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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY
MAY 28 2014
Donna Phart...

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)
Plaintiff,)
v.)
BIOPELLE, INC.; CENTRAL SOLUTIONS,)
INC.; ELIZABETH GRANT)
INTERNATIONAL, INC.; H&M HENNES &)
MAURITZ, L.P.; KAS DIRECT, LLC;)
MARIANNA INDUSTRIES, INC.; RECKITT)
BENCKISER LLC; U.S. INTERNATIONAL)
TRADING CORPORATION; VALUEVISION)
MEDIA, INC.; and DOES 1 through 700,)
inclusive,)
Defendants.)

Case No. RG14726964
**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**
Health & Safety Code § 25249.6, *et seq.*
(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to coconut oil diethanolamine condensate
7 (cocamide diethanolamine) (hereinafter, "Cocamide DEA"), a chemical known to the State of
8 California to cause cancer. Cocamide DEA is a toxic chemical that is used as a foam stabilizer,
9 emulsifier and viscosity builder in cosmetic products. This Complaint addresses exposures that
10 have occurred, and continue to occur, through the manufacture, distribution, sale, and/or use of
11 shampoo and liquid soaps, such as hand soap, body wash and bubble bath (collectively,
12 "Products"). Individuals in California, including pregnant women and children, are exposed to
13 Cocamide DEA through ordinary use of the Products.

14 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
15 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
16 to chemicals known to the State to cause cancer without providing clear and reasonable warnings
17 to individuals prior to their exposure. Defendants introduce Products contaminated with
18 significant quantities of Cocamide DEA into the California marketplace, exposing consumers of
19 their Products to Cocamide DEA.

20 3. Despite the fact that Defendants expose pregnant women, children, and
21 other people to Cocamide DEA, Defendants provide no warnings whatsoever about the
22 carcinogenic hazards associated with these Cocamide DEA exposures. Defendants' conduct thus
23 violates the warning provision of Proposition 65. Health & Safety Code § 25249.6.

24 **PARTIES**

25 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
26 non-profit corporation dedicated to protecting the public from environmental health hazards and
27 toxic exposures. CEH is based in Oakland, California and is incorporated under the laws of the
28 State of California. CEH is a "person" within the meaning of Health & Safety Code §

1 25249.11(a) and brings this enforcement action in the public interest pursuant to Health & Safety
2 Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group
3 that has prosecuted a large number of Proposition 65 cases in the public interest. These cases
4 have resulted in significant public benefit, including the reformulation of thousands of products
5 to remove toxic chemicals to make them safer. CEH also provides information to Californians
6 about the health risks associated with exposure to hazardous substances, where manufacturers
7 and other responsible parties fail to do so.

8 5. Defendant BIOPELLE, INC. is a person in the course of doing business
9 within the meaning of Health & Safety Code § 25249.11. BIOPELLE, INC. manufactures,
10 distributes, and/or sells Products for sale or use in California.

11 6. Defendant CENTRAL SOLUTIONS, INC. is a person in the course of
12 doing business within the meaning of Health & Safety Code § 25249.11. CENTRAL
13 SOLUTIONS, INC. manufactures, distributes, and/or sells Products for sale or use in California.

14 7. Defendant ELIZABETH GRANT INTERNATIONAL, INC. is a person in
15 the course of doing business within the meaning of Health & Safety Code § 25249.11.
16 ELIZABETH GRANT INTERNATIONAL, INC. manufactures, distributes, and/or sells
17 Products for sale or use in California.

18 8. Defendant H&M HENNES & MAURITZ, L.P. is a person in the course of
19 doing business within the meaning of Health & Safety Code § 25249.11. H&M HENNES &
20 MAURITZ, L.P. manufactures, distributes, and/or sells Products for sale or use in California.

21 9. Defendant KAS DIRECT, LLC is a person in the course of doing business
22 within the meaning of Health & Safety Code § 25249.11. KAS DIRECT, LLC manufactures,
23 distributes, and/or sells Products for sale or use in California.

24 10. Defendant MARIANNA INDUSTRIES, INC. is a person in the course of
25 doing business within the meaning of Health & Safety Code § 25249.11. MARIANNA
26 INDUSTRIES, INC. manufactures, distributes, and/or sells Products for sale or use in California.

27 11. Defendant RECKITT BENCKISER LLC is a person in the course of
28 doing business within the meaning of Health & Safety Code § 25249.11. RECKITT

1 **BACKGROUND FACTS**

2 20. The People of the State of California have declared by initiative under
3 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
4 defects, or other reproductive harm.” Proposition 65, § 1(b).

5 21. To effectuate this goal, Proposition 65 prohibits exposing people to
6 chemicals listed by the State of California as known to cause cancer, birth defects, or other
7 reproductive harm without a “clear and reasonable warning” unless the business responsible for
8 the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
9 states, in pertinent part:

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

14 22. On October 21, 2010, the California Environmental Protection Agency’s
15 Office of Environmental Health Hazard Assessment (“OEHHA”) requested information as to
16 whether Cocamide DEA meets the criteria for listing under Proposition 65 by the authoritative
17 bodies mechanism. On January 20, 2012, OEHHA published a notice of intent to list Cocamide
18 DEA in the California Regulatory Notice Register. The publication of the notice initiated a
19 public comment period that closed on April 6, 2012. On June 22, 2012, the State of California
20 officially listed Cocamide DEA as a chemical known to cause cancer. 27 C.C.R. § 27001(b).

21 23. On June 22, 2013, one year after it was listed as a chemical known to
22 cause cancer, Cocamide DEA became subject to the clear and reasonable warning requirement
23 regarding carcinogens under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code §
24 25249.10(b). The chief purpose of the one-year grace period between the listing date of a
25 chemical under Proposition 65 and the effective date of the warning requirement is to give
26 potentially liable parties sufficient time to come into complete compliance with this requirement,
27 such that all illegal exposures can be averted.

28 24. Cocamide DEA is used in Products as a foam stabilizer, emulsifier and
viscosity builder in cosmetic products.

1 25. Defendants' Products contain sufficient quantities of Cocamide DEA such
2 that individuals, including infants and children, are exposed to Cocamide DEA through the
3 average use of Products. The routes of exposure include dermal absorption and ingestion by
4 individuals when, for example, they apply the Products to their hair, scalp or skin.

5 26. Any person acting in the public interest has standing to enforce violations
6 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
7 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
8 action within such time. Health & Safety Code § 25249.7(d).

9 27. More than sixty days prior to naming each Defendant in this lawsuit, CEH
10 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
11 the District Attorneys of every county in California, the City Attorneys of every California city
12 with a population greater than 750,000, and to each of the named Defendants. In compliance
13 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
14 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
15 time period during which violations occurred; (4) specific descriptions of the violations,
16 including (a) the routes of exposure to Cocamide DEA from Products, and (b) the specific type
17 of Products sold and used in violation of Proposition 65; and (5) the name of the specific
18 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

19 28. More than sixty days prior to naming each Defendant in this lawsuit,
20 concurrent with sending the Notices described in the preceding paragraph, CEH also sent a
21 Certificate of Merit for each Notice to the California Attorney General, the District Attorneys of
22 every county in California, the City Attorneys of every California city with a population greater
23 than 750,000, and to the named Defendants. In compliance with Health & Safety Code §
24 25249.7(d) and 11 C.C.R. § 3101, each of the Certificates certified that CEH's counsel: (1) has
25 consulted with one or more persons with relevant and appropriate experience or expertise who
26 reviewed facts, studies, or other data regarding the exposures to Cocamide DEA alleged in each
27 of the Notices; and (2) based on the information obtained through such consultations, believes
28 that there is a reasonable and meritorious case for a citizen enforcement action based on the facts

1 alleged in each of the Notices. In compliance with Health & Safety Code § 25249.7(d) and 11
2 C.C.R. § 3102, each of the Certificates served on the Attorney General included factual
3 information – provided on a confidential basis – sufficient to establish the basis for the
4 Certificate, including the identity of the person(s) consulted by CEH’s counsel and the facts,
5 studies, or other data reviewed by such persons.

6 29. None of the public prosecutors with the authority to prosecute violations
7 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
8 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in the
9 Notices.

10 30. Defendants both know and intend that consumers in California, including
11 infants and children, will use, touch, and/or handle the Products, thus exposing them to
12 Cocamide DEA.

13 31. Under Proposition 65, an exposure is “knowing” where the party
14 responsible for such exposure has:

15 knowledge of the fact that a[n] ... exposure to a chemical listed
16 pursuant to [Health and Safety Code § 25249.8(a)] is occurring.
17 No knowledge that the ... exposure is unlawful is required.

18 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
19 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
20 12201).

21 32. No clear and reasonable warning is provided with the Products regarding
22 the carcinogenic hazards of Cocamide DEA.

23 33. Defendants have been informed of the Cocamide DEA in their Products
24 by the 60-Day Notice of Violation and accompanying Certificate of Merit served on them by
25 CEH.

26 34. As companies that manufacture, import, distribute, and/or sell Products for
27 use in the California marketplace, Defendants know or should know that Products contain
28 Cocamide DEA and that individuals who use the Products will be exposed to Cocamide DEA.

1 These Cocamide DEA exposures are a natural and foreseeable consequence of Defendants'
2 placing the Products into the stream of commerce.

3 35. Nevertheless, Defendants continue to expose consumers in California,
4 including infants and children, to Cocamide DEA without prior clear and reasonable warnings
5 regarding the carcinogenic hazards of Cocamide DEA.

6 36. CEH has engaged in good-faith efforts to resolve the claims alleged herein
7 prior to filing this Complaint.

8 37. Any person "violating or threatening to violate" Proposition 65 may be
9 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
10 violate" is defined to mean "to create a condition in which there is a substantial probability that a
11 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
12 penalties not to exceed \$2,500 per day for each violation of Proposition 65. Health & Safety
13 Code § 25249.7(b).

14 **FIRST CAUSE OF ACTION**
15 **(Violations of Health & Safety Code § 25249.6)**

16 38. CEH realleges and incorporates by reference as if specifically set forth
17 herein Paragraphs 1 through 37, inclusive.

18 39. Cocamide DEA is a chemical listed by the State of California as known to
19 cause cancer.

20 40. By placing their Products into the stream of commerce, Defendants are
21 each a person in the course of doing business within the meaning of Health & Safety Code §
22 25249.11.

23 41. Defendants know that average use of their Products will expose users of
24 the Products to Cocamide DEA. Defendants intend that their Products be used in a manner that
25 results in users of their Products being exposed to Cocamide DEA contained therein.

26 42. Defendants have failed, and continue to fail, to provide prior clear and
27 reasonable warnings regarding the carcinogenicity of Cocamide DEA to users of their Products.

28 43. By committing the acts alleged above, Defendants have at all times

1 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
2 individuals to Cocamide DEA without first giving clear and reasonable warnings to such
3 individuals regarding the carcinogenicity of Cocamide DEA.

4 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.

5 **PRAYER FOR RELIEF**

6 Wherefore, CEH prays for judgment against Defendants as follows:

7 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess
8 civil penalties against each Defendant in the amount of \$2,500 per day for each violation of
9 Proposition 65 alleged herein according to proof;

10 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
11 preliminarily and permanently enjoin Defendants from offering Products for sale in California
12 without providing prior clear and reasonable warnings, as CEH shall specify in further
13 application to the Court;

14 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
15 Defendants to take action to stop ongoing unwarned exposures to Cocamide DEA resulting from
16 use of Products sold by Defendants, as CEH shall specify in further application to the Court;

17 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
18 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

19 5. That the Court grant such other and further relief as may be just and
20 proper.

21
22 Dated: May 28, 2014

Respectfully submitted,

23 LEXINGTON LAW GROUP

24 

25 Mark N. Todzo

26 Attorneys for Plaintiff

27 CENTER FOR ENVIRONMENTAL HEALTH

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