

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

07/15/2022
Clerk of the Court
BY: JEFFREY FLORES
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 PRECILA BALABBO,
12 Plaintiff,

13 vs.

14 CVS PHARMACY, INC.,
15 Defendant.

Case No.: **CGC-22-600744**

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

18 **BACKGROUND OF THE CASE**

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

25 2. This complaint is a representative action brought by Plaintiff in the public interest
26 of the citizens of the State of California to enforce the People’s right to be informed of the health
27 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in Pet
28 Central Bed in a Bag – bags sold and/or distributed by defendant CVS Pharmacy, Inc. (“CVS”) in
California.

1 3. DEHP is a harmful chemical known to the State of California to cause cancer and
2 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical known
3 to the State to cause cancer and it has come under the purview of Proposition 65 regulations since
4 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
5 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
6 reproductive toxicity.

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 defendant 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 Defendant distributes and/or offers for sale in California,
19 without a requisite exposure warning, Pet Central Bed in a Bag – bags (the “Products”) that expose
20 persons to DEHP when used for their intended purpose.

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

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

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

1 dangers and health hazards associated with exposure to DEHP 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 CVS, through its business, effectively imports, distributes, sells, and/or
10 offers the Products for sale or use in the State of California, or it implies by its conduct that it
11 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
12 Plaintiff alleges that defendant CVS is a "person" in the course of doing business within the
13 meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 13. Venue is proper in the County of San Francisco because one or more of the
16 instances of wrongful conduct occurred and continue to occur in this county and/or because
17 Defendant conducted, and continue to conduct, business in the County of San Francisco with
18 respect to the Products.

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

24 15. This Court has jurisdiction over Defendant because each defendant is either a
25 citizen of the State of California, has sufficient minimum contacts with the State of California, is
26 registered with the California Secretary of State as foreign corporations authorized to do business
27 in the State of California, and/or has otherwise purposefully availed itself of the California market.
28

1 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
2 and permissible with traditional notions of fair play and substantial justice.

3 **STATUTORY BACKGROUND**

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

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

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

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

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

- 21 a. A warning that appears on a product’s label or other labeling.
- 22 b. Identification of the product at the retail outlet in a manner which provides
23 a warning. Identification may be through shelf labeling, signs, menus, or a combination
24 thereof.

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 to DEHP from use of the Products without proper warning, subject to a private action to Defendant
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 32. 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 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a private
9 action.

10 33. 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 Defendant under Proposition 65 to enforce the alleged violations which are
13 the subject of the Notice.

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

16 **FIRST CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

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

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: July 15, 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*