

FILED

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**JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: T. Jones, Deputy**

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11 Case No.: CIV 2100698

12 EMA BELL,

13 Plaintiff,

14 vs.

15 CATHY'S CONCEPTS, INC.,
16 DILLARD'S, INC.,

17 Defendants.

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELEIF**

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

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

20 **BACKGROUND OF THE CASE**

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

27 2. This complaint is a representative action brought by Plaintiff in the public interest
28 of the citizens of the State of California to enforce the People's right to be informed of the health
hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
Cathy's Concepts cosmetic cases/carriers sold and/or distributed by defendant Cathy's Concepts,

1 Inc. (“Cathy’s Concepts”) and defendant Dillard’s, Inc. (“Dillard’s”) (collectively, the
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, Cathy’s Concepts cosmetic cases/carriers (the “Products”)
22 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 Cathy's Concepts, through its business, effectively imports, distributes,
12 sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct
13 that it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
14 Plaintiff alleges that defendant Cathy's Concepts is a "person" in the course of doing business
15 within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

16 13. Defendant Dillard's, through its business, effectively imports, distributes, sells,
17 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
18 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
19 Plaintiff alleges that defendant Dillard's 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 Marin because one or more of the instances of
23 wrongful conduct occurred, and continue to occur in this county and/or because Defendants
24 conducted, and continue to conduct, business in the County of Marin with respect to the Products.

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

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.”

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
5 a warning. Identification may be through shelf labeling, signs, menus, or a combination
6 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 retail outlet
9 with such conspicuousness, as compared with other words, statements, designs, or devices
10 in the label, labeling or display as to render it likely to be read and understood by an
11 ordinary individual under customary conditions of purchase or use.
- 12 d. A system of signs, public advertising identifying the system and toll-free
13 information services, or any other system that provides clear and reasonable warnings.

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

20 **FACTUAL BACKGROUND**

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

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27 _____
28 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 reproductive toxicity. In summary, the Listed Chemical was listed under Proposition 65 as a
2 chemical known to the State to cause cancer and reproductive toxicity.

3 23. The consumer exposures that are the subject of this Complaint result from dermal
4 absorption. Dermal absorption of DEHP can occur through direct skin contact when the Products
5 are contacted with bare hands. Concentrations of DEHP can be expected to build within the interior
6 of the Products. Articles placed in the Products, including but not limited to cosmetics, can absorb
7 DEHP. These DEHP contaminated items can subsequently be held with bare hands or applied to
8 the skin resulting in dermal exposure to DEHP or mouthed or ingested resulting in ingestion of
9 DEHP. If the Products are stored or transported in a carrier, DEHP that leaches from the Products
10 may contaminate other articles contained within the Products that are subsequently handled, worn,
11 mouthed, or ingested by the user. Finally, while mouthing of the Products does not seem likely,
12 some amount of exposure through ingestion can occur by touching the Products with subsequent
13 touching of the user's hand to mouth.

14 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
15 and/or sold the Products in California since at least September 24, 2020. The Products continue to
16 be distributed and sold in California without the requisite warning information.

17 25. At all times relevant to this action, Defendants have knowingly and intentionally
18 exposed users and/or consumers of the Products to DEHP without first giving a clear and
19 reasonable exposure warning to such individuals.

20 26. As a proximate result of acts by each defendant, as a person in the course of doing
21 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
22 California, including in Alameda County, have been exposed to DEHP without a clear and
23 reasonable warning on the Products. The individuals subject to the violative exposures include
24 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
25 the Products.

26 **SATISFACTION OF NOTICE REQUIREMENTS**

27 27. On September 24, 2020, Plaintiff gave notice of alleged violation of Health and
28 Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens

1 to DEHP contained in the Products without proper warning, subject to a private action to
2 Defendants and to the California Attorney General's office and the offices of the County District
3 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
4 the herein violations allegedly occurred.

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

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

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

16 **FIRST CAUSE OF ACTION**

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

18 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of
19 this Complaint as though fully set forth herein.

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

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

24 34. The Product does not comply with the Proposition 65 warning requirements.

25 35. Plaintiff, based on her best information and belief, avers that at all relevant times
26 herein, and at least since September 24, 2020, continuing until the present, that Defendants have
27 continued to knowingly and intentionally expose California users and consumers of the Product to
28 DEHP without providing required warnings under Proposition 65.

1 36. The exposures that are the subject of the Notice result from the purchase,
2 acquisition, handling and recommended use of the Products. Consequently, the primary route of
3 exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can occur
4 through direct skin contact when the Products are contacted with bare hands. Concentrations of
5 DEHP can be expected to build within the interior of the Products. Articles placed in the Products,
6 including but not limited to cosmetics, can absorb DEHP. These DEHP contaminated items can
7 subsequently be held with bare hands or applied to the skin resulting in dermal exposure to DEHP
8 or mouthed or ingested resulting in ingestion of DEHP. If the Products are stored or transported in
9 a carrier, DEHP that leaches from the Products may contaminate other articles contained within
10 the Products that are subsequently handled, worn, mouthed, or ingested by the user. Finally, while
11 mouthing of the Products does not seem likely, some amount of exposure through ingestion can
12 occur by touching the Products with subsequent touching of the user's hand to mouth.

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

16 38. Defendants have knowledge that the normal and reasonably foreseeable use of the
17 Products exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
18 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of
19 the Products to consumers in California

20 39. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
21 Complaint.

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

24 41. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
25 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
3 relief:

4 A. That the court assess civil penalties against each defendant in the amount of \$2,500
5 per day for each violation for up to 365 days (up to a maximum civil penalty amount per
6 violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);

7 B. That the court preliminarily and permanently enjoin Defendants mandating
8 Proposition 65 compliant warnings on the Products;

9 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
10 amount of \$50,000.00.

11 D. That the court grant any further relief as may be just and proper.

12 Dated: February 23, 2021

BRODSKY & SMITH, LLC

13 By:  _____

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