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5 CENTER FOR ADVANCED PUBLIC AWARENESS

ELECTRONICALLY
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Superior Court of California,
County of San Francisco

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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 CITY AND COUNTY OF SAN FRANCISCO

9 UNLIMITED CIVIL JURISDICTION

CGC-21-591375

10
11 CENTER FOR ADVANCED PUBLIC
AWARENESS,

12 Plaintiff,

13 v.

14 BURT'S BEES, INC.; and DOES 1-30,
15 inclusive,

16 DEFENDANTS.

Case No.

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

Violation of Proposition 65, The Safe
Drinking Water and Toxic Enforcement Act of
1986 (Health & Safety Code § 25249.5 *et*
seq.)

Action is an Unlimited Civil Case

1 Plaintiff CENTER FOR ADVANCED PUBLIC AWARENESS (“CAPA”), acting in the
2 public interest, alleges a cause of action against DEFENDANTS BURT’S BEES, INC. and DOES 1-
3 30.

4 **INTRODUCTION AND NATURE OF THE ACTION**

5 1. This Complaint is a representative action brought by plaintiff CAPA in the public
6 interest of the citizens of the State of California (“State” or “California”) to enforce the People’s
7 right to be informed of the health hazards caused by exposures to Lead, a toxic chemical found in
8 diaper rash ointments sold by Defendants in the State of California.

9 2. By this Complaint, plaintiff seeks to remedy Defendants’ continuing failure to warn
10 individuals not covered by California’s Occupational Safety Health Act, Labor Code § 6300 *et seq.*
11 (“consumers”) they are being exposed to substances known to the State of California to cause
12 cancer, birth defects and other reproductive harm through exposures to Lead present in diaper rash
13 ointments manufactured, distributed, imported, marketed, sold and otherwise offered for sale or use
14 throughout the State of California by Defendants and purchased by consumers and other individuals
15 who use, handle, or apply the products to the skin, including skin affected with the conditions diaper
16 rash ointment is designed to prevent and treat, and to the diaper area of infants, toddlers and
17 children.

18 3. Detectable levels of Lead are found in diaper rash ointments Defendants manufacture,
19 import, sell or distribute for sale to individuals throughout California.

20 4. Pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
21 Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”), it is unlawful for a person in the course of
22 doing business to knowingly and intentionally expose consumers in California to chemicals known to
23 the State to cause cancer, birth defects or other reproductive harm, without first providing a “clear and
24 reasonable” health hazard warning to such individuals prior to purchase or use.

25 5. CAPA contends and alleges Defendants manufacture, distribute, import, sell, and offer
26 for sale, in or into California, diaper rash ointments containing Lead including, but not limited to,
27 *Burt’s Bees Baby Diaper Rash Ointment NPN 80049237, UPC #3 62103 32302 9*, (collectively
28 referred to hereinafter as the “PRODUCTS”), without Proposition 65’s requisite health hazard

1 warning regarding the harms associated with exposures to the chemical. Defendants' conduct
2 subjects them to civil penalties for each violation, enjoinder as well as preliminary and permanent
3 injunctive relief. Health & Safety Code §§ 25249.7(a) and (b).

4 **PARTIES**

5 6. Plaintiff CAPA is a non-profit corporation organized under the laws of California and
6 acting in the interest of the general public, dedicated to protecting the health of California citizens and
7 the environment through the elimination or reduction of toxic chemicals utilized in manufacturing
8 consumer products and increasing public awareness of those chemicals through the promotion of
9 sound environmental practices and corporate responsibility. CAPA is a person, within the meaning
10 of Health & Safety Code § 25249.11(a), and CAPA brings this action in the public interest pursuant
11 to Health & Safety Code § 25249.7(d).

12 7. Plaintiff is informed, believes and thereon alleges, at all relevant times, Defendant
13 BURT'S BEES, INC. ("BURT'S BEES") was and is a person in the course of doing business, with
14 ten (10) or more employees within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.

15 8. BURT'S BEES manufactures, imports, distributes, sells, and/or offers the
16 PRODUCTS for sale or use in the State of California, or implies by its conduct it manufactures,
17 imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

18 9. Defendants DOES 1-10 ("MANUFACTURER DEFENDANTS") are each a person in
19 the course of doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.
20 MANUFACTURER DEFENDANTS, and each of them, assembles, fabricates, and manufactures, or
21 implies by its conduct it does so one or more of the PRODUCTS offered for sale or use in California.

22 10. Defendants DOES 11-20 ("DISTRIBUTOR DEFENDANTS") are each a person in
23 the course of doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.
24 DISTRIBUTOR DEFENDANTS, and each of them, distributes, transfers, and transports, or implies
25 by its conduct it does so one or more of the PRODUCTS to individuals, businesses, or retailers for
26 sale or use in the State.

27 11. Defendants DOES 21-30 ("RETAILER DEFENDANTS") are each a person in the
28 course of doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.

1 RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to individuals in
2 California.

3 12. At this time, the true names of Defendants DOES 1 through 30, inclusive, are
4 unknown to plaintiff, who, therefore, sues said DEFENDANTS by their fictitious names, pursuant to
5 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, each
6 fictitiously named Defendant is responsible in some manner for the acts and occurrences alleged
7 herein and the damages caused thereby. When ascertained, their true names and capacities shall be
8 reflected in an amended complaint.

9 13. At all times mentioned herein, BURT’S BEES, MANUFACTURER DEFENDANTS,
10 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, hereinafter, where
11 appropriate, be referred to collectively as the “DEFENDANTS.”

12 **JURISDICTION AND VENUE**

13 14. This Court has jurisdiction over this action pursuant to Health & Safety Code
14 § 25249.7, allowing enforcement by any court of competent jurisdiction. The California Superior
15 Court has jurisdiction over this action pursuant to California Constitution Article VI, section 10
16 which grants the Superior Court “original jurisdiction in all causes except those given by statute to
17 other trial courts.” The statute under which this action is brought does not specify any other basis of
18 subject matter jurisdiction.

19 15. The California Superior Court has jurisdiction over DEFENDANTS based on
20 plaintiff’s information and good faith belief DEFENDANTS are each a person, firm, corporation or
21 association that is a citizen of the State of California; does sufficient business in California; have
22 sufficient minimum contacts in California; and/or otherwise purposefully and intentionally avail
23 themselves of the California market through their manufacture, importation, distribution, promotion,
24 marketing or sale of PRODUCTS within the State. DEFENDANTS’ purposeful availment renders
25 the exercise of personal jurisdiction by California courts consistent with traditional notions of fair
26 play and substantial justice.

27 16. Venue is proper in the Superior Court for the City and County of San Francisco
28 pursuant to Code of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of

1 competent jurisdiction; because plaintiff seeks civil penalties against DEFENDANTS; because one or
2 more instances of wrongful conduct occurred, and continue to occur, in this city and county; and/or
3 because DEFENDANTS conducted, and continue to conduct, business in the City and County of San
4 Francisco with respect to the PRODUCTS that are the subject of this action.

5 **REGULATORY BACKGROUND AND LAW**

6 17. In 1986, the people of the State of California approved an initiative addressing
7 concerns regarding the harms caused by hazardous chemicals and declaring their right “[t]o be
8 informed about exposures the chemicals that cause cancer, birth defects, or other reproductive harm.”
9 Ballot Pamp., Proposed General Law, Gen. Elec. (Nov. 4, 1986) at p.3.

10 18. Formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986 and
11 codified at Health & Safety Code §§ 25249.6 *et seq.*, Proposition 65 states in relevant part “[n]o
12 person in the course of doing business shall knowingly and intentionally expose any individual to a
13 chemical known to cause cancer or reproductive toxicity without first giving a clear and reasonable
14 warning to such individual...”

15 19. Under the Act, a “person the course of doing business” is defined as a business with
16 ten (10) or more employees. Health & Safety Code § 25249.11(b). Businesses are prohibited from
17 exposing individuals to hazardous chemicals without first giving a “clear and reasonable” health
18 hazard warning. Health & Safety Code § 25249.6

19 20. An exposure to a hazardous chemical is defined as one that “results from a person’s
20 acquisition, purchase, storage, consumption or other reasonably foreseeable use of a product...” 27
21 C.C.R. § 25600(h). Expose means “to cause to ingest, inhale, contact via body surfaces or otherwise
22 come into contact with a listed chemical.” 27 California Code of Regulations (“CCR”) § 25102(i). A
23 consumer product exposure to a hazardous chemical “results from a person’s acquisition, purchase,
24 storage, consumption or other reasonably foreseeable use of a product...” 27 CCR § 25600.1(e).

25 21. Proposition 65 states persons violating the statute may be enjoined in any court of
26 competent jurisdiction and may be subject to civil penalties of up to \$2,500 per day, per violation.
27 Health & Safety Code § 25249.7.

28

1 22. On February 27, 1987, pursuant to Health & Safety Code § 25249.8, California
2 identified and listed Lead as a chemical known to cause birth defects and reproductive harm or
3 reproductive toxicity, based on evidence clearly showing, through scientifically valid and accepted
4 testing practices, the chemical causes birth defects and both male and female reproductive toxicity.
5 Lead became subject to the “clear and reasonable warning” requirements one year later, on February
6 27, 1988. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8, 25249.10(b).

7 23. On October 1, 1992, California identified and listed Lead as a chemical known to
8 cause cancer, based on testing and evidence clearly demonstrating the relationship between Lead and
9 cancer, and the “clear and reasonable warning” requirement took effect one year later, on October 1,
10 1993. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8, 25249.10(b).

11 24. Pursuant to Health & Safety Code § 25249.10(c), the burden of proof, or the burden
12 to demonstrate an exposure does not pose a significant risk based on a lifetime of exposure or that
13 there is no observable effect of exposure assuming levels 1,000 times the level in question, is on the
14 defendant.

STATEMENT OF FACTS

15
16 25. Plaintiff purchased, investigated and tested DEFENDANTS’ PRODUCTS at an
17 accredited lab, and consultation with a person with relevant and appropriate expertise who reviewed
18 the collected data, analyzed the risk of exposures to Lead and determined the PRODUCTS expose
19 consumers, including infants, toddlers and children, in California to the listed chemical at levels
20 requiring a warning under the statute, based on consumers utilizing the PRODUCTS in accordance
21 with their reasonably foreseeable usage, including by touching, handling or applying the PRODUCTS
22 to the skin, including skin affected with the conditions the PRODUCTS are designed to prevent and
23 treat, and to the diaper area of infants, toddlers and children.

24 26. Plaintiff purchased the PRODUCTS, without a warning, in California.

25 27. Based on the foregoing, Plaintiff’s attorney consulted with an expert and executed a
26 certificate of merit, attesting to a reasonable and meritorious case for this private action and including
27 the factual information supporting the certificate served on the California Attorney General’s Office,
28 as required. Health & Safety Code § 25249.7(d); Title 11 C.C.R. § 3102.

1 reasonable warning” regarding the harms associated with exposures to Lead or reformulating the
2 PRODUCTS to remove Lead;

3 2. That the Court, pursuant to Health & Safety Code § 25249.7(a), issue preliminary and
4 permanent injunctions mandating that DEFENDANTS recall all PRODUCTS currently in the chain
5 of commerce in California without a “clear and reasonable warning”;

6 3. That the Court, assess civil penalties against DEFENDANTS, and each of them, in the
7 amount of \$2,500 per day for each violation of Proposition 65, in an amount to be determined at trial;

8 4. That the Court award plaintiff its reasonable attorneys’ fees and costs of suit, incurred
9 herein; and

10 5. That the Court grant any further relief as the Court may deem just and equitable.

11 Dated: April 28, 2021

Respectfully submitted,

SEVEN HILLS LLP

12
13
14 By: 

Kimberly Gates Johnson

Attorneys for Plaintiff

Center for Advanced Public Awareness