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ELECTRONICALLY
FILED

Superior Court of California,
County of San Francisco

07/10/2020
Clerk of the Court
BY: KALENE APOLONIO
Deputy Clerk

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

10 PRECILA BALABBO,

11 Plaintiff,

12 vs.

13 CVS PHARMACY, INC., et al.

14 Defendant.

Case No.: CGC-20-583875

**FIRST AMENDED COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE RELIEF**

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

15 Plaintiff Precila Balabbo ("Plaintiff"), by and through her attorneys, alleges the following
16 cause of action in the public interest of the citizens of the State of California.

17 **BACKGROUND OF THE CASE**

18 1. Plaintiff brings this representative action on behalf of all California citizens to
19 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
20 the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
21 "[n]o person in the course of doing business shall knowingly and intentionally expose any
22 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
23 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

24 2. This complaint is a representative action brought by Plaintiff in the public interest
25 of the citizens of the State of California to enforce the People's right to be informed of the health
26 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
27 Almar Sales hairband packs/sets and other products of a similar type sold and/or distributed by
28 defendants CVS Pharmacy, Inc. ("CVS") and Almar Sales Co., Inc. ("Almar") (collectively,

1 “Defendants”), as well as Almar My Princess Academy Backpack Makeup Collections and other
2 products of a similar type sold by Almar in California.

3 3. DEHP is a harmful chemical known to the State of California to cause cancer and
4 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical known
5 to the State to cause cancer and it has come under the purview of Proposition 65 regulations since
6 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
7 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
8 reproductive toxicity.

9 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
10 within California or sell products therein to comply with Proposition 65 regulations. Included in
11 such regulations is the requirement that businesses must label any product containing a Proposition
12 65-listed chemical with a “clear and reasonable” warning before “knowingly and intentionally”
13 exposing any person to any such listed chemical.

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

20 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
21 without a requisite exposure warning, (a) Almar Sales Company Expressions hairband super packs
22 and other products of a similar type manufactured, imported, distributed and/or sold by
23 Defendants, and (b) that Almar sells and/or distributes My Princess Academy Backpack Makeup
24 Collections and other products of a similar type in California (collectively the “Products”) that
25 expose persons to DEHP. The Products within the operative 60-day notices and complaint are all
26 Almar carry cases and carrying bags of any kind that are either empty or that contain accessories,
27 including but not limited to backpacks, knapsacks, totes, pouches, or other similar products
28 manufactured by or for Almar, or imported, sold or distributed by Almar, under any Almar

1 tradename such as “Expressions,” “My Princess Expressions,” or “My Princess Academy,”
2 including but not limited to Almar Sales Company Expressions hairband super packs and My
3 Princess Academy Backpack Makeup Collections including, but not limited to, UPC Nos.
4 024576830656 and 024575764586.

5 7. Defendants’ failure to warn consumers and other individuals in California of the
6 health hazards associated with exposure to DEHP in conjunction with the sale and/or distribution
7 of the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and civil
8 penalties described herein.

9 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
10 65 in accordance with Health and Safety Code § 25249.7(b).

11 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
12 Defendants to provide purchasers or users of the Products with required warnings related to the
13 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code
14 § 25249.7(a).

15 10. Plaintiff further seeks a reasonable award of attorney’s fees and costs.

16 **PARTIES**

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

21 12. Defendant CVS, through its business, effectively imports, distributes, sells, and/or
22 offers the Products for sale or use in the State of California, or it implies by its conduct that it
23 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
24 Plaintiff alleges that defendant CVS is a “person” in the course of doing business within the
25 meaning of Health & Safety Code sections 25249.6 and 25249.11.

26 13. Defendant Almar, through its business, effectively imports, distributes, sells, and/or
27 offers the Products for sale or use in the State of California, or it implies by its conduct that it
28 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.

1 Plaintiff alleges that defendant Almar is a “person” in the course of doing business within the
2 meaning of Health & Safety Code sections 25249.6 and 25249.11.

3 **14. VENUE AND JURISDICTION**

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

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

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

19 **STATUTORY BACKGROUND**

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

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

26 No person in the course of doing business shall knowingly and intentionally expose any
27 individual to a chemical known to the state to cause cancer or reproductive toxicity without
28 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
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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.

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

FACTUAL BACKGROUND

23. On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity. In summary, the Listed Chemical was listed under Proposition 65 as a chemical known to the State to cause cancer and reproductive toxicity.

24. The consumer exposures that are the subject of this First Amended Complaint result from dermal absorption. Dermal absorption of DEHP can occur through direct skin contact when the Products are grasped with bare hands. If the Products are stored or transported in a carrier, DEHP that leaches from the Products may contaminate other articles contained within these closed spaces are subsequently handled, worn, mouthed, or consumed. Finally, while mouthing of the Products does not seem likely, some amount of exposure through ingestion can occur by touching the Products with subsequent touching of the user's hand to mouth. Defendants have manufactured, processed, marketed, distributed, offered to sell and/or sold the Products in California since at least March 19, 2019 (Hairband super packs) and November 27, 2019 (backpack makeup collections), respectively. The Products continue to be distributed and sold in California without the requisite warning information.

25. At all times relevant to this action, Defendants have knowingly and intentionally exposed users, consumers and/or patients to the Products and the Listed Chemical without first giving a clear and reasonable exposure warning to such individuals.

26. As a proximate result of acts by Defendants, as a person in the course of doing business within the meaning of H&S Code § 25249.11, individuals throughout the State of California, including in San Francisco County, have been exposed to the Listed Chemical without a clear and reasonable warning on the Products. The individuals subject to the violative exposures

1 include normal and foreseeable users, consumers and patients that use the Products, as well as all
2 others exposed to the Products.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 27. On or about March 19, 2019, Balabbo served Almar, CVS Pharmacy, Inc. (“CVS”)
5 and various public enforcement agencies with documents entitled “60-Day Notice of Violation”
6 pursuant to Health & Safety Code §25249.7(d) (the “March NOV”), alleging that Almar and CVS
7 violated Proposition 65 by failing to warn California consumers that the use of Almar Sales
8 Company Expressions hairband super packs and other products of a similar type manufactured,
9 imported, distributed and/or sold by Almar and/or CVS exposed California consumers to DEHP
10 without a Proposition 65 warning. Thereafter, on November 27, 2019, Balabbo served Almar and
11 various public enforcement agencies with a second set of documents entitled “60-Day Notice of
12 Violation” pursuant to Health & Safety Code §25249.7(d) (the “November NOV”), alleging that
13 Almar violated Proposition 65 by failing to warn California consumers that the use of My Princess
14 Academy Backpack Makeup Collections and other products of a similar type manufactured,
15 imported, distributed and/or sold by Almar exposed California consumers to DEHP without a
16 Proposition 65 warning. The March NOV and the November NOV are collectively referred to
17 herein as the “Notices.” The Notices were also served on the California Attorney General’s office
18 and the offices of the County District attorneys and City Attorneys for each city with a population
19 greater than 750,000 persons wherein the herein violations allegedly occurred.

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

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

29. Plaintiff is commencing this action more than sixty (60) days from the date of the Notices to Defendants, as required by law.

FIRST CAUSE OF ACTION

(By Plaintiff against Defendants for the Violation of Proposition 65)

30. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of this First Amended Complaint as though fully set forth herein.

31. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer of the Products.

32. The Products contain DEHP, a hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

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

34. Plaintiff, based on her best information and belief, avers that at all relevant times herein, and at least since March 19, 2019 (Hairband super packs) and November 27, 2019 (backpack makeup collections), respectively, continuing until the present, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Products to DEHP without providing required warnings under Proposition 65.

35. The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the Products. Consequently, the primary route of exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can occur through direct skin contact when the Products are grasped with bare hands. If the Products are stored or transported in a carrier, DEHP that leaches from the Products may contaminate other articles contained within these closed spaces are subsequently handled, worn, mouthed, or consumed. Finally, while mouthing of the Products does not seem likely, some amount of exposure through ingestion can occur by touching the Products with subsequent touching of the user's hand to mouth.

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

1 37. Defendants have knowledge that the normal and reasonably foreseeable use of the
2 Products exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
3 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of
4 the Products to consumers in California

5 38. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
6 First Amended Complaint.

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

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

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
13 relief:

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

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

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

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

22 Dated: July 10, 2020

BRODSKY & SMITH, LLC

23 By: 

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8 *Attorneys for Plaintiff*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

PRECILA BALABBO,

Plaintiff,

v.

CVS PHARMACY, INC., et al.,

Defendants.

Case No. CGC-20-583875

PROOF OF SERVICE

Judge: Ethan P. Schulman

Dept.: 302

Hearing Date: September 8, 2020

Hearing Time: 9:30 AM

Reservation #:

I, Evan J. Smith, Esquire, declare:

I am over the age of eighteen years, and not a party to the within action; my business address is Two Bala Plaza, Suite 805, Bala Cynwyd, PA 19004 and California business address is 9595 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90212. On July 16, 2020, I served:

On July 21, 2020, I served the following document:

**FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE
RELIEF – VIOLATION OF HEALTH & SAFETY CODE § 25249.5**

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL DELIVERY

The above-described documents were transmitted via electronic mail delivery to the following parties on July 21, 2020:

J. Robert Maxwell
ROGERS JOSEPH O'DONNELL
A Professional Law Corporation
311 California Street, 10th Fl.
San Francisco, CA 94104

1 jmaxwell@rjo.com

2 *Defendant*

3 I declare under penalty of perjury under the laws of California and of the United States of America
4 that the above is true and correct.

5 Executed on July 21, 2020, at Bala Cynwyd, Pennsylvania.

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Evan J. Smith