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5 CENTER FOR ADVANCED PUBLIC AWARENESS

ELECTRONICALLY
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Superior Court of California,
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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 CITY AND COUNTY OF SAN FRANCISCO
9 UNLIMITED CIVIL JURISDICTION

10
11 CENTER FOR ADVANCED PUBLIC
AWARENESS,

12 Plaintiff,

13 v.

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

Case No. CGC-21-591375

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

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

1 regarding the harms associated with exposures to the chemical. Defendants' conduct subjects them to
2 civil penalties for each violation, enjoinder as well as preliminary and permanent injunctive relief.
3 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 of
10 Health & Safety Code § 25249.11(a), and CAPA brings this action in the public interest pursuant to
11 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 ten
14 (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 PRODUCTS
16 for sale or use in the State of California, or implies by its conduct it manufactures, imports, distributes,
17 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 the
23 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 sale
26 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 unknown
4 to plaintiff, who, therefore, sues said DEFENDANTS by their fictitious names, pursuant to Code of
5 Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, each fictitiously
6 named Defendant is responsible in some manner for the acts and occurrences alleged herein and the
7 damages caused thereby. When ascertained, their true names and capacities shall be reflected in an
8 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 which
16 grants the Superior Court “original jurisdiction in all causes except those given by statute to other trial
17 courts.” The statute under which this action is brought does not specify any other basis of subject
18 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 the
25 exercise of personal jurisdiction by California courts consistent with traditional notions of fair play
26 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 competent

1 jurisdiction; because plaintiff seeks civil penalties against DEFENDANTS; because one or more
2 instances of wrongful conduct occurred, and continue to occur, in this city and county; and/or because
3 DEFENDANTS conducted, and continue to conduct, business in the City and County of San Francisco
4 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 concerns
7 regarding the harms caused by hazardous chemicals and declaring their right “[t]o be informed about
8 exposures the chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
9 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 ten
16 (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. DEFENDANTS’ failure to provide a “clear and reasonable” health hazard warning is a
26 labeling deficiency DEFENDANTS can correct using the Changes Being Effected Process, also
27 known as the CBE Process. DEFENDANTS can unilaterally make moderate changes to reflect newly
28 acquired information to add or strengthen a contraindication, warning, precaution, or adverse reaction

1 for a “clinically significant hazard” for which there is “reasonable evidence of a causal association”
2 with the PRODUCTS.

3 22. The U.S. Food and Drug Administration (“FDA”) has promulgated regulations
4 specifying certain changes to warnings on labels for the PRODUCTS may be made without prior FDA
5 approval: the labeling of the PRODUCTS “must be revised to include a warning about a clinically
6 significant hazard as soon as there is reasonable evidence of a causal association” with the
7 PRODUCTS. 21 C.F.R. § 201.57(c)(6)(i). “[A] causal relationship need not have been definitely
8 established.” Id. The risk of birth defects and reproductive harm from exposure to lead in the
9 PRODUCTS presents a clinically significant hazard” for which “there is reasonable evidence of a
10 causal association” with the PRODUCTS.

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

14 24. On February 27, 1987, pursuant to Health & Safety Code § 25249.8, California
15 identified and listed Lead as a chemical known to cause birth defects and reproductive harm or
16 reproductive toxicity, based on evidence clearly showing, through scientifically valid and accepted
17 testing practices, the chemical causes birth defects and both male and female reproductive toxicity.
18 Lead became subject to the “clear and reasonable warning” requirements one year later, on February
19 27, 1988. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8, 25249.10(b).

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

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

28

1 **STATEMENT OF FACTS**

2 27. Plaintiff purchased, investigated and tested DEFENDANTS' PRODUCTS at an
3 accredited lab, and consultation with a person with relevant and appropriate expertise who reviewed
4 the collected data, analyzed the risk of exposures to Lead and determined the PRODUCTS expose
5 consumers, including infants, toddlers and children, in California to the listed chemical at levels
6 requiring a warning under the statute, based on consumers utilizing the PRODUCTS in accordance
7 with their reasonably foreseeable usage, including by touching, handling or applying the PRODUCTS
8 to the skin, including skin affected with the conditions the PRODUCTS are designed to prevent and
9 treat, and to the diaper area of infants, toddlers and children.

10 28. Plaintiff purchased the PRODUCTS, without a warning, in California.

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

15 30. Thereafter, on September 23, 2020, plaintiff served a 60-Day Notice of Violation
16 ("Notice"), together with the requisite certificate of merit, on BURT'S BEES, the California Attorney
17 General's Office, and the requisite public enforcement agencies, alleging, as a result of
18 DEFENDANTS' sales of the PRODUCTS, consumers in the State of California were and are being
19 exposed to Lead resulting from their reasonably foreseeable use of the PRODUCTS without first
20 receiving a "clear and reasonable warning," as required by Proposition 65.

21 31. After receiving plaintiff's Notice, no public enforcement agency has commenced and is
22 diligently prosecuting a cause of action against DEFENDANTS under Proposition 65 to enforce the
23 alleged violations that are the subject of the Notice.

24 **FIRST CAUSE OF ACTION**

25 **(Violation of Proposition 65 - Against All DEFENDANTS)**

26 32. CAPA realleges and incorporates by reference, as if fully stated herein, the allegations
27 set forth in Paragraphs 1 through 31, inclusive.
28

1 33. DEFENDANTS' PRODUCTS contain Lead in levels requiring a clear and reasonable
2 warning under Proposition 65.

3 34. DEFENDANTS knew or should have known the PRODUCTS they manufacture,
4 import, distribute, sell, and offer for sale in California contain Lead. DEFENDANTS were also
5 informed of the presence of Lead in the PRODUCTS through Plaintiff's Notice.

6 35. The PRODUCTS DEFENDANTS manufacture, import, distribute, sell, and offer for
7 sale or use in California cause exposures to Lead, as a result of the reasonably foreseeable use of the
8 PRODUCTS, through dermal contact and ingestion.

9 36. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
10 continues to cause, exposures to Lead.

11 37. DEFENDANTS know the normal and reasonably foreseeable use of the PRODUCTS
12 exposes individuals to Lead through dermal contact and ingestion.

13 38. DEFENDANTS intend exposures to Lead from the reasonably foreseeable use of the
14 PRODUCTS will occur by their deliberate, non-accidental participation in the California marketplace.

15 39. The exposures to Lead, caused by DEFENDANTS and endured by consumers and
16 other individuals in California, are not exempt from the "clear and reasonable" warning requirements
17 of Proposition 65.

18 40. DEFENDANTS failed to provide a "clear and reasonable warning" to those consumers
19 and other individuals in California who have been, or will be, and whose children have been, or will
20 be, exposed to Lead through dermal contact and/or ingestion resulting from their use of the
21 PRODUCTS.

22 41. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
23 directly by California voters, consumers and other individuals exposed to Lead through dermal contact
24 and ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold without a "clear and
25 reasonable" health hazard warning, have suffered, and continue to suffer, irreparable harm for which
26 they have no plain, speedy, or adequate remedy at law.

27 42. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS for
28 sale or use in violation of Health & Safety Code § 25249.6, and DEFENDANTS' violations have

1 continued beyond their receipt of plaintiff's Notice. As such, DEFENDANTS' violations are ongoing
2 and continuous in nature and, unless enjoined, will continue in the future.

3 43. Pursuant to Health & Safety Code § 25249.7(b), as a consequence of the above-
4 described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty of \$2,500
5 per day for each violation.

6 44. As a consequence of the above-described acts, Health & Safety Code § 25249.7(a) also
7 specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

8 **PRAYER FOR RELIEF**

9 Wherefore, CAPA prays for relief and judgment against DEFENDANTS, and each of them, as
10 follows:

11 1. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and
12 permanently enjoin DEFENDANTS from manufacturing, distributing, importing, marketing or
13 otherwise offering the PRODUCTS for sale or use in California without first providing a "clear and
14 reasonable warning" regarding the harms associated with exposures to Lead or reformulating the
15 PRODUCTS to remove Lead;

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

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

21 4. That the Court award plaintiff its reasonable attorneys' fees and costs of suit, incurred
22 herein; and

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

24 Dated: June 28, 2021

Respectfully submitted,

SEVEN HILLS LLP

26
27 By: 

Kimberly Gates Johnson
Attorneys for Plaintiff

Center for Advanced Public Awareness