

Evan J. Smith, Esquire (SBN 242352)
Ryan P. Cardona, Esquire (SBN 302113)
BRODSKY & SMITH
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212
Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

07/14/2022
Clerk of the Court
BY: JEFFREY FLORES
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

PRECILA BALABBO,

Plaintiff,

vs.

PINNACLE BRANDS, LLC, CVS
PHARMACY, INC.,

Defendants.

Case No.:

CGC-22-600727

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

BACKGROUND OF THE CASE

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

2. This complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California to enforce the People's right to be informed of the health hazards caused by exposure to Diethanolamine (DEA), a toxic chemical found in Pinnacle Fresh 'N Clean hand sanitizer sold and/or distributed by defendant Pinnacle Brands, LLC ("Pinnacle") and/or defendant CVS Pharmacy, Inc. ("CVS") (collectively, "Defendants") in California.

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 Defendants distribute and/or offer for sale in California,
17 without a requisite exposure warning, Pinnacle Fresh ‘N Clean hand sanitizer (the “Products”) that
18 expose persons to DEA when used for their intended purpose.

19 7. Defendants’ 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 Defendants to the enjoinder and civil
22 penalties described herein.

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

25 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
26 Defendants 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 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

2 **PARTIES**

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

7 12. Defendant Pinnacle, through its business, effectively imports, distributes, sells,
8 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
9 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
10 Plaintiff alleges that defendant Pinnacle is a "person" in the course of doing business within the
11 meaning of Health & Safety Code sections 25249.6 and 25249.11.

12 13. Defendant CVS, through its business, effectively imports, distributes, sells, and/or
13 offers the Products for sale or use in the State of California, or it implies by its conduct that it
14 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
15 Plaintiff alleges that defendant CVS is a "person" in the course of doing business within the
16 meaning of Health & Safety Code sections 25249.6 and 25249.11.

17 **VENUE AND JURISDICTION**

18 14. Venue is proper in the County of San Francisco because one or more of the
19 instances of wrongful conduct occurred, and continue to occur in this county and/or because
20 Defendants conducted, and continue to conduct, business in the County of San Francisco with
21 respect to the Products.

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

27 16. This Court has jurisdiction over Defendants because each defendant is either a
28 citizen of the State of California, has sufficient minimum contacts with the State of California, is

1 registered with the California Secretary of State as foreign corporations authorized to do business
2 in the State of California, and/or has otherwise purposefully availed itself of the California market.
3 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
4 and permissible with traditional notions of fair play and substantial justice.

5 **STATUTORY BACKGROUND**

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

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

12 No person in the course of doing business shall knowingly and intentionally expose any
13 individual to a chemical known to the state to cause cancer or reproductive toxicity without
14 first giving clear and reasonable warning to such individual...

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

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

23 a. A warning that appears on a product’s label or other labeling.
24
25

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.

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

c. The warnings provided pursuant to subparagraphs (a) and (b) shall be prominently placed upon a product's labels or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

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

21. Proposition 65 provides that any “person who violates or threatens to violate” the statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase “threaten to violate” is defined to mean creating “a condition in which there is a substantial probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil 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.

FACTUAL BACKGROUND

22. On June 22, 2012, the State of California listed DEA 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).

23. The exposures that are the subject of the Notice result from the purchase, acquisition, handling, and recommended use of the Products. The primary route of exposure is through dermal exposure. Exposure through ingestion will occur by touching the Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided with the Products regarding the health hazards of exposure to DEA.

24. Defendants have manufactured, processed, marketed, distributed, offered to sell and/or sold the Products in California since at least July 21, 2021. The Products continue to be distributed and sold in California without the requisite warning information.

1 25. At all times relevant to this action, Defendants have knowingly and intentionally
2 exposed users of the Products to DEA without first giving a clear and reasonable exposure warning
3 to such individuals.

4 26. As a proximate result of acts by each defendant, as a person in the course of doing
5 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
6 California, including in San Francisco County, have been exposed to DEA without a clear and
7 reasonable warning on the Products. The individuals subject to the violative exposures include
8 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
9 the Products.

10 **SATISFACTION OF NOTICE REQUIREMENTS**

11 27. On June 3, 2021, Plaintiff purchased the Product from CVS. At the time of
12 purchase, CVS and Pinnacle did not provide a Proposition 65 exposure warning for DEA or any
13 other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
14 *supra*.

15 28. On or about July 9, 2021, the Product was sent to a testing laboratory for phthalate
16 testing to determine the phthalate content of the Product.

17 29. On July 16, 2021, the laboratory provided the results of its analysis. Results of this
18 test determined the Product exposes users to DEA (the “Chemical Test Report”).

19 30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
20 to determine if, based on the findings of the Chemical Test Report and the reasonable and
21 foreseeable use of the Product, exposure to DEA will occur at levels that require Proposition 65
22 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
23 Code of Regulations.

24 31. On July 21, 2021, Plaintiff received from the analytical chemist an exposure
25 assessment report which concluded that persons in California who use the Products will be exposed
26 to levels of DEA that require a Proposition 65 exposure warning.

27 32. On July 21, 2021, Plaintiff gave notice of alleged violation of Health and Safety
28 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to

1 DEA from use of the Products without proper warning, subject to a private action to Defendants
2 and to the California Attorney General's office and the offices of the County District attorneys and
3 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
4 violations allegedly occurred.

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

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

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

16 **FIRST CAUSE OF ACTION**

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

18 36. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 35 of
19 this Complaint as though fully set forth herein.

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

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

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

25 40. Plaintiff, based on her best information and belief, avers that at all relevant times
26 herein, and at least since July 21, 2021, continuing until the present, that Defendants have
27 continued to knowingly and intentionally expose California users and consumers of the Products
28 to DEA without providing required warnings under Proposition 65.

1 41. The exposures that are the subject of the Notice result from the purchase,
2 acquisition, handling and recommended use of the Products. The primary route of exposure is
3 through dermal exposure. Exposure through ingestion will occur by touching the Product with
4 subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided
5 with the Products regarding the health hazards of exposure to DEA.

6 42. 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.

9 43. Defendants have knowledge that the normal and reasonably foreseeable use of the
10 Products exposes individuals to DEA, and Defendants intend that exposures to DEA will occur by
11 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
12 Products to consumers in California

13 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
14 Complaint.

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

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

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendants 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 Defendants 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: July 14, 2022

BRODSKY & SMITH

13 By: 

14 Evan J. Smith (SBN242352)

15 Ryan P. Cardona (SBN302113)

16 9595 Wilshire Boulevard, Suite 900

17 Beverly Hills, CA 90212

18 Telephone: (877) 534-2590

19 Facsimile: (310) 247-0160

20 *Attorneys for Plaintiff*