1 2 3 4	Evan J. Smith, Esquire (SBN 242352) Ryan P. Cardona, Esquire (SBN 302113) BRODSKY SMITH 9595 Wilshire Blvd., Ste. 900 Beverly Hills, CA 90212 Telephone: (877) 534-2590 Facsimile: (310) 247-0160 <i>Attorneys for Plaintiff</i>	ELECTRONICALLY FILED Superior Court of California, County of San Francisco 10/13/2021	
_	Beverly Hills, CA 90212 Telephone: (877) 534-2590 Facsimile: (310) 247-0160 Attorneys for Plaintiff	FILED Superior Court of California, County of San Francisco 10/13/2021	
4	Facsimile: (310) 247-0160 Attorneys for Plaintiff	Superior Court of California, County of San Francisco 10/13/2021	
		10/13/2021	
5	SUPERIOR COURT OF 7		
6	Clerk of the Court BY: KAREN VALDES SUPERIOR COURT OF THE STATE OF CALIFORNIA Deputy Clerk		
7	COUNTY OF SAN FRANCISCO CGC-21-596018		
8		Case No.:	
9	EMA BELL,	COMPLAINT FOR CIVIL PENALTIES AND	
10	Plaintiff,	INJUNCTIVE RELIEF	
11	VS.	(Violation of Health & Safety Code § 25249.5 et seq.)	
12	BENEFIT COSMETICS, LLC, ULTA BEAUTY, INC.,	sсц.)	
13	Defendants.		
14			
15	Plaintiff Ema Bell ("Plaintiff"), by and through her attorneys, alleges the following cause		
16	of action in the public interest of the citizens of the State of California.		
17	BACKGROUND OF THE CASE		
18		tive action on behalf of all California citizens to	
19	enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at		
20	the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,		
21	"[n]o person in the course of doing business shall knowingly and intentionally expose any		
22	individual to a chemical known to the state to cause cancer or reproductive toxicity without first		
23	giving clear and reasonable warning to such individual". Health & Safety Code § 25249.6.		
24	2. This complaint is a representat	ive action brought by Plaintiff in the public interest	
25	of the citizens of the State of California against defendants Benefit Cosmetics, LLC ("Benefit		
26	Cosmetics") and Ulta Beauty, Inc. ("Ulta") (collectively, the "Defendants") to enforce the People's		
27	right to be informed of the health hazards caused by exposure to diethanolamine (DEA), a toxic		
28			
	- 1 - COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF		

HEALTH & SAFETY CODE §25249.5

chemical found in mascaras manufactured, distributed, and sold by Benefit Cosmetics 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).

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

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

18 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
19 without a requisite exposure warning, mascaras manufactured, distributed, and sold by Benefit
20 Cosmetics (the "Products") that expose persons to DEA.

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

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

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

^{- 2}

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

3

4

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

PARTIES

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

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

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

19

VENUE AND JURISDICTION

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

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

- 3

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

7

STATUTORY BACKGROUND

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

- 11 18. To effect this goal, Proposition 65 requires that individuals be provided with a
 12 "clear and reasonable warning" before being exposed to substances listed by the State of California
 13 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:
- No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual...
- 16

17

18

19

20

21

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

22 23

24

25

26

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

a.

A warning that appears on a product's label or other labeling.

 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.

b. Identification of the product at the retail outlet in a manner which providesa warning. Identification may be through shelf labeling, signs, menus, or a combinationthereof.

c. The warnings provided pursuant to subparagraphs (a) and (b) shall be prominently placed upon a product's labels or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

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

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

17

1

2

3

4

5

6

7

8

9

10

FACTUAL BACKGROUND

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

23 23. The consumer exposures that are the subject of this Complaint result from through
24 dermal absorption. Users will be exposed to DEA in the Products through dermal exposure.
25 Exposure to consumers includes, but is not limited, to, dermal absorption of DEA through direct
26 skin contact with the Products or when applied to the user's eyelashes and comes into contact with
27 portions of the user's eyelids. Some amount of exposure through ingestion can occur by touching

28

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

3 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
4 and/or sold the Products in California since at least September 17, 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, Defendants have 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 Defendants, each 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 REQUIREMNTS

16 27. On October 15, 2020, Plaintiff gave notice of alleged violation of Health and Safety
17 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
18 DEA from use of the Products without proper warning, subject to a private action to Defendants
19 and to the California Attorney General's office and the offices of the County District attorneys and
20 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
21 violations allegedly occurred.

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

27 29. After receiving the Notice, and to Plaintiff's best information and belief, none of
28 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a

^{- 6}

1 cause of action against Defendants under Proposition 65 to enforce the alleged violations which 2 are the subject of the Notice.

30. 3 Plaintiff is commencing this action more than sixty (60) days from the date of the 4 Notice to Defendants, as required by law.

5

6

FIRST CAUSE OF ACTION

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

7 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of 8 this Complaint as though fully set forth herein.

9 32. Defendants have, at all times mentioned herein, acted as distributer, and/or retailer of the Products. 10

33. 11 The Products contain DEA, a hazardous chemical found on the Proposition 65 list 12 of chemicals known to be hazardous to human health.

13

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

14 35. Plaintiff, based on her best information and belief, avers that at all relevant times 15 herein, and at least since October 15, 2020, continuing until the present, that Defendants have 16 continued to knowingly and intentionally expose California users and consumers of the Product to DEA without providing required warnings under Proposition 65. 17

18

36. The exposures that are the subject of the Notice result from the purchase, 19 acquisition, handling and recommended use of the Products. Consequently, the primary route of 20 exposure to these chemicals is through dermal exposure. Users will be exposed to DEA in the 21 Products through dermal exposure. Exposure to consumers includes, but is not limited, to, dermal 22 absorption of DEA through direct skin contact with the Products or when applied to the user's 23 eyelashes and comes into contact with portions of the user's eyelids. Some amount of exposure 24 through ingestion can occur by touching the Products with subsequent touching of the user's hand 25 to mouth, through hand to food to mouth contact, or through hand to cigarette to mouth contact.

26 37. Plaintiff, based on her best information and belief, avers that such exposures will 27 continue every day until clear and reasonable warnings are provided to purchasers and users or 28 until this known toxic chemical is removed from the Products.

- 7 -

1	38. Defendants have knowledge that the normal and reasonably foreseeable use of the		
2	Products exposes individuals to DEA, and Defendants intend that exposures to DEA will occur by		
3	its deliberate, non-accidental participation in the importation, distribution, sale and offering of the		
4	Products to consumers in California		
5	39. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this		
6	Complaint.		
7	40. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above		
8	described acts, each Defendant is liable for a maximum civil penalty of \$2,500 per day per		
9	violation.		
10	41. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically		
11	authorized to grant injunctive relief in favor of Plaintiff and against Defendants.		
12	PRAYER FOR RELIEF		
13	WHEREFORE, Plaintiff demands judgment against Defendants and requests the following		
14	relief:		
15	A. That the court assess civil penalties against each Defendant in the amount of \$2,500		
16	per day for each violation for up to 365 days (up to a maximum civil penalty amount per		
17	violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);		
18	B. That the court preliminarily and permanently enjoin Defendants mandating		
19	Proposition 65 compliant warnings on the Products;		
20	C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the		
21	amount of \$50,000.00.		
22	D. That the court grant any further relief as may be just and proper.		
23	Dated: October 13, 2021 BRODSKY SMITH		
24	By:		
25	Evan J. Smith (SBN242352) Ryan P. Cardona (SBN302113)		
26	9595 Wilshire Boulevard, Suite 900 Beverly Hills, CA 90212		
27	Telephone: (877) 534-2590		
28			
	-8- COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5		

