

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

ENDORSED
FILED
Superior Court of California
County of San Francisco

MAY - 4 2020

CLERK OF THE COURT
BY: ANNA L. TORRES
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 EMA BELL,

12 Plaintiff,

13 vs.

14 UNCAS INTERNATIONAL, LLC, CVS
15 PHARMACY, INC.,

Defendants.

Case No.: CGC - 20 - 584324

COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF

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

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

18 **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 at
21 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 Scented lip gloss sets/kits and Unicorn pouches sold and/or distributed by defendant Uncas

- 1 -

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

1 International, LLC (“Uncas”) and defendant CVS Pharmacy, Inc. (“CVS”) (collectively,
2 “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 known
5 to the State to cause cancer and it has come under the purview of Proposition 65 regulations since
6 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
7 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
8 reproductive toxicity.

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

14 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
15 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
16 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
17 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
18 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
19 25249.7.

20 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
21 without a requisite exposure warning, Scented lip gloss sets/kits and Unicorn pouches (the
22 “Products”) that expose persons to DEHP.

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

27 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
28 65 in accordance with Health and Safety Code § 25249.7(b).

1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Defendants to provide purchasers or users of the Products with required warnings related to the
3 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code
4 § 25249.7(a).

5 10. Plaintiff further seeks a reasonable award of attorney’s fees and costs.

6 **PARTIES**

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

11 12. Defendant Uncas, through its business, effectively imports, distributes, sells, and/or
12 offers the Products for sale or use in the State of California, or it implies by its conduct that it
13 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
14 Plaintiff alleges that defendant Uncas is a “person” in the course of doing business within the
15 meaning of Health & Safety Code sections 25249.6 and 25249.11.

16 13. Defendant CVS, through its business, effectively imports, distributes, sells, and/or
17 offers the Products for sale or use in the State of California, or it implies by its conduct that it
18 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
19 Plaintiff alleges that defendant CVS is a “person” in the course of doing business within the
20 meaning of Health & Safety Code sections 25249.6 and 25249.11.

21 **VENUE AND JURISDICTION**

22 14. Venue is proper in the County of San Francisco because one or more of the
23 instances of wrongful conduct occurred, and continue to occur in this county and/or because
24 Defendants conducted, and continue to conduct, business in the County of San Francisco with
25 respect to the Products.

26 15. This Court has jurisdiction over this action pursuant to California Constitution
27 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
28 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement

1 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
2 jurisdiction over this lawsuit.

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

9 **STATUTORY BACKGROUND**

10 17. The people of the State of California declared in Proposition 65 their right “[t]o be
11 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
12 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

13 18. To effect this goal, Proposition 65 requires that individuals be provided with a
14 “clear and reasonable warning” before being exposed to substances listed by the State of California
15 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

16 No person in the course of doing business shall knowingly and intentionally expose any
17 individual to a chemical known to the state to cause cancer or reproductive toxicity without
18 first giving clear and reasonable warning to such individual...

19 19. An exposure to a chemical in a consumer product is one “which results from a
20 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
21 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
22 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
23 shall provide a warning to any person to whom the product is sold or transferred unless the product
24 is packaged or labeled with a clear and reasonable warning.”
25
26
27
28

1 20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
2 more of the following methods individually or in combination:¹

- 3 a. A warning that appears on a product’s label or other labeling.
- 4 b. Identification of the product at the retail outlet in a manner which provides a
5 warning. Identification may be through shelf labeling, signs, menus, or a
6 combination thereof.
- 7 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
8 prominently placed upon a product’s labels or other labeling or displayed at the
9 retail outlet with such conspicuousness, as compared with other words,
10 statements, designs, or devices in the label, labeling or display as to render it
11 likely to be read and understood by an ordinary individual under customary
12 conditions of purchase or use.
- 13 d. A system of signs, public advertising identifying the system and toll-free
14 information services, or any other system that provides clear and reasonable
15 warnings.

16 21. Proposition 65 provides that any “person who violates or threatens to violate” the
17 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
18 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
19 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
20 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
21 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

22 **FACTUAL BACKGROUND**

23 22. On January 1, 1988, the State of California listed DEHP as a chemical known to
24 the State to cause cancer and it has come under the purview of Proposition 65 regulations since
25 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
26 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
27 reproductive toxicity. In summary, the Listed Chemical was listed under Proposition 65 as a
28 chemical known to the State to cause cancer and reproductive toxicity.

¹ Alternatively, a person in the course of doing business may elect to comply with the warning requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30, 2016, and operative on August 30, 2018.

1 23. The consumer exposures that are the subject of this Complaint result from through
2 dermal absorption. Users can be exposed to DEHP by dermal absorption through direct skin
3 contact with the Products during routine use when the Products are handled with bare hands. If the
4 Products are stored or transported in a carrier, DEHP that leaches from the Products may
5 contaminate other articles contained within these closed spaces that are subsequently handled,
6 worn, mouthed, or ingested by the user. Finally, while mouthing of the Products does not seem
7 likely, some amount of exposure through ingestion can occur by touching the Products with
8 subsequent touching of the user’s hand to mouth.

9 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
10 and/or sold the Products in California since at least May 10, 2019. The Products continue to be
11 distributed and sold in California without the requisite warning information.

12 25. At all times relevant to this action, Defendants have knowingly and intentionally
13 exposed users, consumers and/or patients to the Products and the Listed Chemical without first
14 giving a clear and reasonable exposure warning to such individuals.

15 26. As a proximate result of acts by each defendant, as a person in the course of doing
16 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
17 California, including in San Francisco County, have been exposed to the Listed Chemical without
18 a clear and reasonable warning on the Products. The individuals subject to the violative exposures
19 include normal and foreseeable users, consumers and patients that use the Products, as well as all
20 others exposed to the Products.

21 **SATISFACTION OF NOTICE REQUIREMENTS**

22 27. On May 10, 2019 and May 13, 2019, Plaintiff, respectively, gave notice of alleged
23 violation of Health and Safety Code § 25249.6 (the “Notices”) to Defendants concerning the
24 exposure of California citizens to DEHP contained in the Products without proper warning, subject
25 to a private action to Defendants and to the California Attorney General’s office and the offices of
26 the County District attorneys and City Attorneys for each city with a population greater than
27 750,000 persons wherein the herein violations allegedly occurred.

1 28. The Notices complied with all procedural requirements of Proposition 65 including
2 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
3 least one person with relevant and appropriate expertise who reviewed relevant data regarding
4 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a private
5 action.

6 29. After receiving the Notices, and to Plaintiff's best information and belief, none of
7 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
8 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
9 are the subject of the Notice.

10 30. Plaintiff is commencing this action more than sixty (60) days from the date of the
11 Notices to Defendants, as required by law.

12 **FIRST CAUSE OF ACTION**

13 **(By Plaintiff against Defendants for the Violation of Proposition 65)**

14 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
15 this complaint as though fully set forth herein.

16 32. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
17 of the Product.

18 33. The Products contain DEHP, a hazardous chemical found on the Proposition 65 list
19 of chemicals known to be hazardous to human health.

20 34. The Products do not comply with the Proposition 65 warning requirements.

21 35. Plaintiff, based on her best information and belief, avers that at all relevant times
22 herein, and at least since May 10, 2019, continuing until the present, that Defendants have
23 continued to knowingly and intentionally expose California users and consumers of the Product to
24 DEHP without providing required warnings under Proposition 65.

25 36. The exposures that are the subject of the May 10, 2019, Unicorn pouch notice result
26 from the purchase, acquisition, handling and recommended use of the Products. Consequently, the
27 primary route of exposure to these chemicals is through dermal absorption. Users can be exposed
28 to DEHP by dermal absorption through direct skin contact with the plastic during routine use when

1 the Products are handled with bare hands. If the Products are stored or transported in a carrier,
2 DEHP that leaches from the Products may contaminate other articles contained within these closed
3 spaces that are subsequently handled, worn, mouthed, or ingested by the user. Finally, while
4 mouthing of the Products does not seem likely, some amount of exposure through ingestion can
5 occur by touching the Products with subsequent touching of the user's hand to mouth.

6 37. The exposures that are the subject of the May 13, 2019, Scented lip gloss sets/kits
7 notice result from the purchase, acquisition, handling and recommended use of the Products.
8 Consequently, the primary route of exposure to these chemicals is through dermal absorption.
9 Users may be exposed to DEHP by dermal absorption through direct skin contact with the Products
10 during routine use when it is manipulated with bare hands. DEHP from the Products can potentially
11 be absorbed to the surface of the interior contents which includes but is not limited to lip gloss.
12 When handled with bare hands, these Products can provide an indirect source of dermal transfer
13 of DEHP. Contaminated makeup can also provide an indirect source of dermal transfer of DEHP
14 to the user's facial area when the contaminated makeup is applied to the user's facial skin. If the
15 Products are stored or transported in a carrier, DEHP that leaches from the Products may
16 contaminate other articles contained within these closed spaces that are subsequently handled,
17 worn, mouthed, or ingested by the user. Finally, while mouthing of the Products does not seem
18 likely, some amount of exposure through ingestion can occur by touching the Products with
19 subsequent touching of the user's hand to mouth or through ingestion of contaminated cosmetics
20 or cosmetic brushes makeup applied to the lips.

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

24 39. Defendants have knowledge that the normal and reasonably foreseeable use of the
25 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
26 by their deliberate, non-accidental participation in the importation, distribution, sale and offering
27 of the Products to consumers in California

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

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

5 42. 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.

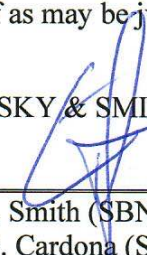
7 **PRAYER FOR RELIEF**

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

- 10 A. That the court assess civil penalties against each Defendant in the amount of \$2,500
11 per day for each violation for up to 365 days (up to a maximum civil penalty amount
12 per violation of \$912,000.00) in accordance with Health and Safety Code §
13 25249.7(b);
- 14 B. That the court preliminarily and permanently enjoin Defendants mandating
15 Proposition 65 compliant warnings on the Product;
- 16 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
17 amount of \$50,000.00.
- 18 D. That the court grant any further relief as may be just and proper.

19 Dated: May 4, 2020

BRODSKY & SMITH, LLC

20 By: 
21 Evan J. Smith (SBN242352)
22 Ryan P. Cardona (SBN302113)
23 9595 Wilshire Boulevard, Suite 900
24 Beverly Hills, CA 90212
25 Telephone: (877) 534-2590
26 Facsimile: (310) 247-0160

Attorneys for Plaintiff