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5 CENTER FOR ADVANCED PUBLIC AWARENESS

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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-21-596173**

10
11 CENTER FOR ADVANCED PUBLIC
AWARENESS,

12 Plaintiff,

13 v.

14 THE HONEST COMPANY, INC.; and DOES 1-
15 30, 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.*)

UNLIMITED CIVIL

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

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 right
7 to be informed of the health hazards caused by exposures to Lead, a toxic chemical found in diaper
8 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 cancer,
12 birth defects and other reproductive harm through exposures to Lead present in diaper rash ointments
13 manufactured, imported, distributed, marketed, sold and otherwise offered for sale or use throughout
14 the State of California (“California” or “State”) by Defendants and purchased by consumers and other
15 individuals who use, handle, or apply the products to the skin, including compromised skin affected
16 with the condition diaper rash ointment is designed to prevent and treat, such as the diaper area of
17 infants, toddlers and children.

18 3. Detectable levels of Lead are found in diaper rash ointments Defendants manufacture,
19 import, distribute, sell or offer for sale to individuals throughout California. Pursuant to the Safe
20 Drinking Water and Toxic Enforcement Act of 1986, codified at Health & Safety Code § 25249.6 *et*
21 *seq.* (“Proposition 65”), it is unlawful for a person in the course of doing business to knowingly and
22 intentionally expose consumers in California to chemicals known to the State to cause cancer, birth
23 defects or other reproductive harm, without first providing a “clear and reasonable” health hazard
24 warning to such individuals prior to purchase or use.

25 4. CAPA contends and alleges Defendants manufacture, import, distribute, sell, and
26 offer for sale, in or into California, diaper rash ointments containing Lead, including, but not limited
27 to the *Honest Diaper Rash Cream UPC 8 17810 01456 7*, (collectively referred to hereinafter as
28 the “PRODUCTS”), without Proposition 65’s requisite health hazard warning regarding the harms

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

4 **PARTIES**

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

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

15 7. HONEST manufactures, imports, distributes, sells, and offers the PRODUCTS for sale
16 or use in the State of California, or implies by its conduct it manufactures, imports, distributes, sells,
17 and/or offers the PRODUCTS for sale or use in the State of California.

18 8. 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, assemble, fabricate, and manufacture, or
21 impliedly, by their conduct, do so for one or more of the PRODUCTS offered for sale or use in
22 California.

23 9. Defendants DOES 11-20 ("DISTRIBUTOR DEFENDANTS") are each a person in the
24 course of doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.
25 DISTRIBUTOR DEFENDANTS, and each of them, distribute, transfer, and transport, or impliedly,
26 by their conduct, do so for one or more of the PRODUCTS to individuals, businesses, or retailers for
27 sale or use in the State.

1 10. Defendants DOES 21-30 (“RETAILER DEFENDANTS”) are each a person in the
2 course of doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.
3 RETAILER DEFENDANTS, and each of them, sell or offer the PRODUCTS for sale directly to
4 individuals, consumers and customers in California, by any means, including the internet.

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

11 12. At all times mentioned herein, HONEST, MANUFACTURER DEFENDANTS,
12 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, hereinafter, where
13 appropriate, be referred to collectively as the “DEFENDANTS.”

14 **JURISDICTION AND VENUE**

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

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

1 15. Venue is proper in the Superior Court for the City and County of San Francisco
2 pursuant to Code of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of competent
3 jurisdiction; because plaintiff seeks civil penalties against DEFENDANTS; because one or more
4 instances of wrongful conduct occurred, and continue to occur, in this city and county; and/or because
5 DEFENDANTS conducted, and continue to conduct, business in the City and County of San Francisco
6 with respect to the PRODUCTS that are the subject of this action.

7 **REGULATORY BACKGROUND AND LAW**

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

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

17 18. Under the Act, a “person the course of doing business” is defined as a business with ten
18 (10) or more employees. Health & Safety Code § 25249.11(b).

19 19. Businesses are prohibited from exposing individuals to hazardous chemicals without
20 first giving a “clear and reasonable” health hazard warning. Health & Safety Code § 25249.6.

21 20. An exposure to a hazardous chemical is defined as one that “results from a person’s
22 acquisition, purchase, storage, consumption or other reasonably foreseeable use of a product...” 27
23 C.C.R. § 25600(r).

24 21. Expose means “to cause to ingest, inhale, contact via body surfaces or otherwise come
25 into contact with a listed chemical.” 27 California Code of Regulations (“CCR”) § 25102(i).

26 22. DEFENDANTS’ failure to provide a “clear and reasonable” health hazard warning is a
27 labeling deficiency DEFENDANTS can correct using the Changes Being Effected Process, also
28 known as the CBE Process. DEFENDANTS can unilaterally make moderate changes to reflect newly

1 acquired information to add or strengthen a contraindication, warning, precaution, or adverse reaction
2 for a “clinically significant hazard” for which there is “reasonable evidence of a causal association”
3 with the PRODUCTS. 21 C.F.R. § 201.57(c)(6)(i).

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

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

15 25. On February 27, 1987, pursuant to Health & Safety Code § 25249.8, California
16 identified and listed Lead as a chemical known to cause birth defects and reproductive harm or
17 reproductive toxicity, based on evidence clearly showing, through scientifically valid and accepted
18 testing practices, the chemical causes birth defects and both male and female reproductive toxicity.
19 Lead became subject to the “clear and reasonable warning” requirements one year later, on February
20 27, 1988. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8, 25249.10(b).

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

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

1 **STATEMENT OF FACTS**

2 28. Plaintiff purchased, investigated and tested DEFENDANTS’ PRODUCTS at an
3 accredited lab and consulted with a person with relevant and appropriate expertise who reviewed the
4 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, Lead, at
6 levels requiring a warning under the statute. Consumers utilizing the PRODUCTS in accordance with
7 their reasonably foreseeable uses and intended usage, such as through touching, handling or applying
8 the PRODUCTS to the skin, including to diaper area of infants, toddlers and children with diaper rash
9 whose skin is affected with the conditions the PRODUCTS are designed to prevent and treat, the
10 PRODUCTS expose consumers to Lead.

11 29. Plaintiff purchased the PRODUCTS, without a warning, in California.

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

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

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

25 **FIRST CAUSE OF ACTION**

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

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

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

3 35. 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 36. 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 37. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
10 continues to cause, exposures to Lead.

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

13 39. 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 40. 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 41. 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 42. 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
25 and reasonable" health hazard warning, have suffered, and continue to suffer, irreparable harm for
26 which they have no plain, speedy or adequate remedy at law.

27 43. 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 44. 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 45. 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: October 22, 2021

Respectfully submitted,

25 SEVEN HILLS LLP

26 By: 

27 Kimberly Gates Johnson
Attorneys for Plaintiff

28 *Center for Advanced Public Awareness*