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Superior Court of California,
County of San Francisco

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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 NUTRITION & FITNESS, INC. dba NFI
13 CONSUMER PRODUCTS, CVS
14 PHARMACY, INC.,

Defendants.

Case No.:

CGC-22-600852

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

17 **BACKGROUND OF THE CASE**

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

24 2. This complaint is a representative action brought by Plaintiff in the public interest
25 of the citizens of the State of California to enforce the People’s right to be informed of the health
26 hazards caused by exposure to Diethanolamine (DEA), a toxic chemical found in Blue Emu Pain
27 Relief Cream sold and/or distributed by defendant Nutrition & Fitness, Inc. dba NFI Consumer
28

1 Products (“NFI Consumer Products”) and/or defendant CVS Pharmacy, Inc. (“CVS”)
2 (collectively, “Defendants”) in California.

3 3. DEA is a harmful chemical known to the State of California to cause cancer. On
4 June 22, 2012, the State of California listed DEA as a chemical known to the State to cause cancer
5 and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs.
6 Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

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

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

18 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
19 without a requisite exposure warning, Blue Emu Pain Relief Cream (the “Products”) that expose
20 persons to DEA when used for their intended purpose.

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

25 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
26 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
28 Defendants to provide purchasers or users of the Products with required warnings related to the

1 dangers and health hazards associated with exposure to DEA pursuant to Health and Safety Code
2 § 25249.7(a).

3 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

4 **PARTIES**

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

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

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

20 **VENUE AND JURISDICTION**

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

25 15. This Court has jurisdiction over this action pursuant to California Constitution
26 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
27 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement
28

1 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
2 jurisdiction over this lawsuit.

3 16. This Court has jurisdiction over Defendants because each defendant is either a
4 citizen of the State of California, has sufficient minimum contacts with the State of California, is
5 registered with the California Secretary of State as foreign corporations authorized to do business
6 in the State of California, and/or has otherwise purposefully availed itself of the California market.
7 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
8 and permissible with traditional notions of fair play and substantial justice.

9 **STATUTORY BACKGROUND**

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

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

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

19 19. An exposure to a chemical in a consumer product is one “which results from a
20 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
21 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
22 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
23 shall provide a warning to any person to whom the product is sold or transferred unless the product
24 is packaged or labeled with a clear and reasonable warning.”

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

3 a. A warning that appears on a product's label or other labeling.

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

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

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

14 21. Proposition 65 provides that any "person who violates or threatens to violate" the
15 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
16 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
17 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
18 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
19 365 days.

20 FACTUAL BACKGROUND

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

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.

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

6 31. On August 18, 2021, Plaintiff received from the analytical chemist an exposure
7 assessment report which concluded that persons in California who use the Products will be exposed
8 to levels of DEA that require a Proposition 65 exposure warning.

9 32. On August 18, 2021, Plaintiff gave notice of alleged violation of Health and Safety
10 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
11 DEA from use of the Products without proper warning, subject to a private action to Defendants
12 and to the California Attorney General's office and the offices of the County District attorneys and
13 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
14 violations allegedly occurred.

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

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

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

26 **FIRST CAUSE OF ACTION**

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

28

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

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

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

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

8 40. Plaintiff, based on her best information and belief, avers that at all relevant times
9 herein, and at least since August 18, 2021, continuing until the present, that Defendants have
10 continued to knowingly and intentionally expose California users and consumers of the Products
11 to DEA without providing required warnings under Proposition 65.

12 41. The exposures that are the subject of the Notice result from the purchase,
13 acquisition, handling and recommended use of the Products. Consequently, the primary route of
14 exposure to these chemicals is through dermal absorption. Dermal absorption of DEA will occur
15 through direct skin contact when the Products are contacted with the user's skin. Exposure through
16 ingestion will occur by touching the Products with subsequent touching of the user's hand to
17 mouth.

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

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

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

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

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

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
5 relief:

- 6 A. That the court assess civil penalties against each defendant in the amount of \$2,500
7 per day for each violation for up to 365 days in accordance with Health and Safety Code §
8 25249.7(b);
- 9 B. That the court preliminarily and permanently enjoin Defendants mandating
10 Proposition 65 compliant warnings on the Products;
- 11 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
12 amount of \$50,000.00.
- 13 D. That the court grant any further relief as may be just and proper.

14 Dated: July 21, 2022

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