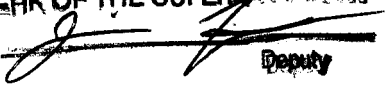


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**ENDORSED
FILED
ALAMEDA COUNTY**

MAR 19 2019

CLERK OF THE SUPERIOR COURT
By  Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

13 CENTER FOR ENVIRONMENTAL HEALTH,
14 a non-profit corporation,

15 Plaintiff,

16 v.

17 XTTRIUM LABORATORIES, INC.; and DOES
18 1 through 20, inclusive,

18 Defendants.

Case No. RG 19011555

**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 information and
2 belief and investigation of counsel, except for information based on knowledge, hereby makes the
3 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. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and use of antiseptic skin cleansers (the "Products"). Individuals
10 in California are exposed to Cocamide DEA when they use the Products.

11 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
12 unlawful for businesses to knowingly and intentionally expose individuals in California to
13 chemicals known to the State to cause cancer without providing clear and reasonable warnings to
14 such individuals. Defendants introduce Products containing significant quantities of Cocamide
15 DEA into the California marketplace, thereby exposing users of their Products to Cocamide DEA.

16 3. Despite the fact that Defendants expose individuals to Cocamide DEA, Defendants
17 provide no clear and reasonable warnings about the carcinogenic hazards associated with
18 Cocamide DEA exposure. Defendants' conduct thus violates the warning provision of
19 Proposition 65, Health & Safety Code § 25249.6.

20 **PARTIES**

21 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a non-profit
22 corporation dedicated to protecting the public from environmental health hazards and toxic
23 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of
24 California. CEH is a "person" within the meaning of Health & Safety Code § 25249.11(a) and
25 brings this enforcement action in the public interest pursuant to Health & Safety Code §
26 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has
27 prosecuted a large number of Proposition 65 cases in the public interest. These cases have
28 resulted in significant public benefit, including the reformulation of thousands of products to

1 remove toxic chemicals and to make them safer. CEH also provides information to Californians
2 about the health risks associated with exposure to hazardous substances, where manufacturers and
3 other responsible parties fail to do so.

4 5. Defendant XTTRIUM LABORATORIES, INC. is a person in the course of doing
5 business within the meaning of Health & Safety Code § 25249.11. Defendant XTTRIUM
6 LABORATORIES, INC. manufactures, distributes and/or sells the Products for sale and use in
7 California.

8 6. DOES 1 through 20 are each a person in the course of doing business within the
9 meaning of Health & Safety Code § 25249.11. DOES 1 through 20 manufacture, distribute
10 and/or sell the Products for sale and use in California. Defendant XTTRIUM LABORATORIES,
11 INC. and DOES 1 through 20 are collectively referred to herein as “Defendants.”

12 7. The true names of DOES 1 through 20 are either unknown to CEH at this time or
13 the applicable time period before which CEH may file a Proposition 65 action has not run. When
14 their identities are ascertained or the applicable time period before which CEH may file a
15 Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

16 **JURISDICTION AND VENUE**

17 8. The Court has jurisdiction over this action pursuant to Health & Safety Code §
18 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
19 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
20 other trial courts.

21 9. This Court has jurisdiction over Defendants because each is a business entity that
22 does sufficient business, has sufficient minimum contacts in California, or otherwise intentionally
23 avails itself of the California market through the sale, marketing, or use of the Products in
24 California and/or by having such other contacts with California so as to render the exercise of
25 jurisdiction over it by the California courts consistent with traditional notions of fair play and
26 substantial justice.

27 10. Venue is proper in Alameda County Superior Court because one or more of the
28 violations arise in the County of Alameda.

1 **BACKGROUND FACTS**

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

5 12. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals
6 listed by the State of California as known to cause cancer, birth defects, or other reproductive
7 harm above certain levels without a “clear and reasonable warning” unless the business
8 responsible for the exposure can prove that it fits within a statutory exemption. Health & Safety
9 Code § 25249.6 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 state to
12 cause cancer or reproductive toxicity without first giving clear and
reasonable warning to such individual

13 13. On June 22, 2012, the State of California officially listed Cocamide DEA as a
14 chemical known to cause cancer. On June 22, 2013, one year after it was listed as a chemical
15 known to cause cancer, Cocamide DEA became subject to the clear and reasonable warning
16 requirement regarding carcinogens under Proposition 65. 27 California Code of Regulations
17 (“C.C.R.”) § 27001(b); Health & Safety Code § 25249.10(b).

18 14. Defendants’ Products contain Cocamide DEA as an intentionally added ingredient.
19 The Products contain sufficient quantities of Cocamide DEA such that individuals who use the
20 Products are exposed to Cocamide DEA. The routes of exposure for the violations include
21 dermal absorption and ingestion by individuals. These exposures occur through the ordinary use
22 of the Products when, for example, individuals apply the Products to their skin. The exposures
23 occur in homes, schools, workplaces, and everywhere else throughout California where the
24 Products are used.

25 15. No clear and reasonable warning is provided with the Products regarding the
26 carcinogenic hazards of Cocamide DEA.

27 16. Any person acting in the public interest has standing to enforce violations of
28 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid

1 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
2 within such time. Health & Safety Code § 25249.7(d).

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

13 18. CEH also sent a Certificate of Merit for each Notice to the California Attorney
14 General, to the District Attorneys of every county in California, to the City Attorneys of every
15 California city with a population greater than 750,000, and to each of the named Defendants. In
16 compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate
17 certified that CEH’s counsel: (1) has consulted with one or more persons with relevant and
18 appropriate experience or expertise who reviewed facts, studies, or other data regarding the
19 exposures to Cocamide DEA alleged in each Notice; and (2) based on the information obtained
20 through such consultations, believes that there is a reasonable and meritorious case for a citizen
21 enforcement action based on the facts alleged in each Notice. In compliance with Health &
22 Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney General
23 included factual information – provided on a confidential basis – sufficient to establish the basis
24 for the Certificate, including the identity of the person(s) consulted by CEH’s counsel and the
25 facts, studies, or other data reviewed by such persons.

26 19. None of the public prosecutors with the authority to prosecute violations of
27 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
28

1 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each
2 of CEH's Notices.

3 20. Defendants both know and intend that individuals will use the Products, thus
4 exposing them to Cocamide DEA.

5 21. Under Proposition 65, an exposure is "knowing" where the party responsible for
6 such exposure has:

7 knowledge of the fact that a[n] . . . exposure to a chemical listed pursuant
8 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that
the . . . exposure is unlawful is required.

9 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
10 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
11 § 12601).

12 22. The Cocamide DEA in Defendants' Products is an intentionally added ingredient.
13 As companies that manufacture, import, distribute, and/or sell the Products for use in the
14 California marketplace, Defendants know or should know that the Products contain Cocamide
15 DEA and that individuals who use the Products will be exposed to Cocamide DEA. The
16 Cocamide DEA exposures to individuals who use the Products are a natural and foreseeable
17 consequence of Defendants' placing the Products into the stream of commerce.

18 23. Defendants have also been informed of the Cocamide DEA exposures caused by
19 their Products pursuant to the 60-Day Notice of Violation and accompanying Certificate of Merit
20 served on them by CEH.

21 24. Nevertheless, Defendants continue to expose individuals to Cocamide DEA
22 without prior clear and reasonable warnings regarding the carcinogenic hazards of Cocamide
23 DEA.

24 25. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
25 filing this Complaint.

26 26. Any person "violating or threatening to violate" Proposition 65 may be enjoined in
27 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is
28 defined to mean "to create a condition in which there is a substantial probability that a violation

1 will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not
2 to exceed \$2,500 per day for each violation of Proposition 65.

3 **FIRST CAUSE OF ACTION**
4 **(Violations of Health & Safety Code § 25249.6)**

5 27. CEH realleges and incorporates by reference as if specifically set forth herein
6 Paragraphs 1 through 26, inclusive.

7 28. By placing the Products into the stream of commerce, Defendants are each a
8 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

9 29. Cocamide DEA is a chemical listed by the State of California as known to cause
10 cancer.

11 30. Defendants know that ordinary use of the Products will expose users of their
12 Products to Cocamide DEA. Defendants intend that the Products be used in a manner that results
13 in exposures to Cocamide DEA.

14 31. Defendants have failed, and continue to fail, to provide clear and reasonable
15 warnings regarding the carcinogenicity of Cocamide DEA to users of the Products.

16 32. By committing the acts alleged above, Defendants have at all times relevant to this
17 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
18 Cocamide DEA without first giving clear and reasonable warnings to such individuals regarding
19 the carcinogenicity of Cocamide DEA.

20 **PRAYER FOR RELIEF**

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

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

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

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

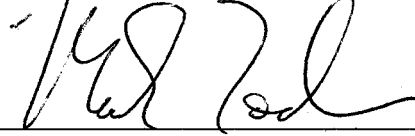
4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

Dated: March 19, 2019

Respectfully submitted,

LEXINGTON LAW GROUP



Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH