

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

10/18/2022
Clerk of the Court
BY: JEFFREY FLORES
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 GABRIEL ESPINOZA,
12 Plaintiff,
13 vs.
14 MACY'S, INC.,
15 Defendant.

Case No.:

CGC-22-602465

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

16 Plaintiff Gabriel Espinoza ("Plaintiff"), by and through his attorneys, alleges the following
17 cause 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 chromium (hexavalent compounds) ("chromium (VI)"), a toxic
28

1 chemical found in Fashion Focus belts, UPC# 806264124670, sold and/or distributed by defendant
2 Macy's, Inc. ("Macy's" or "Defendant") in California.

3 3. Chromium (VI) is a harmful chemical known to the State of California to cause
4 cancer, reproductive toxicity, and adverse developmental effects. On February 27, 1987, the State
5 of California listed chromium (VI) as a chemical known to the State to cause cancer and it has
6 come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, §
7 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On December 19, 2008, the State of
8 California listed chromium (VI) as a chemical known to cause reproductive toxicity and adverse
9 developmental effects.

10 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
11 within California or sell products therein to comply with Proposition 65 regulations. Included in
12 such regulations is the requirement that businesses must label any product containing a Proposition
13 65-listed chemical that will create an exposure above safe harbor levels with a "clear and
14 reasonable" warning before "knowingly and intentionally" exposing any person to any such listed
15 chemical.

16 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
17 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
18 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
19 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
20 actions of a defendant which "violate or threaten to violate" the statute. Health & Safety Code §
21 25249.7.

22 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
23 without a requisite exposure warning, Fashion Focus belts, UPC# 806264124670 (the "Products")
24 that expose persons to chromium (VI) when used for their intended purpose.

25 7. Defendant's failure to warn consumers and other individuals in California of the
26 health hazards associated with exposure to chromium (VI) in conjunction with the sale and/or
27 distribution of the Products is a violation of Proposition 65 and subjects Defendant to the
28 enjoinder and civil penalties described herein.

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

3 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
4 Defendant to provide purchasers or users of the Products with required warnings related to the
5 dangers and health hazards associated with exposure to chromium (VI) pursuant to Health and
6 Safety Code § 25249.7(a).

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

8 **PARTIES**

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

13 12. Defendant Macy's, through its business, effectively imports, distributes, sells,
14 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
15 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.

16 13. Plaintiff alleges that defendant Macy's is a "person" in the course of doing business
17 within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

18 **VENUE AND JURISDICTION**

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

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

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

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

17 19. An exposure to a chemical in a consumer product is one “which results from a
18 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
19 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
20 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
21 shall provide a warning to any person to whom the product is sold or transferred unless the product
22 is packaged or labeled with a clear and reasonable warning.”

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

- 25 a. A warning that appears on a product’s label or other labeling.

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 b. Identification of the product at the retail outlet in a manner which provides
2 a warning. Identification may be through shelf labeling, signs, menus, or a combination
3 thereof.

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

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

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

17 **FACTUAL BACKGROUND**

18 22. Chromium (VI) is a harmful chemical known to the State of California to cause
19 cancer, reproductive toxicity, and adverse developmental effects. On February 27, 1987, the State
20 of California listed chromium (VI) as a chemical known to the State to cause cancer and it has
21 come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, §
22 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On December 19, 2008, the State of
23 California listed chromium (VI) as a chemical known to cause reproductive toxicity and adverse
24 developmental effects.

25 23. The exposures that are the subject of the Notice result from the purchase,
26 acquisition, handling and recommended use of the Products. The primary route of exposure to the
27 is through dermal absorption directly through the skin when consumers use, touch, or handle the
28 Products. Increased duration of contact with the Products, natural aging of the Products,

1 temperature, light exposure, and contact of the Products with oxidizing agents and alkaline
2 solutions will result in increased conversion of chromium (III) to chromium (VI) in the Products
3 and thus increased dermal exposure to chromium (VI). Additionally, oral exposure to chromium
4 (VI) will occur by touching the Products with subsequent touching of the user's hand to mouth.

5 24. Defendant has manufactured, processed, marketed, distributed, offered to sell
6 and/or sold the Products in California since at least October 25, 2021. The Products continue to be
7 distributed and sold in California without the requisite warning information.

8 25. At all times relevant to this action, Defendant has knowingly and intentionally
9 exposed users, consumers and/or patients to the Products and the chromium (VI) without first
10 giving a clear and reasonable exposure warning to such individuals.

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

17 **SATISFACTION OF NOTICE REQUIREMENTS**

18 27. On September 1, 2021, Plaintiff purchased the Product from Macys.com. At the
19 time of purchase, Macy's did not provide a Proposition 65 exposure warning for chromium (VI)
20 or any other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as
21 described *supra*.

22 28. On or about October 4, 2022, the Product was sent to a testing laboratory to
23 determine the chromium (VI) content of the Product.

24 29. On October 6, 2022, the laboratory provided the results of its analysis. Results of
25 this test determined the Product exposes users to chromium (VI) (the "Chemical Test Report").

26 30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
27 to determine if, based on the findings of the Chemical Test Report and the reasonable and
28 foreseeable use of the Product, exposure to chromium (VI) will occur at levels that require

1 Proposition 65 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of
2 the California Code of Regulations.

3 31. On October 23, 2022, Plaintiff received from the analytical chemist an exposure
4 assessment report which concluded that persons in California who use the Products will be exposed
5 to levels of chromium (VI) that require a Proposition 65 exposure warning.

6 32. On October 25, 2021, Plaintiff gave notice of alleged violation of Health and Safety
7 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to
8 chromium (VI) contained in the Products without proper warning, subject to a private action to
9 Defendant and to the California Attorney General’s office and the offices of the County District
10 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
11 the herein violations allegedly occurred.

12 33. The Notice complied with all procedural requirements of Proposition 65 including
13 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
14 least one person with relevant and appropriate expertise who reviewed relevant data regarding
15 chromium (VI) exposure, and that counsel believed there was meritorious and reasonable cause
16 for a private action.

17 34. After receiving the Notice, and to Plaintiff’s best information and belief, none of
18 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
19 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are
20 the subject of the Notice.

21 35. Plaintiff is commencing this action more than sixty (60) days from the date of the
22 Notice to Defendant, as required by law.

23 **FIRST CAUSE OF ACTION**

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

25 36. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 35 of
26 this Complaint as though fully set forth herein.

27 37. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
28 the Products.

1 38. Use of the Products will expose users and consumers thereof to chromium (VI), a
2 hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human
3 health.

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

5 40. Plaintiff, based on his best information and belief, avers that at all relevant times
6 herein, and at least since October 25, 2021, continuing until the present, that Defendant has
7 continued to knowingly and intentionally expose California users and consumers of the Products
8 to chromium (VI) without providing required warnings under Proposition 65.

9 41. The exposures that are the subject of the Notice result from the purchase,
10 acquisition, handling and recommended use of the Products. The primary route of exposure to the
11 is through dermal absorption directly through the skin when consumers use, touch, or handle the
12 Products. Increased duration of contact with the Products, natural aging of the Products,
13 temperature, light exposure, and contact of the Products with oxidizing agents and alkaline
14 solutions will result in increased conversion of chromium (III) to chromium (VI) in the Products
15 and thus increased dermal exposure to chromium (VI). Additionally, oral exposure to chromium
16 (VI) will occur by touching the Products with subsequent touching of the user's hand to mouth.

17 42. Plaintiff, based on his best information and belief, avers that such exposures will
18 continue every day until clear and reasonable warnings are provided to purchasers and users or
19 until this known toxic chemical is removed from the Products.

20 43. Defendant has knowledge that the normal and reasonably foreseeable use of the
21 Product exposes individuals to chromium (VI), and Defendant intends those exposures to
22 chromium (VI) will occur by its deliberate, non-accidental participation in the importation,
23 distribution, sale and offering of the Products to consumers in California

24 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
25 Complaint.

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

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

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff demands judgment against Defendant and requests the following
5 relief:

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

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

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

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

14 Dated: October 18, 2022

BRODSKY & SMITH

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

Attorneys for Plaintiff