

1 Instant Artist acrylic paint sets sold and/or distributed by defendant Ross Stores, Inc. (“Ross
2 Stores” 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, Instant Artist acrylic paint sets (the “Products”)
21 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 January 30, 2019, Plaintiff gave notice of alleged violation of Health and
6 Safety Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California
7 citizens to DEHP contained in the Products without proper warning, subject to a private action to
8 Defendant and to the California Attorney General’s office and the offices of the County District
9 attorneys and City Attorneys for each city with a population greater than 750,000 persons
10 wherein the 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 the Notice.

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 Products.

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. Products do not comply with the Proposition 65 warning requirements.

4 24. Plaintiff, based on his best information and belief, avers that at all relevant times
5 herein, and at least since January 30, 2019, continuing until the present, that Defendant has
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 25. The exposures that are the subject of the Notice result from the purchase,
9 acquisition, handling and recommended use of the Products. Consequently, the primary route of
10 exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can occur
11 through direct skin contact with the Products during routine use when grasped, opened, or
12 manipulated with bare hands. If the Products become wet due to contact with water and is
13 handled or held in contact with wet skin, aqueous DEHP skin permeation rates have been
14 reported to be faster than neat DEHP permeation. Concentrations of DEHP can be expected to
15 build within the Products. This gas phase and surface DEHP can absorb to the surface of the
16 Products, that can subsequently be handled, held in direct contact with skin, mouthed, or ingested
17 by the user. If the Products are stored or transported in a carrier, DEHP that leaches from the
18 Products may contaminate other articles contained within the storage area or carrier that are
19 subsequently handled, worn, mouthed, or ingested by the user. Finally, while mouthing of the
20 Products does not seem likely, some amount of exposure through ingestion can occur by
21 handling the product with subsequent touching of the user's hand to mouth.

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

25 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
26 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP 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.

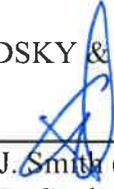
7 **PRAYER FOR RELIEF**

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: October 30, 2019

BRODSKY & SMITH, LLC

18 By:  _____

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