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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

06/23/2022
Clerk of the Court
BY: JEFFREY FLORES
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

9 PRECILA BALABBO,

10 Plaintiff,

11 vs.

12 CVS PHARMACY, INC.,

13 Defendant.

Case No.:

CGC-22-600335

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

16 **BACKGROUND OF THE CASE**

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

23 2. This complaint is a representative action brought by Plaintiff in the public interest
24 of the citizens of the State of California to enforce the People’s right to be informed of the health
25 hazards caused by exposure to Diethanolamine (DEA), a toxic chemical found in Pop-arazzi
26 mascara sold and/or distributed by defendant CVS Pharmacy, Inc. (“CVS”) in California.
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1 3. DEA is a harmful chemical known to the State of California to cause cancer. On
2 June 22, 2012, the State of California listed DEA as a chemical known to the State to cause cancer
3 and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs.
4 Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

5 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
6 within California or sell products therein to comply with Proposition 65 regulations. Included in
7 such regulations is the requirement that businesses must label any product containing a Proposition
8 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
9 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
10 chemical.

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

16 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
17 without a requisite exposure warning, Pop-arazzi mascara (the “Products”) that expose persons to
18 DEA when used for their intended purpose.

19 7. Defendant’s failure to warn consumers and other individuals in California of the
20 health hazards associated with exposure to DEA in conjunction with the sale and/or distribution
21 of the Products is a violation of Proposition 65 and subjects Defendant to the enjoinder and civil
22 penalties described herein.

23 8. Plaintiff seeks civil penalties against Defendant for violations of Proposition 65 in
24 accordance with Health and Safety Code § 25249.7(b).

25 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
26 Defendant to provide purchasers or users of the Products with required warnings related to the
27 dangers and health hazards associated with exposure to DEA pursuant to Health and Safety Code
28 § 25249.7(a).

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

4 17. To effect this goal, Proposition 65 requires that individuals be provided with a
5 “clear and reasonable warning” before being exposed to substances listed by the State of California
6 as causing Cancer or Cancer. H&S Code § 25249.6 states, in pertinent part:

7 No person in the course of doing business shall knowingly and intentionally expose any
8 individual to a chemical known to the state to cause Cancer or Cancer without first giving
9 clear and reasonable warning to such individual...

10 18. An exposure to a chemical in a consumer product is one “which results from a
11 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
12 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
13 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
14 shall provide a warning to any person to whom the product is sold or transferred unless the product
15 is packaged or labeled with a clear and reasonable warning.”

16 19. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
17 more of the following methods individually or in combination:¹

18 a. A warning that appears on a product’s label or other labeling.

19 b. Identification of the product at the retail outlet in a manner which provides
20 a warning. Identification may be through shelf labeling, signs, menus, or a combination
21 thereof.

22 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
23 prominently placed upon a product’s labels or other labeling or displayed at the retail outlet
24 with such conspicuousness, as compared with other words, statements, designs, or devices
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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.

1 in the label, labeling or display as to render it likely to be read and understood by an
2 ordinary individual under customary conditions of purchase or use.

3 d. A system of signs, public advertising identifying the system and toll-free
4 information services, or any other system that provides clear and reasonable warnings.

5 20. Proposition 65 provides that any “person who violates or threatens to violate” the
6 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
7 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
8 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
9 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
10 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

11 **FACTUAL BACKGROUND**

12 21. On June 22, 2012, the State of California listed DEA as a chemical known to the
13 State to cause Cancer and it has come under the purview of Proposition 65 regulations since that
14 time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

15 22. The exposures that are the subject of the Notice result from the purchase,
16 acquisition, handling, and recommended use of the Products. The exposures that are the subject of
17 the Notice result from the purchase, acquisition, handling and recommended use of the Product.
18 The primary route of exposure is through dermal exposure. Some amount of exposure through
19 ingestion can occur by touching the Product with subsequent touching of the user’s hand to mouth.
20 No clear and reasonable warning is provided with the Products regarding the health hazards of
21 exposure to DEA.

22 23. Defendant has manufactured, processed, marketed, distributed, offered to sell
23 and/or sold the Products in California since at least July 1, 2021. The Products continue to be
24 distributed and sold in California without the requisite warning information.

25 24. At all times relevant to this action, Defendant has knowingly and intentionally
26 exposed users of the Products to DEA without first giving a clear and reasonable exposure warning
27 to such individuals.

1 Attorneys for each city with a population greater than 750,000 persons wherein the herein
2 violations allegedly occurred.

3 32. The Notice complied with all procedural requirements of Proposition 65 including
4 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
5 least one person with relevant and appropriate expertise who reviewed relevant data regarding
6 DEA exposure, and that counsel believed there was meritorious and reasonable cause for a private
7 action.

8 33. After receiving the Notice, and to Plaintiff's best information and belief, none of
9 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
10 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are
11 the subject of the Notice.

12 34. Plaintiff is commencing this action more than sixty (60) days from the date of the
13 Notice to Defendant, as required by law.

14 **FIRST CAUSE OF ACTION**

15 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

16 35. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 34 of
17 this Complaint as though fully set forth herein.

18 36. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
19 the Products.

20 37. Use of the Products will expose users and consumers thereof to DEA, a hazardous
21 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

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

23 39. Plaintiff, based on her best information and belief, avers that at all relevant times
24 herein, and at least since July 1, 2021, continuing until the present, that Defendant has continued
25 to knowingly and intentionally expose California users and consumers of the Products to DEA
26 without providing required warnings under Proposition 65.

27 40. The exposures that are the subject of the Notice result from the purchase,
28 acquisition, handling and recommended use of the Products. Consequently, the primary route of

1 exposure to the Listed Chemical is through dermal exposure. Some amount of exposure through
2 ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth.
3 No clear and reasonable warning is provided with the Products regarding the health hazards of
4 exposure to DEA.

5
6 41. Plaintiff, based on her best information and belief, avers that such exposures will
7 continue every day until clear and reasonable warnings are provided to purchasers and users or
8 until this known toxic chemical is removed from the Products.

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10 42. Defendant has knowledge that the normal and reasonably foreseeable use of the
11 Products exposes individuals to DEA, and Defendant intends that exposures to DEA will occur by
12 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
13 Products to consumers in California

14
15 43. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
16 Complaint.

17
18 44. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
19 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

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21 45. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
22 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.
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1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendant and requests the following
3 relief:

4 A. That the court assess civil penalties against each defendant in the amount of \$2,500
5 per day for each violation for up to 365 days in accordance with Health and Safety Code §
6 25249.7(b);

7 B. That the court preliminarily and permanently enjoin Defendant mandating
8 Proposition 65 compliant warnings on the Products;

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

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

12 Dated: June 23, 2022

BRODSKY & SMITH

13 By: 

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