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Superior Court of California,
County of San Francisco

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Clerk of the Court
BY: JACKIE LAPREVOTTE
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.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

CGC-22-603070

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 without first giving clear and
24 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 Coconut oil diethanolamine condensate (Cocomide DEA), a toxic
28 chemical found in Condition 3 in 1 Maximum Hold mousse sold and/or distributed by defendant
CVS Pharmacy, Inc. (“CVS”) in California.

1 3. Cocomide DEA is a harmful chemical known to the State of California to cause
2 cancer. On June 22, 2012, the State of California listed Cocomide DEA as a chemical known to
3 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 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 defendants 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, Condition 3 in 1 Maximum Hold mousse (the “Products”)
18 that expose persons to Cocomide 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 Cocomide DEA in conjunction with the sale and/or
21 distribution of the Products is a violation of Proposition 65 and subjects defendant to the
22 enjoinder and civil 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 Cocomide DEA pursuant to Health and
28 Safety Code § 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 CVS, through its business, effectively imports, distributes, sells, and/or
8 offers the Products for sale or use in the State of California, or it implies by its conduct that it
9 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
10 Plaintiff alleges that defendant CVS is a “person” in the course of doing business within the
11 meaning of Health & Safety Code sections 25249.6 and 25249.11.

12 **VENUE AND JURISDICTION**

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

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

22 15. This Court has jurisdiction over defendant because defendant is either a citizen of
23 the State of California, has sufficient minimum contacts with the State of California, is registered
24 with the California Secretary of State as foreign corporations authorized to do business in the State
25 of California, and/or has otherwise purposefully availed itself of the California market. Such
26 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
27 permissible with traditional notions of fair play and substantial justice.

28 **STATUTORY BACKGROUND**

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
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 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.

11 FACTUAL BACKGROUND

12 21. On June 22, 2012, the State of California listed Cocomide DEA as a chemical
13 known to the State to cause Cancer and it has come under the purview of Proposition 65 regulations
14 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
15 25249.10(b).

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

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

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

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

7 **SATISFACTION OF NOTICE REQUIREMENTS**

8 26. On August 5, 2021, Plaintiff purchased the Product from CVS. At the time of
9 purchase, CVS did not provide a Proposition 65 exposure warning for Cocomide DEA or any other
10 Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
11 *supra*.

12 27. On October 1, 2021, The Product was sent to a testing laboratory for phthalate
13 testing to determine the phthalate content of the Product.

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

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

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

24 31. On November 24, 2021, Plaintiff gave notice of alleged violation of Health and
25 Safety Code § 25249.6 (the “Notice”) to defendant concerning the exposure of California citizens
26 to Cocomide DEA from use of the Products without proper warning, subject to a private action to
27 defendant and to the California Attorney General’s office and the offices of the County District
28

1 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
2 the herein 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 Cocomide DEA exposure, and that counsel believed there was meritorious and reasonable cause
7 for a private 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 Cocomide DEA, a
21 hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human
22 health.

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

24 39. Plaintiff, based on her best information and belief, avers that at all relevant times
25 herein, and at least since November 24, 2021, continuing until the present, that defendant has
26 continued to knowingly and intentionally expose California users and consumers of the Products
27 to Cocomide DEA 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 Products. Consequently, the primary route of
3 exposure to the Listed Chemical is through dermal exposure. Some amount of exposure through
4 ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth.
5 No clear and reasonable warning is provided with the Products regarding the health hazards of
6 exposure to Cocomide DEA.
7

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

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

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

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

19 45. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
20 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 defendant in the amount of \$2,500 per
5 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: November 22, 2022

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