

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

10/13/2021
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 DECIEM BEAUTY GROUP, INC.,
15 ULTA BEAUTY, INC.,

16 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

CGC-21-596027

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

19 **BACKGROUND OF THE CASE**

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

26 2. This complaint is a representative action brought by Plaintiff in the public interest
27 of the citizens of the State of California against defendants Deciem Beauty Group, Inc. (“Deciem”)
28 and Ulta Beauty, Inc. (“Ulta”) (collectively, the “Defendants”) to enforce the People’s right to be
informed of the health hazards caused by exposure to diethanolamine (DEA), a toxic chemical

1 found in cosmetic formulas/oils manufactured, distributed, and/or sold by Deciem including but
2 not limited to, The Ordinary Surface Hydration oil/formula in California.

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

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

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

18 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
19 without a requisite exposure warning, cosmetic formulas/oils manufactured, distributed, and/or
20 sold by Deciem including but not limited to, The Ordinary Surface Hydration oil/formula (the
21 “Products”) that expose persons to DEA.

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

26 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
27 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 DEA 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 Deciem, through its business, effectively imports, distributes, sells,
12 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
13 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
14 Plaintiff alleges that defendant Deciem 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 Ulta, 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 Ulta 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.”

1 summary, the DEA was listed under Proposition 65 as a chemical known to the State to cause
2 cancer.

3 23. The consumer exposures that are the subject of this Complaint result from through
4 dermal absorption. Users will be exposed to DEA in the Products through dermal exposure.
5 Exposure to consumers includes, but is not limited, to, when handling the Products, DEA comes
6 into contact with the hands and is then absorbed through the skin. Additionally, dermal absorption
7 of DEA can occur through direct skin contact when the Products are applied to the user's body or
8 face. Finally, some amount of exposure through ingestion can occur by touching the Products with
9 subsequent touching of the user's hand to mouth, through hand to food to mouth contact, or through
10 hand to cigarette to mouth contact.

11 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
12 and/or sold the Products in California since at least September 17, 2020. The Products continue to
13 be distributed and sold in California without the requisite warning information.

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

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

23 **SATISFACTION OF NOTICE REQUIREMENTS**

24 27. On October 15, 2020, Plaintiff gave notice of alleged violation of Health and Safety
25 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
26 DEA from use of the Products without proper warning, subject to a private action to Defendants
27 and to the California Attorney General's office and the offices of the County District attorneys and
28

1 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
2 violations allegedly occurred.

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

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

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

14 **FIRST CAUSE OF ACTION**

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

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

18 32. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
19 of the Products.

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

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

23 35. Plaintiff, based on her best information and belief, avers that at all relevant times
24 herein, and at least since October 15, 2020, continuing until the present, that Defendants have
25 continued to knowingly and intentionally expose California users and consumers of the Product to
26 DEA without providing required warnings under Proposition 65.

27 36. The exposures that are the subject of the Notice result from the purchase,
28 acquisition, handling and recommended use of the Products. Consequently, the primary route of

1 exposure to these chemicals is through dermal exposure. Users will be exposed to DEA in the
2 Products through dermal exposure. Exposure to consumers includes, but is not limited, to, when
3 handling the Products, DEA comes into contact with the hands and is then absorbed through the
4 skin. Additionally, dermal absorption of DEA can occur through direct skin contact when the
5 Products are applied to the user's body or face. Finally, some amount of exposure through
6 ingestion can occur by touching the Products with subsequent touching of the user's hand to mouth,
7 through hand to food to mouth contact, or through hand to cigarette to mouth contact.

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

11 38. Defendants have knowledge that the normal and reasonably foreseeable use of the
12 Products exposes individuals to DEA, and Defendants intend that exposures to DEA will occur by
13 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
14 Products to consumers in California

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

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

20 41. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
21 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: October 13, 2021

BRODSKY SMITH

13 By: 

14 Evan J. Smith (SBN242352)
15 Ryan P. Cardona (SBN302113)
16 9595 Wilshire Boulevard, Suite 900
17 Beverly Hills, CA 90212
18 Telephone: (877) 534-2590
19 Facsimile: (310) 247-0160

Attorneys for Plaintiff