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County of San Francisco

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 ANTHONY FERREIRO,

12 Plaintiff,

13 vs.

14 AMERICAN CREW, INC., TARGET
15 CORPORATION,

16 Defendants.

Case No.: CGC-20-585325

**FIRST AMENDED COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE RELIEF**

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

17 Plaintiffs Anthony Ferreiro (“Ferreiro”) and Ema Bell (“Bell”) (collectively, “Plaintiffs”),
18 by and through their attorneys, allege the following cause of action in the public interest of the
19 citizens of the State of California.

20 **BACKGROUND OF THE CASE**

21 1. Plaintiffs bring 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 first amended complaint is a representative action brought by Plaintiffs in the
28 public interest 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 diethanolamine (DEA), a toxic chemical found in

1 cosmetics as defined by Cal. Health & Safety Code 109900 for use on hair and skin (the
2 “Products”) that are sold and/or distributed by defendants American Crew, Inc., Revlon, Inc.
3 (collectively, “Revlon”) and Target Corporation (“Target”) (collectively, “Defendants”) in
4 California.

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

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. Plaintiffs allege that Defendants distribute and/or offer for sale in California,
21 without a requisite exposure warning, 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. Plaintiffs seek civil penalties against Defendants for their violations of Proposition
27 65 in accordance with Health and Safety Code § 25249.7(b).

1 9. Plaintiffs also seek 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. Plaintiffs further seek a reasonable award of attorney's fees and costs.

6 **PARTIES**

7 11. Plaintiffs are citizens 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. Plaintiffs bring
10 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

11 12. Defendant Revlon, 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 Plaintiffs allege that defendant Revlon 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 Target, 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 Plaintiffs allege that defendant Target 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 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 June 22, 2012, the State of California listed DEA as a chemical known to the
24 State to cause cancer and it has come under the purview of Proposition 65 regulations since that
25 time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). In
26 summary, the Listed Chemical was listed under Proposition 65 as a chemical known to the State
27 to cause cancer.

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 23. The consumer exposures that are the subject of this first amended complaint result
2 from through dermal absorption. 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 with the
5 Products when it is applied and comes into contact with portions of the user's skin. Representative
6 areas of the user's skin may include, but are not limited to, the user's scalp, neck, ears, face and
7 shoulders. Exposure may continue to occur for a significant period after the initial contact. Finally,
8 while ingestion of the Products does not seem likely, some amount of exposure through ingestion
9 can occur by touching the Products with subsequent touching of the user's hand to mouth, through
10 hand to food to mouth contact, or through 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 July 18, 2019. The Products continue to be
13 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, consumers and/or patients to the Products and the Listed Chemical without first
16 giving a clear and reasonable exposure warning to such individuals.

17 26. As a proximate result of acts by each defendant, 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 the Listed Chemical without
20 a clear and reasonable warning on the Products. The individuals subject to the violative exposures
21 include normal and foreseeable users, consumers and patients that use the Products, as well as all
22 others exposed to the Products.

23 **SATISFACTION OF NOTICE REQUIREMNTS**

24 27. On July 18, 2019 (Ferreiro) and on October 15, 2020 (Bell), Plaintiffs gave notice
25 of alleged violation of Health and Safety Code § 25249.6 (collectively, the "Notices") to
26 Defendants concerning the exposure of California citizens to DEA contained in the Products
27 without proper warning, subject to a private action to Defendants and to the California Attorney
28

1 General's office and the offices of the County District attorneys and City Attorneys for each city
2 with a population greater than 750,000 persons wherein the herein violations allegedly occurred.

3 28. The Notices complied with all procedural requirements of Proposition 65 including
4 the attachment of a Certificate of Merit affirming that Plaintiffs' 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 Notices, and to Plaintiffs' 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 Notices.

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

14 **FIRST CAUSE OF ACTION**

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

16 31. Plaintiffs 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 Product.

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. Plaintiffs, based on their best information and belief, avers that at all relevant times
24 herein, and at least since July 18, 2019, continuing until the present, that Defendants have
25 continued to knowingly and intentionally expose California users and consumers of the Products
26 to DEA without providing required warnings under Proposition 65.

27 36. The exposures that are the subject of the Notices 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. Exposure to consumers includes, but is
2 not limited to, when handling the Products, DEA comes into contact with the hands and is then
3 absorbed through the skin. Additionally, dermal absorption of DEA can occur through direct skin
4 contact with the Products when it is applied and comes into contact with portions of the user's
5 skin. Representative areas of the user's skin may include, but are not limited to, the user's scalp,
6 neck, ears, face and shoulders. Exposure may continue to occur for a significant period after the
7 initial contact. Finally, while ingestion of the Products does not seem likely, some amount of
8 exposure through ingestion can occur by touching the Products with subsequent touching of the
9 user's hand to mouth, through hand to food to mouth contact, or through hand to cigarette to mouth
10 contact.

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

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

18 39. Plaintiffs have engaged in good faith efforts to resolve the herein claims prior to
19 this first amended complaint.

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

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

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiffs demand judgment against Defendants and requests the following
26 relief:

- 27 A. That the court assess civil penalties against each defendant in the amount of \$2,500
28 per day for each violation for up to 365 days (up to a maximum civil penalty amount

1 per violation of \$912,000.00) in accordance with Health and Safety Code §
2 25249.7(b);

3 B. That the court preliminarily and permanently enjoin Defendants mandating
4 Proposition 65 compliant warnings on the Product;

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

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

8
9 Dated: February 12, 2021

BRODSKY & SMITH, LLC

10 By: _____

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