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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

08/15/2022
Clerk of the Court
BY: LAURA SIMMONS
Deputy Clerk

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

11 DONATUS MCCOY,

12 Plaintiff,

13 vs.

14 ALOE CARE INTERNATIONAL, LLC,
15 WEST MARINE PRODUCTS, INC.,

16 Defendants.

Case No.:

CGC-22-601262

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

17 Plaintiff Donatus McCoy (“Plaintiff”), by and through his attorneys, alleges the following
18 cause of action in the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

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

26 2. This complaint is a representative action brought by Plaintiff in the public interest
27 of the citizens of the State of California to enforce the People’s right to be informed of the health
28 hazards caused by exposure to Diethanolamine (DEA), a toxic chemical found in Aloe Up
sunscreens sold and/or distributed by defendant Aloe Care International, LLC (“Aloe Care”) and/or

1 defendant West Marine Products, Inc. (“West Marine Tools”) (collectively, “Defendants”) in
2 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, Aloe Up sunscreen (the “Products”) that expose persons to
20 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. He brings this
8 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

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

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

19 **VENUE AND JURISDICTION**

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

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

1 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
2 and/or sold the Products in California since at least November 4, 2021. The Products continue to
3 be distributed and sold in California without the requisite warning information.

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

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

13 **SATISFACTION OF NOTICE REQUIREMENTS**

14 27. On September 29, 2021, Plaintiff purchased the Product from West Marine Tools.
15 At the time of purchase, West Marine Tools and Aloe Care did not provide a Proposition 65
16 exposure warning for DEA or any other Proposition 65 listed chemical in a manner consistent with
17 H&S Code § 25603.1 as described *supra*.

18 28. On or about October 20, 2021, the Product was sent to a testing laboratory for
19 testing to determine the chemical content of the Product.

20 29. On October 27, 2021, the laboratory provided the results of its analysis. Results of
21 this test determined the Product exposes users to DEA (the “Chemical Test Report”).

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

1 31. On November 4, 2021, Plaintiff received from the analytical chemist an exposure
2 assessment report which concluded that persons in California who use the Products will be exposed
3 to levels of DEA that require a Proposition 65 exposure warning.

4 32. On November 4, 2021, Plaintiff gave notice of alleged violation of Health and
5 Safety Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens
6 to DEA from use of the Products without proper warning, subject to a private action to Defendants
7 and to the California Attorney General’s office and the offices of the County District attorneys and
8 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
9 violations allegedly occurred.

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

15 34. After receiving the Notice, and to Plaintiff’s best information and belief, none of
16 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
17 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
18 are the subject of the Notice.

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

21 **FIRST CAUSE OF ACTION**

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

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

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

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

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

2 40. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since November 4, 2021, continuing until the present, that Defendants have
4 continued to knowingly and intentionally expose California users and consumers of the Products
5 to DEA without providing required warnings under Proposition 65.

6 41. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling and recommended use of the Products. Consequently, the primary route of
8 exposure to DEA is through dermal absorption. Dermal absorption of DEA can occur through
9 direct skin contact when the Products are contacted with bare hands, exposed skin, or the Products
10 are applied to the user's skin. Exposure through ingestion will occur by touching the Products with
11 subsequent touching of the user's hand to mouth.

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

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

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

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

23 46. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
24 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: August 15, 2022

BRODSKY & SMITH

13 By:  _____

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