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FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

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AS YOU SOW

DEPARTMENT 212

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

10
11 AS YOU SOW, a California Non-Profit
Public Benefit Corporation,

12 Plaintiff,

13 v.

14 ASCENDIA BRANDS COMPANY INC.,
15 NATERRA INTERNATIONAL
16 INCORPORATED, BATH & BODY
WORKS, INC., LIMITED BRANDS INC.,
17 CVS PHARMACY, INC., CVS
CAREMARK CORPORATION, GERBER
18 PRODUCTS COMPANY, NESTLE
HOLDINGS, INC., KIMBERLY-CLARK
19 CORPORATION, KIMBERLY-CLARK
GLOBAL SALES, INC., JOHNSON AND
20 JOHNSON, L'OREAL USA S/D, INC., THE
PROCTOR AND GAMBLE COMPANY,
21 THE VILLAGE COMPANY, LLC, WAL-
MART STORES, INC., WATER-JEL
22 TECHNOLOGIES LLC, AND WATER-JEL
HOLDINGS, INC., and DOES 1 through 100,
inclusive,

23 Defendants.
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Case No. **CSC-09-488616**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

(Health & Safety Code § 25249 *et seq.*)

1 Plaintiff AS YOU SOW alleges as follows

2 **I. INTRODUCTION**

3 1. This complaint seeks an injunction and civil penalties to remedy Defendants'
4 continuing failure to give clear and reasonable warnings to residents of California prior to
5 exposing those residents to baby shampoo, body washes, and gels (collectively, "personal care
6 products") containing formaldehyde and/or 1,4-dioxane, both of which are chemicals known to
7 the State of California to cause cancer. Under the Safe Drinking Water and Toxic Enforcement
8 Act of 1986, Health and Safety Code section 25249.6,¹ also known as "Proposition 65,"
9 businesses must provide persons with a "clear and reasonable warning" before exposing them to
10 such chemicals.

11 2. Defendants market many of these personal care products for frequent and regular
12 use on the skin, hair, and bodies of newborn infants, toddlers, and young children. These groups
13 are particularly vulnerable to harm from such chemicals. Among other things, infants and
14 young children have developing organ systems that typically are more vulnerable to damage
15 from chemical exposures than adults, and they have many more years of future life in which to
16 develop cancer and other diseases triggered by early exposure to cancer-causing chemicals.
17 Likewise, chemical exposures to infants and small children are typically far greater, pound-for-
18 pound, than exposures to adults using the same products. Nevertheless, Defendants have not
19 provided the warnings required by Proposition 65 that the personal care products they
20 manufacture, distribute, or sell contain chemicals known to the State of California to cause
21 cancer. Plaintiff seeks injunctive relief and civil penalties to remedy these violations of
22 Proposition 65.

23 **II. PARTIES**

24 3. Plaintiff, AS YOU SOW, is a nonprofit organization based in San Francisco,
25 California, and incorporated under the laws of the State of California. AS YOU SOW is

26 _____

27 ¹ All further statutory references are to the Health and Safety Code unless indicated otherwise.

28

1 dedicated to, among other causes, the protection of the environment, the promotion of human
2 health, the improvement of worker and consumer safety, and environmental education. AS
3 YOU SOW is a "person" pursuant to section 25249.11(a). AS YOU SOW brings this action in
4 the interest of the general public pursuant to section 25249.7.

5 4. Defendant Ascendia Brands Company, Inc. is a business entity that manufactures,
6 distributes, and/or sells personal care products, including Baby Magic "Soft Baby Scent" Baby
7 Lotion, which contain formaldehyde to consumers within the State of California.

8 5. Defendant Naterra International Incorporated is a business entity that
9 manufactures, distributes, and/or sells personal care products, including Baby Magic "Soft Baby
10 Scent" Baby Lotion, which contain formaldehyde to consumers within the State of California.

11 6. Defendant Bath & Body Works, Inc. is a business entity that manufactures,
12 distributes, and/or sells personal care products, including American Girl Real Beauty Inside &
13 Out Shower Gel-Apple Blossom, American Girl Real Beauty Inside & Out Shower Gel-Sunny
14 Orange, American Girl Hopes and Dreams Glistening Shower and Bath Wash, American Girl
15 Hopes and Dreams Shimmer Body Lotion, Goldie LLC for Bath & Body Works Tinker Bell
16 Bubble Bath, and Goldie LLC for Bath & Body Works Tinker Bell Body Lotion, which contain
17 formaldehyde and/or 1,4-dioxane to consumers within the State of California.

18 7. Defendant Limited Brands, Inc., is a business entity that manufactures, distributes,
19 and/or sells personal care products, including American Girl Real Beauty Inside & Out Shower
20 Gel-Apple Blossom, American Girl Real Beauty Inside & Out Shower Gel-Sunny Orange,
21 American Girl Hopes and Dreams Glistening Shower and Bath Wash, American Girl Hopes and
22 Dreams Shimmer Body Lotion, Goldie LLC for Bath & Body Works Tinker Bell Bubble Bath,
23 and Goldie LLC for Bath & Body Works Tinker Bell Body Lotion, which contain formaldehyde
24 and/or 1,4-dioxane to consumers within the State of California.

25 8. Defendant CVS Pharmacy, Inc. is a business entity that manufactures, distributes,
26 and/or sells personal care products, including CVS Baby Shampoo, which contain formaldehyde
27 to consumers within the State of California.

28 9. Defendant CVS Caremark Corporation is a business entity that manufactures,

1 distributes, and/or sells personal care products, including CVS Baby Shampoo, which contain
2 formaldehyde to consumers within the State of California.

3 10. Gerber Products Company is a business entity that manufactures, distributes,
4 and/or sells personal care products, including Grins & Giggles Milk & Honey Baby Wash,
5 which contain formaldehyde to consumers within the State of California.

6 11. Nestle Holdings, Inc. is a business entity that manufactures, distributes, and/or
7 sells personal care products, including Grins & Giggles Milk & Honey Baby Wash, which
8 contain formaldehyde to consumers within the State of California.

9 12. Kimberly-Clark Corporation is a business entity that manufactures, distributes,
10 and/or sells personal care products, including Huggies Naturally Refreshing Cucumber & Green
11 Tea Baby Wash and Huggies Soft Skin Shea Butter Baby Wipes, which contain formaldehyde to
12 consumers within the State of California.

13 13. Kimberly-Clark Global Sales, Inc. is a business entity that manufactures,
14 distributes, and/or sells personal care products, including Huggies Naturally Refreshing
15 Cucumber & Green Tea Baby Wash and Huggies Soft Skin Shea Butter Baby Wipes, which
16 contain formaldehyde to consumers within the State of California.

17 14. Johnson and Johnson is a business entity that manufactures, distributes, and/or
18 sells personal care products, including Johnson's Baby Shampoo, which contain formaldehyde
19 to consumers within the State of California.

20 15. L'Oreal USA S/D, Inc. is a business entity that manufactures, distributes, and/or
21 sells personal care products, including L'Oreal Kids Extra Gentle 2-in-1 Fast Dry Shampoo,
22 which contain formaldehyde to consumers within the State of California.

23 16. The Proctor and Gamble Company is a business entity that manufactures,
24 distributes, and/or sells personal care products, including Pampers Kandoo Foaming Handsoap-
25 Magic Melon, which contain formaldehyde to consumers within the State of California.

26 17. The Village Company, LLC is a business entity that manufactures, distributes,
27 and/or sells personal care products, including Sesame Street Bubble Bath-Orange Mango Tango,
28 which contain formaldehyde to consumers within the State of California.

1 18. Wal-Mart Stores, Inc. is a business entity that manufactures, distributes, and/or
2 sells personal care products, including Equate Tearless Baby Wash, which contain formaldehyde
3 to consumers within the State of California.

4 19. Water-Jel Technologies, LLC is a business entity that manufactures, distributes,
5 and/or sells personal care products, including Barbie Berry Sweet Bubble Bath, which contain
6 formaldehyde to consumers within the State of California.

7 20. Water-Jel Holdings, Inc. is a business entity that manufactures, distributes, and/or
8 sells personal care products, including Barbie Berry Sweet Bubble Bath, which contain
9 formaldehyde to consumers within the State of California.

10 21. The true names and capacities of Defendants sued herein as Does 1 through 100
11 are unknown to plaintiff, who therefore sues them by fictitious names. Plaintiff will amend this
12 complaint to allege the true names and capacities of these Defendants when they have been
13 determined. Each of the fictitiously named Defendants is responsible for the manufacture,
14 distribution, marketing, and/or sale of personal care products containing formaldehyde and/or 1,
15 4-dioxane to consumers in California.

16 22. Wherever reference is made to "Defendants" in this complaint, such reference
17 includes the Defendants named in paragraphs 4 to 20 and Does 1 through 100, inclusive.

18 **III. JURISDICTION AND VENUE**

19 23. This court has jurisdiction pursuant to California Constitution Article VI, Section
20 10, because this case is a cause not given by statute to other trial courts.

21 24. This court has jurisdiction over each Defendant named above because each does
22 sufficient business in California, has sufficient minimum contacts in California, or otherwise
23 intentionally avails itself of the California market, through the sale, marketing, and/or use of its
24 products in California, to render the exercise of jurisdiction over each Defendant by the
25 California courts consistent with traditional notions of fair play and substantial justice.

26 25. Venue is proper in this Court because Defendants' manufacturing, distributing,
27 marketing, and/or sales of personal care products containing formaldehyde and/or 1,4-dioxane
28 has occurred in the City and County of San Francisco and/or to people who live in the City and

1 County of San Francisco, which causes people, including infants, toddlers, and young children,
2 to be exposed to formaldehyde and/or 1, 4-dioxane while they are physically present in San
3 Francisco County.

4 26. On March 11, 2008, Plaintiff provided a Notice of Violation of Proposition 65 to
5 the California Attorney General, the District Attorney of each county in California, the City
6 Attorney of each California city with a population over 750,000 persons, and each named
7 Defendant, pursuant to section 25249.7(d).

8 27. Each Notice of Violation included a Certificate of Merit that Plaintiff's attorneys
9 had consulted with one or more persons with relevant and appropriate experience or expertise
10 who has reviewed facts, studies, or other data regarding exposure to formaldehyde and 1, 4-
11 dioxane from the personal care products manufactured, distributed, and/or sold by Defendants
12 and that, based on that information, such attorneys believe that there is a reasonable and
13 meritorious case for this private action. Each Notice of Violation also included a Certificate of
14 Service. The Notice of Violation mailed to each Defendant included a document entitled "The
15 Safe Drinking Water and Toxic Enforcement Act of 1986: a Summary." In compliance with
16 section 25249.7(d) and title 11, section 3102 of the California Code of Regulations, the Attorney
17 General was served with a Notice of Violation and Certificate of Merit that included confidential
18 factual information sufficient to establish the basis of the Certificate of Merit, including the
19 identify of individual(s) with whom Plaintiff consulted and the facts, studies or other data that
20 was reviewed by such person(s).

21 28. None of the public prosecutors that received the Notice of Violation has
22 commenced and is diligently prosecuting an action against these named Defendants for the
23 violations alleged in this complaint, although the notice period established in section 25249.7(d)
24 has elapsed since the Notice of Violation was served by mail.

25 29. Because AS YOU SOW has fully complied with the requirements of Health &
26 Safety Code § 25249.7 (d), and neither the Attorney General, nor any district attorney, city
27 attorney or prosecutor has commenced and is diligently pursuing an action against the violations
28 alleged herein, Plaintiff has standing to bring this complaint.

1
2 **IV. STATUTORY BACKGROUND**

3 **Proposition 65**

4 30. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative
5 statute passed as "Proposition 65" by a vote of the People in November of 1986.

6 31. The warning requirement of Proposition 65 is contained in Health and Safety Code
7 section 25249.6, which provides:

8 No person in the course of doing business shall knowingly and intentionally
9 expose any individual to a chemical known to the state to cause cancer or
10 reproductive toxicity without first giving clear and reasonable warning to such
11 individual, except as provided in Section 25249.10.

12 32. Regulations promulgated to implement Proposition 65 provide that the warning
13 method "must be reasonably calculated, considering the alternative methods available under the
14 circumstances, to make the warning message available to the individual prior to exposure." 27
15 CCR § 25601(a).

16 33. The regulations prescribe certain types of warnings that are considered valid,
17 including: (A) warnings on labels, (B) identification at the retail outlet through "shelf labeling,
18 signs, menus, or a combination thereof," and (C) "a system of signs, public advertising
19 identifying the system and toll-free information services . . . that provides clear and reasonable
20 warnings." 27 CCR §§ 25603.1a.

21 34. Proposition 65 also establishes a procedure by which the state is to develop a list
22 of chemicals "known to the State to cause cancer or reproductive toxicity." § 25249.8. No
23 warning need be given concerning a listed chemical until one year after the chemical first
24 appears on the list.

25 35. Proposition 65 provides that any person "violating or threatening to violate" the
26 statute may be enjoined in any court of competent jurisdiction. § 25249.7. To "threaten to
27 violate" is defined to mean "to create a condition in which there is a substantial probability that
28 a violation will occur." § 25249.11(e). In addition, violators are liable for civil penalties of up
to \$2,500 per day for each violation, recoverable in a civil action. § 25249.7(b).

1 36. Private actions to enforce Proposition 65 "may be brought by any person in the
2 public interest" if the action is commenced more than sixty days from the date that the person
3 has given notice of an alleged violation of Section 25249.5 or 25249.6 to the Attorney General,
4 and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation occurred
5 and to the alleged violator. A certificate of merit shall be included with the notification to the
6 Attorney General, district attorney, city attorney, or prosecutor in each jurisdiction where the
7 violation occurred. If no public prosecutors commence enforcement within sixty days, then the
8 person giving notice may sue.

9 **V. FACTS**

10 37. Formaldehyde was listed under Proposition 65 as a chemical known to the State of
11 California to cause cancer on January 1, 1988.

12 38. 1,4-dioxane was listed under Proposition 65 as a chemical known to the State of
13 California to cause cancer on January 1, 1988.

14 39. Each Defendant manufactures, distributes and/or sells personal care products that
15 contain formaldehyde for sale or use in the State of California. Many of these personal care
16 products are marketed for frequent and regular use on or by newborn infants, toddlers, and
17 young children. These personal care products are applied directly to the skin and hair of such
18 infants and children, and to the adults who use and apply them, which results in exposure to
19 formaldehyde through the mouth, nose, eyes, ears, and skin. Formaldehyde in these shampoos,
20 body washes, and gels is volatile and, under the recommended conditions of use for these
21 products, formaldehyde will be inhaled into the lungs of the infants, children, and adults who
22 use and apply them. Infants, toddlers, and younger children also ingest these personal care
23 products during regular use. The infants, children, and adults who use these personal care
24 products are thus exposed to formaldehyde through multiple exposure pathways in the course of
25 their reasonable and foreseeable use of these products.

26 40. Each Defendant knew or reasonably should have known that the personal care
27 products it manufactured, distributed, marketed, or sold contained formaldehyde. Each
28 Defendant has intended that individuals use and handle these products by directly applying them

1 to the skin or hair. Each Defendant has had knowledge that individuals, including infants,
2 toddlers, young children, and adults, use and handle the personal care products that Defendant
3 has manufactured, distributed, marketed or sold. Each Defendant has knowingly and
4 intentionally exposed individuals to formaldehyde through its deliberate act(s) of
5 manufacturing, distributing, marketing, and/or selling personal care products containing
6 formaldehyde.

7 41. Defendant Bath & Body Works, Inc. and Defendant Limited Brands, Inc.
8 manufacture, distribute, and/or sell personal care products that contain 1,4-dioxane. These
9 Defendants each knew or reasonably should have known that the personal care products it
10 manufactured, distributed, marketed, or sold contained 1,4-dioxane. Each of these Defendants
11 has intended that individuals use and handle these products by directly applying them to the
12 body. These personal care products are applied directly to the skin and hair of the individuals
13 who use and apply them, which results in exposure to 1, 4-dioxane through the mouth, nose,
14 eyes, ears, and skin. 1,4-dioxane in these personal care products is volatile and, under the
15 recommended conditions of use for these products, 1,4-dioxane will be inhaled into the lungs of
16 the children and adults who use and apply them. Each of these Defendants has had knowledge
17 that children and adults use and handle the personal care products that it has manufactured,
18 distributed, marketed or sold. Each Defendant has knowingly and intentionally exposed
19 individuals to 1,4-dioxane through its deliberate act(s) of manufacturing, distributing, marketing,
20 and/or selling personal care products containing 1,4-dioxane.

21 42. Each of the personal care products described in this complaint was purchased in
22 California, tested in a certified laboratory, and found to contain sufficiently high levels of
23 formaldehyde and/or 1, 4-dioxane to necessitate clear and reasonable warnings, under
24 Proposition 65, that use of the product results in exposure to a chemical known to the State of
25 California to cause cancer.

26 43. Each Defendant has failed to provide clear and reasonable warnings that the use of
27 the personal care products described above results in exposure to a chemical known to the State
28 of California to cause cancer, and no such warning was provided to consumers using those

1 products.

2 **VI. FIRST CAUSE OF ACTION**

3 44. Paragraphs 1 through 42 are realleged as if fully set forth herein.

4 45. Plaintiff is informed and believes, and based on such information and belief,
5 alleges that each Defendant employs ten or more persons.

6 46. By committing the acts alleged above, each Defendant has, within the previous
7 twelve months and in the course of doing business, knowingly and intentionally exposed
8 individuals to formaldehyde, a chemical known to the State of California to cause cancer,
9 without first giving clear and reasonable warning to such individuals within the meaning of
10 section 25249.6.

11 47. Said violations render each Defendant liable to plaintiff for civil penalties of up to
12 \$2,500 per day for each violation, as well as other remedies.

13 48. Defendant Bath & Body Works, Inc. and Defendant Limited Brands, Inc., have,
14 within the previous twelve months and in the course of doing business, knowingly and
15 intentionally expose individuals to 1,4-dioxane, a chemical known to the State of California to
16 cause cancer, without first giving clear and reasonable warnings to such individuals, within the
17 meaning of section 25249.6.

18 49. Said violations render these Defendants liable to plaintiff for civil penalties of up
19 to \$2,500 per day for each violation, as well as other remedies.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, plaintiff prays that the Court:

22 1. Pursuant to the First Cause of Action, assess civil penalties against each Defendant
23 in the amount of \$2,500 per day for each violation of Proposition 65, according to proof;

24 2. Pursuant to section 25249.7, enter such temporary restraining orders, preliminary
25 injunctions, permanent injunctions, or other orders prohibiting Defendants from exposing
26 persons within the State of California to formaldehyde, and/or 1,4-dioxane by use of their
27 personal care products without providing clear and reasonable warnings, as Plaintiff shall
28 specify in further application to the court;

