

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY SMITH
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*

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

07/12/2021
Clerk of the Court
BY: RONNIE OTERO
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 EMA BELL,

12 Plaintiff,

13 vs.

14 UNILEVER UNITED STATES, INC,

15 Defendant.

Case No.:

CGC-21-593789

**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 diethanolamine (DEA), a toxic chemical found in (a) Suave Aloe
28 Soothing Lotion, UPC# 079400067845, and (b) Apothecare Essentials Phyto Young Firming Eye
Cream, UPC# 055086003773, sold and/or distributed by defendant Unilever United States, Inc.
 (“Unilever” or the “Defendant”) in California.

1 3. DEA is a harmful chemical known to the State of California to cause cancer. On
2 June 22, 2012, the State of California listed DEA as a chemical known to the State to cause cancer
3 and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs.
4 Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

5 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
6 within California or sell products therein to comply with Proposition 65 regulations. Included in
7 such regulations is the requirement that businesses must label any product containing a Proposition
8 65-listed chemical with a “clear and reasonable” warning before “knowingly and intentionally”
9 exposing any person to any such listed chemical.

10 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
11 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
12 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
13 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
14 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
15 25249.7.

16 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
17 without a requisite exposure warning, (a) Suave Aloe Soothing Lotion, UPC# 079400067845, and
18 (b) Apothecare Essentials Phyto Young Firming Eye Cream, UPC# 055086003773 (the
19 “Products”) that expose persons to DEA.

20 7. Defendant’s failure to warn consumers and other individuals in California of the
21 health hazards associated with exposure to DEA in conjunction with the sale and/or distribution
22 of the Products is a violation of Proposition 65 and subjects Defendant to the enjoinder and civil
23 penalties described herein.

24 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition 65
25 in accordance with Health and Safety Code § 25249.7(b).

26 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
27 Defendant to provide purchasers or users of the Products with required warnings related to the
28

1 dangers and health hazards associated with exposure to DEA pursuant to Health and Safety Code
2 § 25249.7(a).

3 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

4 **PARTIES**

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

9 12. Defendant Unilever, through its business, effectively imports, distributes, sells,
10 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
11 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.

12 13. Plaintiff alleges that defendant Unilever is a "person" in the course of doing
13 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 14. Venue is proper in the County of San Francisco because one or more of the
16 instances of wrongful conduct occurred, and continue to occur in this county and/or because
17 Defendant conducted, and continues to conduct, business in the County of San Francisco with
18 respect to the Products.

19 15. This Court has jurisdiction over this action pursuant to California Constitution
20 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
21 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement
22 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
23 jurisdiction over this lawsuit.

24 16. This Court has jurisdiction over Defendant because Defendant is either a citizen of
25 the State of California, has sufficient minimum contacts with the State of California, is registered
26 with the California Secretary of State as foreign corporations authorized to do business in the State
27 of California, and/or has otherwise purposefully availed itself of the California market. Such
28

1 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
2 permissible with traditional notions of fair play and substantial justice.

3 STATUTORY BACKGROUND

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

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

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

13 19. An exposure to a chemical in a consumer product is one “which results from a
14 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
15 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
16 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
17 shall provide a warning to any person to whom the product is sold or transferred unless the product
18 is packaged or labeled with a clear and reasonable warning.”

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

- 21 a. A warning that appears on a product’s label or other labeling.
- 22 b. Identification of the product at the retail outlet in a manner which provides
23 a warning. Identification may be through shelf labeling, signs, menus, or a combination
24 thereof.

25
26
27 ¹ Alternatively, a person in the course of doing business may elect to comply with the warning
28 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 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
2 prominently placed upon a product's labels or other labeling or displayed at the retail outlet
3 with such conspicuousness, as compared with other words, statements, designs, or devices
4 in the label, labeling or display as to render it likely to be read and understood by an
5 ordinary individual under customary conditions of purchase or use.

6 d. A system of signs, public advertising identifying the system and toll-free
7 information services, or any other system that provides clear and reasonable warnings.

8 21. Proposition 65 provides that any "person who violates or threatens to violate" the
9 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
10 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
11 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
12 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
13 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

14 **FACTUAL BACKGROUND**

15 22. On June 22, 2012, the State of California listed DEA as a chemical known to the
16 State to cause cancer and it has come under the purview of Proposition 65 regulations since that
17 time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). In
18 summary, the Listed Chemical was listed under Proposition 65 as a chemical known to the State
19 to cause cancer.

20 23. The consumer exposures that are the subject of this Complaint result from through
21 dermal absorption. Users will be exposed to DEA in Products through dermal exposure. Exposure
22 to consumers includes, but is not limited to, when handling the product, DEA comes into contact
23 with the hands and is then absorbed through the skin. Additionally, dermal absorption of DEA can
24 occur through direct skin contact when the Products are applied to the user's body and comes into
25 contact with portions of the user's skin that can include, but is not limited to, the user's face.
26 Ingestion of the Products can occur when applied to the user's lips and mouth during shaving, or
27 eyelids or facial area. Finally, some amount of exposure through ingestion can occur by touching
28

1 the Products with subsequent touching of the user's hand to mouth, through hand to food to mouth
2 contact, or through hand to cigarette to mouth contact.

3 24. Defendant has manufactured, processed, marketed, distributed, offered to sell
4 and/or sold the Products in California since at least September 29, 2020. The Products continue to
5 be distributed and sold in California without the requisite warning information.

6 25. At all times relevant to this action, Defendant has knowingly and intentionally
7 exposed users and/or consumers of the Products to DEA without first giving a clear and reasonable
8 exposure warning to such individuals.

9 26. As a proximate result of acts by Defendant, as a person in the course of doing
10 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
11 California, including in San Francisco County, have been exposed to DEA without a clear and
12 reasonable warning on the Products. The individuals subject to the violative exposures include
13 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
14 the Products.

15 **SATISFACTION OF NOTICE REQUIREMENTS**

16 27. On September 29, 2020 (Suave Aloe Soothing Lotion) and October 29, 2020
17 (Apothecare Essentials Phyto Young Firming Eye Cream), Plaintiff gave notice of alleged
18 violation of Health and Safety Code § 25249.6 (collectively, the "Notices") to Defendant
19 concerning the exposure of California citizens to DEA contained in the Products without proper
20 warning, subject to a private action to Defendant and to the California Attorney General's office
21 and the offices of the County District attorneys and City Attorneys for each city with a population
22 greater than 750,000 persons wherein the herein violations allegedly occurred.

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

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

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

7 **FIRST CAUSE OF ACTION**

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

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

11 32. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
12 the Products.

13 33. The Products contain DEA, a hazardous chemical found on the Proposition 65 list
14 of chemicals known to be hazardous to human health.

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

16 35. Plaintiff, based on her best information and belief, avers that at all relevant times
17 herein, and at least since September 29, 2020, continuing until the present, that Defendant has
18 continued to knowingly and intentionally expose California users and consumers of the Product to
19 DEA without providing required warnings under Proposition 65.

20 36. The exposures that are the subject of the Notice result from the purchase,
21 acquisition, handling and recommended use of the Products. Users will be exposed to DEA in
22 Products through dermal exposure. Exposure to consumers includes, but is not limited to, when
23 handling the product, DEA comes into contact with the hands and is then absorbed through the
24 skin. Additionally, dermal absorption of DEA can occur through direct skin contact when the
25 Products are applied to the user's body and comes into contact with portions of the user's skin that
26 can include, but is not limited to, the user's face. Ingestion of the Products can occur when applied
27 to the user's lips and mouth during shaving, or eyelids or facial area. Finally, some amount of
28 exposure through ingestion can occur by touching the Products with subsequent touching of the

1 user's hand to mouth, through hand to food to mouth contact, or through hand to cigarette to mouth
2 contact.

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

6 38. Defendant has knowledge that the normal and reasonably foreseeable use of the
7 Products exposes individuals to DEA, and Defendant intends that exposures to DEA will occur by
8 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
9 Products to consumers in California

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

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

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

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff demands judgment against Defendant and requests the following
18 relief:

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

22 B. That the court preliminarily and permanently enjoin Defendant mandating
23 Proposition 65 compliant warnings on the Products;

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

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

27 Dated: July 9, 2021

BRODSKY SMITH

28 By: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Evan J. Smith (SBN242352)
Ryan P. Cardona (SBN302113)
9595 Wilshire Boulevard, Suite 900
Beverly Hills, CA 90212
Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff