

in the labeling thereof, or under such conditions of use as are customary or usual...” 21 U.S.C. § 361(a).

58. A cosmetic shall be deemed to be misbranded if its labeling is false or misleading in any particular. 21 U.S.C. § 362 (a).

59. FDA guidance permits up to 2 ppm benzene in a product if its use in the manufacturing process is “unavoidable.”⁴²

60. In cosmetic products, the FDA has announced recalls of various products contaminated with benzene, including other dry shampoos⁴³.

61. Moreover, because dry shampoos are cosmetics and not drugs, they contain no active pharmaceutical ingredient for therapeutic purpose which might create an exception to the presence of benzene.

62. Regardless, Defendant’s Product contains levels of benzene above 2 ppm, including, in some cases, **more than 17 times** that limit.⁴⁴

63. Defendant could have avoided any potential for benzene contamination in the Product by changing the manufacturing process or raw ingredients, and the Product could have been sold with absolutely no benzene in them.

64. The mere presence of benzene renders the Products both adulterated and misbranded under the FDCA. The Product is adulterated because they “contains [a] poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof.” 21 U.S.C. § 361(a).

⁴² *Valisure Citizen Petition, supra.*

⁴³ Food and Drug Administration. *P&G Issues Voluntary Recall of Aerosol Dry Conditioner Spray Products and Aerosol Dry Shampoo Spray Products* (December 17, 2021) (<https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts/pg-issues-voluntary-recall-aerosol-dry-conditioner-spray-products-and-aerosol-dry-shampoo-spray>)

⁴⁴ *Valisure Citizen Petition, supra.*

65. The Product is misbranded because its labeling is “false” and “misleading” because it does not disclose the presence of benzene. 21 U.S.C. § 362(a).

66. A product that is “adulterated” or “misbranded” cannot legally be manufactured, advertised, distributed, or sold. 21 U.S.C. § 331(a). Adulterated and misbranded products thus have no economic value and are legally worthless.

67. The Illinois Food, Drug and Cosmetic Act (“IL FDCA”) has expressly adopted the federal labeling requirements as its own. The definition of “adulterated” as defined by 410 ILCS 620/14 is exactly the same as the FD&C Act.

68. As alleged herein, Defendant has violated the FDCA, the IL FDCA, the Illinois Consumer Fraud and Deceptive Trade Practices Act (“ICFA”), and various state consumer protection statutes. Defendant engaged in fraudulent, unfair, deceptive, misleading, and/or unlawful conduct stemming from its misrepresentations and omissions surrounding benzene contamination affecting the Product.

69. If Defendant had disclosed to Plaintiff and putative Class Members that the Product contained or risked containing benzene and thus risked users to benzene exposure, Plaintiff and putative Class Members would not have purchased the Product or they would have paid less for the Product.

70. As a seller of a cosmetic, Defendant had and has a duty to ensure that its Product did not and do not contain excessive (or any) level of benzene, including through regular testing, especially before injecting the Product into the stream of commerce for consumers to use on their hair and scalp. But based on Valisure’s testing results set forth above, Defendant made no reasonable effort to test its Product for benzene. Nor did it disclose to Plaintiff in any advertising or marketing that its dry shampoo contained benzene, let alone at levels that are many multiples

of the emergency, interim limit set by the FDA. To the contrary, Defendant represented and warranted, expressly and impliedly, that the Product was of merchantable quality, complied with federal and state law, and did not contain carcinogens or other impurities such as benzene.

VII. Defendant’s Knowledge, Misrepresentations, Omissions, and Concealment of Material Facts Deceived Plaintiff and Reasonable Consumers

71. The Product contains isobutane and propane as a propellant.

72. Aerosols typically contain volatile hydrocarbons, like butane or isobutane, as propellants. These propellants are derived from crude oil and manufactured in oil refineries where a variety of other hydrocarbons, including benzene, are produced.

73. Because the chemicals are derived from the same sources in the same facilities, there is high potential for benzene contamination in the processing of isobutane.

74. Manufacturing companies that work with isobutane understand the risks of benzene contamination.⁴⁵

75. Defendant, a large, sophisticated corporation in the business of manufacturing, distributing, and selling products containing aerosol propellants such as isobutane, knew or should have known of the risks of benzene contamination.

76. Defendant’s use of isobutane as a propellant therefore put them on notice of the risk of benzene contamination in the Products.

77. Defendant sold, and continue to sell, dry shampoo products containing isobutane during the class period despite Defendant’s knowledge of the risk of benzene contamination.

⁴⁵ See, e.g., *Butane Safety Data Sheet*, Whiting, <https://whiting.com/wp-content/uploads/Butane-SDS.pdf> (last updated Oct. 30, 2013) (“MAY CONTAIN TRACE AMOUNTS OF BENZENE WHICH CAN CAUSE CANCER OR BE TOXIC TO BLOOD-FORMING ORGANS.”).

78. Federal and state regulatory regimes require that cosmetics marketed on a retail basis to consumers contain a list of ingredients.⁴⁶ Failure to comply with this requirement renders a cosmetic misbranded under the FD&C Act.

79. Benzene is not listed on the Product's label as an ingredient, nor is there any warning about the inclusion (or even potential inclusion) of benzene in the Product.

80. Defendant has engaged in deceptive, untrue, and misleading advertising by making representations by failing to warn about the potential presence of benzene in the Product, and nothing on the Product's labels otherwise insinuate, state, or warn that the Product contains benzene.

81. The presence of benzene in the Product renders the Product misbranded and adulterated and therefore illegal and unfit for sale in trade or commerce. Plaintiff would not have purchased the Product had they been truthfully and accurately labeled.

82. Had Defendant adequately tested its Product for benzene and other carcinogens and impurities, it would have discovered that its Product contained benzene – even at levels above the FDA's limit (to the extent even applicable), making the Product illegal to distribute, market, and sell.

83. Defendant also knew or should have known about the carcinogenic potential of benzene because it is classified as a Group 1 compound by the World Health Organization and the International Agency for Research on Cancer, meaning that it is “carcinogenic to humans.”⁴⁷

⁴⁶ See 21 C.F.R. § 701.3

⁴⁷ <https://monographs.iarc.who.int/list-of-classifications> (last visited Aug. 18, 2022).

84. Accordingly, Defendant knowingly, recklessly, or at least negligently, introduced a contaminated, adulterated, and misbranded Product containing or risked containing dangerous amounts of benzene into the U.S. market.

85. By marketing and selling its body spray products in the stream of commerce with the intent that its Product would be purchased by Plaintiff and Class Members, Defendant warrants that the Product is safe to use rather than adulterated body sprays containing a dangerous, cancer-causing chemical.

86. Defendant did not disclose the actual or potential presence of benzene in its dry shampoo products on the Product's labeling, advertising, marketing, or sale of the Product.

87. Defendant's concealment was material and intentional because people are concerned with what is in the products that they are putting onto and into their bodies. Consumers such as Plaintiff and Class members make purchasing decisions based on the representations made on the Product's labeling, including the ingredients listed.

88. Defendant knows that if it had not omitted that the Product contained benzene, then Plaintiff and Class members would not have purchased the Product.

VIII. Injuries to Plaintiff and Class Members

89. When Plaintiff purchased Defendant's Product, Plaintiff did not know, and had no reason to know, that Defendant's Product contained or risked containing the harmful carcinogen benzene. Not only would Plaintiff not have purchased Defendant's Products had they known the Product contained benzene, but they would also not have been capable of purchasing them if Defendant had done as the law required and tested the Product for benzene and other carcinogens and impurities.

90. Consumers lack the ability to test or independently ascertain or verify whether a product contains unsafe substances, such as benzene, especially at the point of sale, and therefore must and rely on Defendant to truthfully and honestly report what the Product contains on the Product's packaging or labels.

91. Further, given Paul Mitchell's position as a leader in the hair care industry, Plaintiff and reasonable consumers trusted and relied on Defendant's representations and omissions regarding the presence of benzene in the Product.

92. Yet, when consumers look at the Product's packaging, there is no mention of benzene. It is not listed in the ingredients section, nor is there any warning about the inclusion (or even potential inclusion) of benzene in the Product. This leads reasonable consumers to believe the Product does not contain benzene. Indeed, these expectations are reasonable because if the Products are manufactured properly, benzene will not be present in the Product.

93. No reasonable consumer would have paid any amount for products containing benzene, a known carcinogen and reproductive toxin, much less above the limits set by the FDA (which do not even apply to Defendant's Product).

94. Thus, if Plaintiff and Class members had been informed that Defendant's Product contained or may contain benzene, they would not have purchased or used the Product, or would have paid significantly less for the Product, making such omitted facts material to them.

95. Defendant's false, misleading, omissions, and deceptive misrepresentations regarding the presence of benzene in the Product are likely to continue to deceive and mislead reasonable consumers and the public, as it has already deceived and misled Plaintiff and the Class Members.

96. Plaintiff and Class members bargained for a dry shampoo product free of contaminants and dangerous substances. Plaintiff and Class members were injured by the full purchase price of the Product because the Product is worthless, as it is adulterated and contains harmful levels of benzene—or at risk of containing the same—and Defendant failed to warn consumers of this fact. Such illegally sold products are worthless and have no value.

97. As alleged above, Plaintiff and Class members' Products either contained benzene or were at significant risk of containing the same.

98. Plaintiff and Class members are further entitled to statutory and punitive damages, attorneys' fees and costs, and any further relief this Court deems just and proper.

CLASS ALLEGATIONS

99. Plaintiff, individually and on behalf of all others, bring this class action pursuant to Fed. R. Civ. P. 23.

100. Plaintiff seeks to represent a class defined as:

All persons who purchased the Product in the United States for personal or household use within any applicable limitations period ("Nationwide Class").

101. Plaintiff also seeks to represent a subclass defined as:

All persons who purchased the Product in Illinois for personal or household use within any applicable limitations period ("Illinois Subclass").

102. Plaintiff also seeks to represent a subclass defined as:

All persons who purchased one or more of Defendant's Products in the States of California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, or Washington for personal or household use within any applicable limitations period ("Consumer Fraud Multi-State Subclass").⁴⁸

⁴⁸ While discovery may alter the following, the states in the Consumer Fraud Multi-State Class are limited to those states with similar consumer fraud laws under the facts of this case: California (Cal. Bus. & Prof. Code § 17200, *et*

103. Excluded from the Class and Subclasses are: (1) any Judge or Magistrate presiding over this action and any members of their families; (2) Defendant, Defendant's subsidiaries, parents, successors, predecessors, and any entities in which Defendant or its parents and any entities in which Defendant has a controlling interest and its current or former employees, officers, and directors; and (3) individuals who allege personal bodily injury resulting from the use of the Products.

104. Plaintiff reserves the right to modify, change, or expand the definitions of the Class based upon discovery and further investigation.

105. *Numerosity*: The Class is so numerous that joinder of all members is impracticable. The Class likely contains thousands of members based on publicly available data. The Class is ascertainable by records in Defendant's possession.

106. *Commonality*: Questions of law or fact common to the Class include, without limitation:

- a. Whether the Product contains benzene;
- b. Whether a reasonable consumer would consider the presence of benzene in the Product to be material;
- c. Whether Defendant knew or should have known that the Product contains benzene;
- d. Whether Defendant misrepresented whether the Product contains benzene;
- e. Whether Defendant failed to disclose that the Product contains benzene;
- f. Whether Defendant concealed that the Product contains benzene;

seq.); Florida (Fla. Stat. § 501.201, *et seq.*); Illinois (815 Ill. Comp. Stat. 505/1, *et seq.*); Massachusetts (Mass. Gen. Laws Ch. 93A, *et seq.*); Michigan (Mich. Comp. Laws § 445.901, *et seq.*); Minnesota (Minn. Stat. § 325F.67, *et seq.*); Missouri (Mo. Rev. Stat. § 407.010, *et seq.*); New Jersey (N.J. Stat. § 56:8-1, *et seq.*); New York (N.Y. Gen. Bus. Law §§ 349 and 350); and Washington (Wash. Rev. Code § 19.86.010, *et seq.*).

- g. Whether Defendant engaged in unfair or deceptive trade practices;
- h. Whether Defendant violated the state consumer protection statutes alleged herein;
- i. Whether Defendant was unjustly enriched; and
- j. Whether Plaintiff and Class members are entitled to damages.

107. *Typicality*: Plaintiff's claims are typical of the claims of Class members. Plaintiff and Class members were injured and suffered damages in substantially the same manner, have the same claims against Defendant relating to the same course of conduct, and are entitled to relief under the same legal theories.

108. *Adequacy*: Plaintiff will fairly and adequately protect the interests of the Class and have no interests antagonistic to those of the Class. Plaintiff has retained counsel experienced in the prosecution of complex class actions, including actions with issues, claims, and defenses similar to the present case. Counsel intends to vigorously prosecute this action.

109. *Predominance and superiority*: Questions of law or fact common to Class members predominate over any questions affecting individual members. A class action is superior to other available methods for the fair and efficient adjudication of this case because individual joinder of all Class members is impracticable and the amount at issue for each Class member would not justify the cost of litigating individual claims. Should individual Class members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single court. Plaintiff is unaware of any difficulties that are likely

to be encountered in the management of this action that would preclude its maintenance as a class action.

110. Accordingly, this class action may be maintained pursuant to Fed. R. Civ. P. 23(b)(3).

CAUSES OF ACTION

COUNT I
VIOLATIONS OF STATE CONSUMER FRAUD ACTS
(On behalf of Plaintiff and the Consumer Fraud Multi-State Subclass)

111. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

112. Plaintiff brings this Count on behalf of herself and the Consumer Fraud Multi-State Subclass against Defendant.

113. The Consumer Fraud Acts of the States in the Consumer Fraud Multi-State Subclass prohibit the use of unfair or deceptive business practices in the conduct of trade or commerce.

114. Plaintiff and the other Members of the Consumer Fraud Multi-State Subclass have standing to pursue a cause of action for violation of the Consumer Fraud Acts of the states in the Consumer Fraud Multi-State Subclass because Plaintiff and Members of the Consumer Fraud Multi-State Subclass have suffered an injury in fact and lost money as a result of Defendant's actions set forth herein.

115. Defendant engaged in unfair and/or deceptive conduct by making material misrepresentations and omissions regarding the presence of benzene in the Product, as discussed herein.

116. Defendant intended that Plaintiff and each of the other Members of the Consumer Fraud Multi-State Subclass would rely upon its unfair and deceptive conduct and a reasonable person would in fact be misled by this deceptive conduct described above.

117. Given Defendant's position in the hair care market as an industry leader, Plaintiff and reasonable consumers, trusted and relied on Defendant's representations and omissions regarding the presence of benzene in the Product.

118. As a result of Defendant's use or employment of unfair or deceptive acts or business practices, Plaintiff and each of the other Members of the Consumer Fraud Multi-State Subclass have sustained damages in an amount to be proven at trial.

119. In addition, Defendant's conduct showed malice, motive, and the reckless disregard of the truth such that an award of punitive damages is appropriate.

COUNT II
**VIOLATIONS OF THE ILLINOIS CONSUMER FRAUD AND
DECEPTIVE TRADE PRACTICES ACT**
815 ILCS 505/1, *et seq.*
(On behalf of Plaintiff and the Illinois Subclass)

120. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

121. Plaintiff brings this Count on behalf of herself and the Illinois Subclass against Defendant.

122. Plaintiff and other Class Members are persons within the context of the Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFA"), 815 ILCS 505/1(c).

123. Defendant is a person within the context of the ICFA, 815 ILCS 505/1(c).

124. At all times relevant hereto, Defendant was engaged in trade or commerce as defined under the ICFA, 815 ILCS 505/1(f).

