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County of San Francisco

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Clerk of the Court

BY: DAEJA ROGERS
Deputy Clerk

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7
8 COUNTY OF SAN FRANCISCO

9 EMA BELL,

10 Plaintiff,

11 vs.

12 SM BEAUTY LLC, BURLINGTON
13 STORES, INC., BURLINGTON COAT
14 FACTORY OF TEXAS, INC.,

15 Defendants.

Case No.:

CGC-23-608449

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

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 without first giving clear and reasonable
24 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 *K-Beauty*® acne
28 care face masks, UPC# 818307026025, sold and/or distributed by defendants SM Beauty LLC

1 (“SM Beauty”), Burlington Stores, Inc., and/or Burlington Coat Factory of Texas, Inc.
2 (collectively, “Defendants”) 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 that will create an exposure above safe harbor levels with a “clear and
11 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
12 chemical.

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

19 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
20 without a requisite exposure warning, *K-Beauty*® acne care face masks, UPC# 818307026025,
21 (the “Products”) that expose persons to DEA when used for their intended purpose.

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 **VENUE AND JURISDICTION**

2 15. Venue is proper in the County of San Francisco because one or more of the
3 instances of wrongful conduct occurred, and continue to occur in this county and/or because
4 Defendants conducted, and continue to conduct, business in the County of San Francisco with
5 respect to the Products.

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

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

17 **STATUTORY BACKGROUND**

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

21 19. To effect this goal, Proposition 65 requires that individuals be provided with a
22 “clear and reasonable warning” before being exposed to substances listed by the State of California
23 as causing cancer and birth defects or other reproductive harm. H&S Code § 25249.6 states, in
24 pertinent part:

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

1 20. An exposure to a chemical in a consumer product is one “which results from a
2 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
3 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
4 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
5 shall provide a warning to any person to whom the product is sold or transferred unless the product
6 is packaged or labeled with a clear and reasonable warning.”

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

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

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

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

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

20 22. Proposition 65 provides that any “person who violates or threatens to violate” the
21 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
22 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
23 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
24

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 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
2 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

3 **FACTUAL BACKGROUND**

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

7 24. The exposures that are the subject of the Notice result from the purchase,
8 acquisition, handling and recommended use of the Product. The primary route of exposure to DEA
9 is through dermal exposure. Some amount of exposure through ingestion can occur by touching
10 the Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning
11 is provided with the Products regarding the health hazards of exposure to DEA.

12 25. Defendants have manufactured, processed, marketed, distributed, offered to sell
13 and/or sold the Products in California since at least August 24, 2022. The Products continue to be
14 distributed and sold in California without the requisite warning information.

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

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

24 **SATISFACTION OF NOTICE REQUIREMENTS**

25 28. Plaintiff purchased the Product from Burlington. At the time of purchase,
26 Defendants did not provide a Proposition 65 exposure warning for DEA or any other Proposition
27 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

1 29. The Product was sent to a testing laboratory for testing to determine the chemical
2 content of the Product.

3 30. The laboratory provided the results of its analysis. Results of this test determined
4 the Product exposes users to DEA (the “Chemical Test Report”).

5 31. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
6 to determine if, based on the findings of the Chemical Test Report and the reasonable and
7 foreseeable use of the Product, exposure to DEA will occur at levels that require Proposition 65
8 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
9 Code of Regulations.

10 32. On August 24, 2022, Plaintiff received from the analytical chemist an exposure
11 assessment report which concluded that persons in California who use the Products will be exposed
12 to levels of DEA that require a Proposition 65 exposure warning.

13 33. On August 24, 2022, Plaintiff gave notice of alleged violation of Health and Safety
14 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
15 DEA from use of the Products without proper warning, subject to a private action to Defendants
16 and to the California Attorney General’s office and the offices of the County District attorneys and
17 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
18 violations allegedly occurred.

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

24 35. After receiving the Notice, and to Plaintiff’s best information and belief, none of
25 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
26 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
27 are the subject of the Notice.

1 45. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
2 Complaint.

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

5 47. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
6 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
9 relief:

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

13 B. That the court preliminarily and permanently enjoin Defendants mandating
14 Proposition 65 compliant warnings on the Products;

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

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

18 Dated: August 17, 2023

BRODSKY SMITH

19 By:  _____

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