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ELECTRONICALLY
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Superior Court of California,
County of San Francisco

04/15/2024
Clerk of the Court

BY: AUSTIN LAM
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CGC-24-613972

9 ANTHONY FERREIRO,

10 Plaintiff,

11 vs.

12 MILL CREEK BOTANICALS INC.,
13 MILL CREEK BOTANICALS LLC,
14 U.S. INTERNATIONAL TRADING
15 CORP., VISTACOST.COM, INC.,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

16 Plaintiff Anthony Ferreiro (“Plaintiff”), by and through his 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 reasonable
24 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 diethanolamine (DEA), a toxic chemical found in *Mill Creek®*
28 *Biotene H-24®* natural extra body styling gels, UPC # 079526003086 sold and/or distributed by

1 defendants Mill Creek Botanicals Inc., Mill Creek Botanicals LLC, U.S. International Trading
2 Corp., and/or Vistacost.com, Inc. (collectively, “Defendants” and each a “Defendant”) in
3 California.

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

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

14 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
15 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
16 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
17 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
18 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
19 25249.7.

20 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
21 without a requisite exposure warning, *Mill Creek® Biotene H-24®* natural extra body styling gels,
22 UPC # 079526003086 (the “Products”) that expose persons to DEA when used for their intended
23 purpose.

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

28

1 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
2 65 in accordance with Health and Safety Code § 25249.7(b).

3 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
4 Defendants to provide purchasers or users of the Products with required warnings related to the
5 dangers and health hazards associated with exposure to DEA pursuant to Health and Safety Code
6 § 25249.7(a).

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

8 **PARTIES**

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

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

19 13. Defendant Mill Creek Botanicals LLC, through its business, effectively imports,
20 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
21 by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the
22 State of California. Plaintiff alleges that defendant Mill Creek Botanicals LLC is a "person" in the
23 course of doing business within the meaning of Health & Safety Code sections 25249.6 and
24 25249.11.

25 14. Defendant U.S. Trading International Corp., through its business, effectively
26 imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it
27 implies by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use
28 in the State of California. Plaintiff alleges that defendant U.S. Trading International Corp. is a

1 “person” in the course of doing business within the meaning of Health & Safety Code sections
2 25249.6 and 25249.11.

3 15. Defendant Vistacost.com, Inc., through its business, effectively imports,
4 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
5 by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the
6 State of California. Plaintiff alleges that defendant Vistacost.com, Inc. is a “person” in the course
7 of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

8 **VENUE AND JURISDICTION**

9 16. Venue is proper in the County of San Francisco because one or more of the
10 instances of wrongful conduct occurred, and continue to occur in this county and/or because
11 Defendants conducted, and continue to conduct, business in the County of San Francisco with
12 respect to the Products.

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

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

STATUTORY BACKGROUND

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

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

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

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

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

- a. A warning that appears on a product’s label or other labeling.
- 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

¹ Alternatively, a person in the course of doing business may elect to comply with the warning 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 with such conspicuousness, as compared with other words, statements, designs, or devices
2 in the label, labeling or display as to render it likely to be read and understood by an
3 ordinary individual under customary conditions of purchase or use.

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

6 23. Proposition 65 provides that any “person who violates or threatens to violate” the
7 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
8 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
9 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
10 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
11 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

12 **FACTUAL BACKGROUND**

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

16 25. The exposures that are the subject of the Notice result from the purchase,
17 acquisition, handling and recommended use of the Product. The primary route of exposure to the
18 chemical is through dermal absorption directly through the skin when consumers use, touch, or
19 handle the Products. Exposure through ingestion will occur by touching the Product with
20 subsequent touching of the user’s hand to mouth. No clear and reasonable warning is provided
21 with the Products regarding the health hazards of exposure.

22 26. Defendants have manufactured, processed, marketed, distributed, offered to sell
23 and/or sold the Products in California since at least May 9, 2023. The Products continue to be
24 distributed and sold in California without the requisite warning information.

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

1 28. As a proximate result of acts by Defendants, 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 DEA without a clear and
4 reasonable warning on the Products. The individuals subject to the violative exposures include
5 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
6 the Products.

7 SATISFACTION OF NOTICE REQUIREMENTS

8 29. Plaintiff purchased the Product from Vitacost.com, Inc. At the time of purchase,
9 Defendants did not provide a Proposition 65 exposure warning for DEA or any other Proposition
10 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

11 30. On April 21, 2023, the Product was sent to a testing laboratory for testing to
12 determine the chemical content of the Product.

13 31. On April 27, 2023, the laboratory provided the results of its analysis. Results of this
14 test determined the Product exposes users to DEA (the “Chemical Test Report”).

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

20 33. On May 9, 2023, Plaintiff received from the analytical chemist an exposure
21 assessment report which concluded that persons in California who use the Products will be exposed
22 to levels of DEA that require a Proposition 65 exposure warning.

23 34. On May 9, 2023, Plaintiff gave notice of alleged violation of Health and Safety
24 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
25 DEA from use of the Products without proper warning, subject to a private action to Defendants
26 and to the California Attorney General’s office and the offices of the County District attorneys and
27 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
28 violations allegedly occurred.

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

6 36. After receiving the Notice, and to Plaintiff’s best information and belief, none of
7 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
8 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
9 are the subject of the Notice.

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

12 **FIRST CAUSE OF ACTION**

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

14 38. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 37 of
15 this Complaint as though fully set forth herein.

16 39. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
17 of the Products.

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

20 41. The Products do not comply with the Proposition 65 warning requirements.

21 42. Plaintiff, based on his best information and belief, avers that at all relevant times
22 herein, and at least since May 9, 2023, continuing until the present, that Defendants have continued
23 to knowingly and intentionally expose California users and consumers of the Products to DEA
24 without providing required warnings under Proposition 65.

25 43. The exposures that are the subject of the Notice result from the purchase,
26 acquisition, handling and recommended use of the Product. The primary route of exposure to the
27 chemical is through dermal absorption directly through the skin when consumers use, touch, or
28 handle the Products. Exposure through ingestion will occur by touching the Product with

1 subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided
2 with the Products regarding the health hazards of exposure.

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

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

10 46. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
11 Complaint.

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

15 48. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
16 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 (up to a maximum civil penalty amount per
6 violation of \$912,000.00) in accordance with Health and Safety Code § 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: April 15, 2024

BRODSKY SMITH

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