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**Superior Court of California, County of Alameda**  
**Rene C. Davidson Alameda County Courthouse**

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PROPOSITION 65 COCAMIDE DEA CASES

No. JCCP004765

Order

Demurrer to Complaint  
Sustained

(Abbreviated Title)

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The Demurrer to Complaint was set for hearing on 07/22/2014 at 02:30 PM in Department 17 before the Honorable George C. Hernandez, Jr.. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Demurrer of Defendant Lush Cosmetics LLC to Complaint of Latonia Enge is **SUSTAINED WITHOUT LEAVE TO AMEND**, for the reasons that follow.

The demurrer to the first cause of action is **SUSTAINED WITHOUT LEAVE TO AMEND**. As plaintiff concedes, the Proposition 65 cause of action has already been settled on behalf of the people of California and is thus barred by res judicata.

As to the second and third causes of action, the court first observes that neither party sought judicial notice of the complaint, which was filed in Los Angeles County Superior Court (as Latonia Enge v. Lush Cosmetics, Case No. BC526662) and later became an included action in this coordinated proceeding. However, the complaint is on record in the coordinated proceeding and may be found as Exhibit G to the Abdelnour Declaration filed in support of the request to add the Enge action to the coordination proceedings, filed 10/21/2013.

The second cause of action under the Unfair Competition Law is, as pleaded, a claim for "unlawful" conduct, only. Factually, the cause of action incorporates only those facts pleaded in the Proposition 65 cause of action; legally, it alleges "an affirmative legal duty to warn purchasers of the above-listed products that they are being exposed to a chemical known to the state of California to cause cancer." (See Compl. paras. 16-17.) As pleaded, the claim is wholly derivative of, and dependent upon, Health & Safety Code section 25249.6. Because the underlying claim is not viable, the claim for "unlawful" activity under the UCL is similarly barred.

To the extent that Plaintiff's opposition suggests that she has pleaded a claim for "unfair" or "fraudulent" conduct under the UCL, she is mistaken. The complaint includes no facts or assertions that would support such a claim. Similarly, although Plaintiff suggests that this claim may include a "false advertising" claim under section 17500, the court can find no facts (such as an allegation of any advertising or marketing) or legal assertions anywhere in the complaint that would support such a claim. Because Plaintiff has not requested leave to amend or stated what facts Plaintiff could allege to remedy the foregoing deficiencies, the demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND** as to the second cause of action.

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Order

Plaintiff's claim under the CLRA incorporates the facts pleaded as to the Proposition 65 and UCL actions, and concludes that "the above-referenced conduct violates Civil Code section 1770, subdivision (a)(5), (7) and (9). (Compl. paras. 23-24.) Subdivision (a)(5), in pertinent part, prohibits a person from representing that a good has characteristics or ingredients that it does not have; the complaint does not make any factual allegation that would support this claim. Subdivision (a)(7) essentially prohibits a person from representing that a good is of a particular standard, quality or grade, if it is of another; the complaint does not contain any facts showing such a representation, either (and to the extent that the CLRA claim is for deceit, under the facts alleged, the only legal obligation to disclose that the products are of a particular standard, quality or grade would derive from the contention that exposure exceeded that permitted in Proposition 65, triggering a warning requirement, and that claim has been settled). Subdivision (a)(9) concerns false advertising; as noted above, the complaint contains no allegations regarding advertising or marketing conduct by the defendant.

Plaintiff suggests that the CLRA claim survives because it is sufficient that she alleges that, had she known that the product she purchased contained Cocamide DEA, she would not have purchased it. (Compl. para. 20.) However, Plaintiff does not plead any facts to support this general allegation that there was a failure to disclose that the contents included Cocamide DEA; she has only pleaded that there was no "clear and reasonable warning" under Proposition 65. Because Proposition 65's warning requirement demands more than merely including a listed substance on the ingredients panel, the alleged failure to provide such a warning is not the equivalent, at least for pleading purposes, to pleading facts that Defendant concealed the contents of the product.

Because Plaintiff has not requested leave to amend or stated what facts Plaintiff could allege to remedy the foregoing deficiencies, the demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND** as to the third cause of action.

Based upon the foregoing, the complaint is **DISMISSED**.

Dated: 07/22/2014

A handwritten signature in black ink, appearing to read "George C. Hernandez, Jr.", with the word "facsimile" written in a smaller font above the signature.

Judge George C. Hernandez, Jr.

SHORT TITLE:

PROPOSITION 65 COCAMIDE DEA CASES

CASE NUMBER:

JCCP004765

ADDITIONAL ADDRESSEES

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Superior Court of California, County of Alameda  
Rene C. Davidson Alameda County Courthouse

Case Number: JCCP004765  
Order After Hearing Re: of 07/22/2014

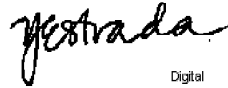
**DECLARATION OF SERVICE BY MAIL**

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 07/23/2014.

Executive Officer / Clerk of the Superior Court

By



Digital

Deputy Clerk