposition 65.

26 **PARTIES**

27 5. PLAINTIFF is a non-profit corporation organized under California law. CAPA is
28 dedicated to, among other causes, helping safeguard the public from health hazards by bringing

1 about a reduction in the use and misuse of hazardous and toxic chemicals, fostering and increasing
2 the awareness of chemical used to manufacture consumer products, facilitating a safe environment
3 for consumers and employees, and encouraging corporate responsibility.

4 6. CAPA is a person within the meaning of Health and Safety Code, section 25249.11
5 and this enforcement action in the public interest pursuant to Health and Safety Code, section
6 25249.7, subdivision (d). Health and Safety Code, section 25249.7, subdivision (d) specifies a
7 person may bring an action to enforce Proposition 65 in the public interest, provided certain notice
8 requirements and that no other public prosecutor is diligently prosecuting an action for the same
9 violation(s).

10 7. OMG ACCESSORIES LLC is now, and was at all times relevant herein, a limited
11 liability company organized under the laws of Illinois and is a person in the course of doing
12 business within the meaning of Health and Safety Code, section 25249.11.

13 8. NORDSTROM, INC. is now, and was at all times relevant herein, a corporation
14 organized under the laws of Washington and is a person in the course of doing business within the
15 meaning of Health and Safety Code, section 25249.11.

16 9. DEFENDANTS own, administer, direct, control, and/or operate facilities and/or
17 agents, distributors, sellers, marketers, or other retail operations who place this product into the
18 stream of commerce in California (including but not limited to Alameda County) under the brand
19 name, UNICORN COSMETICS CASE, which contains the LISTED CHEMICAL without first
20 giving clear and reasonable warnings.

21 10. DEFENDANTS, separately and each of them, are or were, at all times relevant to the
22 claims in this Complaint and continuing through the present, legally responsible for compliance
23 with the provisions of Proposition 65. Whenever an allegation regarding any act of a DEFENDANT
24 is made herein, such allegation shall be deemed to mean that DEFENDANT, or its agents, officers,
25 directors, managers, supervisors, or employees did or so authorized such acts while engaged in the
26 affairs of DEFENDANTS' business operations and/or while acting within the course and scope of
27 their employment or while conducting business for DEFENDANTS for a commercial purpose.

28

1 11. In this Complaint, when reference is made to any act of a DEFENDANTS, such
2 allegation shall mean that the owners, officers, directors, agents, employees, contractors, or
3 representatives of DEFENDANTS acted or authorized such actions, and/or negligently failed and
4 omitted to act or adequately and properly supervise, control, or direct its employees and agents
5 while engaged in the management, direction, operation, or control of the affairs of the business
6 organizations. Whenever reference is made to any act of any DEFENDANTS, such allegation shall
7 be deemed to mean the act of each DEFENDANTS acting individually, jointly and severally as
8 defined by Civil Code, section 1430 *et seq.*

9 12. PLAINTIFF does not know the true names, capacities, and liabilities of
10 DEFENDANT DOES Nos. 1-25, inclusive, and therefore sues them under fictitious names.
11 PLAINTIFF will amend this Complaint to allege the true name and capacities of the DOE
12 DEFENDANTS upon being ascertained. Each of these DEFENDANTS was in some way legally
13 responsible for the acts, omissions and/or violations alleged herein.

14 **JURISDICTION AND VENUE**

15 13. This Court has jurisdiction over this action pursuant to California Constitution
16 Article VI, Section 10, which grants the Superior Court, “original jurisdiction in all causes except
17 those given by statute to other trial courts.” The statute under which this action is brought does not
18 specify any other court with jurisdiction.

19 14. This Court has jurisdiction over DEFENDANTS because they are business entities
20 that do sufficient business, have sufficient minimum contacts in California, or otherwise
21 intentionally avail themselves of the California market, through the sale, marketing, and use of their
22 PRODUCT in California, to render the exercise of jurisdiction over them by the California courts is
23 consistent with traditional notions of fair play and substantial justice.

24 15. Venue in this action is proper in the Alameda County Superior Court because the cause,
25 or part thereof, arises in the County of Alameda since DEFENDANTS’ PRODUCT is marketed,
26 offered for sale, sold, and/or used in this county.

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STATUTORY BACKGROUND

16. The People of the California declared in Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.” (Section 1, subdivision (b) of Initiative Measure, Proposition 65). To effect this goal, Proposition 65 requires that individuals be provided with a “clear and reasonable warning” before being exposed to substances listed by the State of California as causing cancer or reproductive toxicity. (Health & Saf. Code, § 25249.6.) Health and Safety Code, section 25249.6 states, in pertinent 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 . . .”

17. An exposure to a chemical in a consumer product is one “that results from a person’s acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer good, including consumption of food.” (Cal. Code Regs., tit. 27, § 25600.1, subd. (e).)

18. Proposition 65 provides that any “person who violates or threatens to violate” the statute may be enjoined in a court of competent jurisdiction. (Health & Saf. Code, § 25249.7). The phrase “threaten to violate” is defined to mean creating “a condition in which there is a substantial probability that a violation will occur” (*Id.*, § 25249.11, subd. (e).) Violators are liable for civil penalties of up to \$2,500 per day for each violation of the Act. (*Id.*, § 25249.7.)

FACTUAL BACKGROUND

19. On October 24, 2003, the State of California listed DEHP as a chemical known to the State to cause developmental toxicity and male reproductive toxicity. The clear and reasonable warning requirement for DEHP went into effect one year later on October 24, 2004.

20. The Maximum Allowable Dose Level (“MADL”) for DEHP is 410µg/day for adults; 58 µg/day for infant boys, age 29 days to 24 months; and 20 µg/day for neonatal infant boys, age 0 to 28 days. The MADL is calculated based is calculated based on a human body weight of 70 kg, age-specific MADLs have been calculated for infant and neonatal boys based on bodyweights of 10 and 3.5 kg, respectively.

21. To test DEFENDANTS’ PRODUCT for DEHP, PLAINTIFF hired a well-respected

1 and accredited testing laboratory that used the testing protocol used and approved by the California
2 Attorney General. The results of testing undertaken by PLAINTIFF of DEFENDANTS'
3 PRODUCT show the PRODUCT tested were in violation of the 58 µg/day for infant boys, age (29
4 days to 24 months) and 20 µg/day for neonatal infant boys (age 0 to 28 days) "safe harbor" daily
5 dose limits, as set forth in Proposition 65's regulations. The overall exposure estimate from the
6 UNICORN COSMETICS CASE exceeds the MADL for infant boys aged 0-24 months through
7 dermal absorption, object-to-mouth ingestion, and direct and indirect hand-to-mouth ingestion. This
8 exposure level significantly exceeds the MADL set by the California Office of Environmental
9 Health Hazard Assessment. As a result, the UNICORN COSMETICS CASE needs a clear a
10 reasonable warning under Proposition 65.

11 22. The consumer exposures that are the subject of this notice result from the purchase,
12 acquisition, and handling of the product. Consequently, a primary route of exposure to these
13 chemicals is through dermal absorption, object-to-mouth ingestion, and direct and indirect hand-to-
14 mouth ingestion. Significant exposure will occur under object-to-mouth ingestion and direct and
15 indirect hand-to-mouth ingestion. Infant boys aged 0-24 months are exposed to the LISTED
16 CHEMICAL through object-to-mouth ingestion and direct and indirect hand-to-mouth ingestion,
17 and dermal contact when they handle or touch the UNICORN COSMETICS CASE.

18 23. At all times relevant to this action, DEFENDANTS, therefore, have knowingly and
19 intentionally exposed the users, consumers, and/or handlers of the PRODUCT to the LISTED
20 CHEMICAL without first giving a clear and reasonable warning to such individuals.

21 24. The PRODUCT has allegedly been sold by DEFENDANT for use in California since
22 at least March 22, 2017. The PRODUCT continues to be distributed and sold in California without
23 the requisite warning information.

24 25. As a proximate result of acts by DEFENDANTS, as persons in the course of doing
25 business within the meaning of Health and Safety Code, section 25249.11, individuals throughout
26 the State of California, including in the County of Alameda, have been exposed to the LISTED
27 CHEMICAL without a clear and reasonable warning on the PRODUCT. The individuals subject to
28 the violative exposures include normal and foreseeable users of the PRODUCT, as well as all other

1 persons exposed to the PRODUCT.

2 26. On July 19, 2018, CAPA served DEFENDANTS and each other the appropriate
3 public enforcement agencies with a document entitled “Notice of Violation of California Health &
4 Safety Code Section 25249.5 *et seq.* (Proposition 65)” that provided DEFENDANTS and the public
5 enforcement agencies with notice that DEFENDANTS were in violation of Proposition 65 for
6 failing to warn purchasers and individuals using the PRODUCT that the use of the PRODUCT
7 exposes them to DEHP, a chemical known in the State of the California to cause reproductive of
8 male reproductive toxicity. A true and correct copy of the 60-Day Notice is attached hereto as
9 Exhibit A, is hereby incorporated by reference, and is available on the Attorney General’s website
10 located at <https://oag.ca.gov/prop65>.

11 27. On July 19, 2018, PLAINTIFF sent a 60-Day Notice of Proposition 65 Violations
12 (“NOTICE”) to the requisite public enforcement agencies, and to DEFENDANTS. The NOTICE
13 was issued pursuant to, and in compliance with, the requirements of Health and Safety Code,
14 section 25249.7, subdivision (d) and the statute’s implementing regulations regarding the notice of
15 the violations to be given to certain public enforcement agencies and to the violator. The NOTICE
16 included, *inter alia*, the following information: the name, address, and telephone number of the
17 noticing individual; the name of the alleged violators; the statute violated; the approximate time
18 period during which violations occurred; and descriptions of the violations including the chemicals
19 involved, the routes of toxic exposure; and the specific product or type of product causing the
20 violations.

21 28. DEFENDANTS were provided a copy of the NOTICE and the document entitled
22 “The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,”
23 which is also known as Appendix A to Title 27 of the California Code of Regulations, section
24 25903, via certified mail.

25 29. The California Attorney General was provided a copy of the NOTICE and a
26 Certificate of Merit by the attorney for the noticing party, stating that there is a reasonable and
27 meritorious case for this action, and attaching factual information sufficient to establish a basis for
28 the certificate, including the identity of the persons consulted with and relied on by the certifier, and

1 the facts, studies, or other data reviewed by those persons, pursuant to Health and Safety Code,
2 section 25249.7, subdivision (h)(2) via online submission.

3 30. After expiration of the sixty (60) day notice period, the appropriate public
4 enforcement agencies have failed to commence and diligently prosecute a cause of action under
5 Health and Safety Code, section 25249.5, *et seq.* against DEFENDANTS based on the allegations
6 herein.

7 31. Within the last three (3) years from the filing of this complaint and continuing
8 through the present, subject to the relevant tolling agreements applicable herein, and after
9 reasonable inquiry and due diligence in attempting to discover additional violations,
10 DEFENDANTS, separately and each of them, have engaged in acts and omissions in violation of
11 Health and Safety Code, section 25249.5, *et seq.* concerning the PRODUCT described in the July
12 19, 2018 NOTICE.

13 **FIRST CAUSE OF ACTION**

14 **(Civil Penalties for Violations of Health and Safety Code, section 25249.5, *et seq.* Concerning
15 the PRODUCT Described in the July 19, 2018 Prop. 65 Notice of Violation)**

16 32. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 31,
17 inclusive, as if specifically set forth herein.

18 33. By committing the acts alleged in this Complaint, DEFENDANTS at all times
19 relevant to this action, and continuing through the present, have violated Health and Safety Code,
20 section 25249.6 by, in the course of doing business, knowingly and intentionally exposing
21 individuals in California to chemicals known to the State of California to cause developmental
22 toxicity and male reproductive toxicity without first giving clear and reasonable warnings to such
23 persons who use, consume or handle the PRODUCT containing the LISTED CHEMICAL, pursuant
24 to Health and Safety Code, sections 25249.6 and 25249.11, subdivision (f).

25 34. By the above-described acts, DEFENDANTS are liable, pursuant to Health and
26 Safety Code, section 25249.7, subdivision (b), for a civil penalty of up to \$2,500 per day per
27 violation for each unlawful exposure to the LISTED CHEMICAL from the PRODUCTS, in an
28 amount in excess of \$750,000.

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THE NEED FOR INJUNCTIVE RELIEF
**(Injunctive Relief for Violations of Health and Safety Code § 25249.5, et seq. Concerning the
PRODUCT Described in the July 19, 2018 Prop. 65 Notice of Violation)**

35. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 34,
inclusive, as specifically set forth herein.

36. By committing the acts alleged in this Complaint, DEFENDANTS at all times
relevant to this action, and continuing through the present, have violated Health and Safety Code,
section 25249.6 by, in the course of doing business, knowingly and intentionally exposing
individuals in California to chemicals known in the State of California to cause developmental
toxicity and male reproductive toxicity without first giving clear and reasonable warnings to such
persons who use, consume, or handle the PRODUCT containing the LISTED CHEMICAL,
pursuant to Health and Safety Code, sections 25249.6 and 25249.11, subdivision (f).

37. By the above-described acts, DEFENDANTS have violated Health and Safety Code,
section 25249.6 and are therefore subject to preliminary and permanent injunctions ordering
DEFENDANTS to stop violating Proposition 65, to provide warnings to all present and future
customers, and to provide warnings to DEFENDANTS' past customers who purchased or used the
PRODUCTS without receiving a clear and reasonable warning.

38. A remedy of injunctive relief under Proposition 65 is specifically authorized by
Health and Safety Code, section 25249.7, subdivision (a).

39. Continuing commission by DEFENDANTS of the acts alleged above will
irreparably harm the citizens of the State of California, for which harm they have no plain, speedy,
or adequate remedy at law.

40. In the absence of preliminary and then permanent injunctive relief, DEFENDANTS
will continue to create a substantial risk of irreparable injury by continuing to cause consumers to
be involuntarily, unknowingly, and unwittingly exposed to the LISTED CHEMICAL through the
use, consumption, and/or handling of the PRODUCT.

PRAYER FOR RELIEF

Wherefore, PLAINTIFF prays for the following relief:

A. A preliminary and permanent injunction, pursuant to Health and Safety Code, section

1 25249.7, subdivision (b), enjoining DEFENDANTS, their agents, employees, assigns, and all persons
2 acting in concert or participating with DEFENDANTS, from manufacturing, distributing, marketing,
3 or selling the PRODUCT in California without first providing a clear and reasonable warning, within
4 the meaning of Proposition 65, that the users and/or handlers of the PRODUCT are exposed to the
5 LISTED CHEMICAL;

6 B. An injunctive order, pursuant to Health and Safety Code, section 25249.7, subdivision
7 (b), compelling DEFENDANTS to identify and locate each individual who has purchased the
8 PRODUCT since March 22, 2017, and to provide a warning to such person that the use of the
9 PRODUCT will expose the user to the chemicals known to cause developmental toxicity and male
10 reproductive toxicity;

11 C. An assessment of civil penalties pursuant to Health and Safety Code, section 25249.7,
12 subdivision (b), against DEFENDANTS in the amount on \$2,500 per day for each violation of
13 Proposition 65, in excess of \$750,000, according to proof;

14 D. An award to PLAINTIFF of its reasonable attorney's fees and cost of suit pursuant to
15 California Code of Civil Procedure, sections 1032 *et seq.* and 1021.5, as PLAINTIFF shall specify in
16 further applications to the Court; and

17 E. Such other and further relief the Court deems just and proper.

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19 DATED: October 10, 2018

AQUA TERRA AERIS LAW GROUP

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23 _____
24 Matthew C. Maclear
25 Anthony M. Barnes
26 Attorneys for Plaintiff
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