

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,
by ANDREW M. CUOMO, Attorney General of the State
of New York,

Petitioner,

- against-

CVS CORPORATION,

Respondent.
-----X

VERIFIED PETITION

Index No. _____

IAS Part _____

Assigned to Justice _____

The People of the State of New York, by their attorney, ANDREW M. CUOMO,
Attorney General of the State of New York, respectfully allege, upon information and belief:

PARTIES AND JURISDICTION

1. Petitioner is the People of the State of New York, by their attorney, Andrew M. Cuomo, Attorney General of the State of New York.
2. Petitioner brings this special proceeding pursuant to Executive Law § 63(12) to enjoin respondents from engaging in repeated illegal acts and practices in connection with their sale of over-the-counter ("OTC") drugs, infant formula, milk and eggs after the expiration dates printed on their packaging (hereinafter "Expired Products"). Executive Law § 63(12) empowers the Attorney General to seek injunctive relief, restitution, damages and costs when any person or business entity has engaged in or otherwise demonstrated repeated or persistent fraudulent or illegal acts in the transaction of business.
3. Respondent CVS Corporation ("CVS"), by selling Expired Products, engaged in various acts, practices, and omissions that violated Executive Law § 63(12) and General Business Law ("GBL") § 820, as well as federal and local New York laws including 21 U.S.C. §§ 331,

342, 350a and 21 C.F.R. 107.20, New York City Health Code § 111.33, Westchester County Consumer Protection Code, Article IV, Section 863.91.8, and Regulatory Local Laws of Suffolk County, Chapter 301, Article I, Section 301-4.

4. Respondent CVS is a corporation located in Woonsocket, Rhode Island. CVS operates 428 retail stores and pharmacies in New York State offering for sale and selling pharmaceutical and other products.

FACTS

5. In the regular course of its business, CVS stocks and sells, among other things, OTC drugs, infant formula, milk and eggs for sale to the general public.

6. In 2003, an investigation conducted by the State of New York Office of the Attorney General (hereinafter "OAG") revealed that CVS had held for sale and sold various OTC drugs on dates after the expiration dates printed on their packaging. CVS resolved the OAG's investigation by entering into an Assurance of Discontinuance with the OAG (hereinafter "the 2003 Assurance") under which it agreed to refrain from selling expired OTC drugs and to implement safeguards to prevent their sale in the future. These safeguards included instituting procedures to ensure that OTC drugs were identified and removed from CVS stores and directing and training employees involved in stocking of OTC drugs in these procedures. The 2003 Assurance further provided, consistent with Executive Law § 63(15), "evidence of a violation of this Assurance shall constitute *prima facie* proof of a violation of the applicable statutes in any civil action or proceeding hereinafter commenced by the Attorney General."

7. Based upon evidence that CVS had sold certain Expired Products from retail stores located in the State of New York, the OAG instituted a full-scale, statewide undercover

investigation of CVS during the period from March through May 2008. As part of the investigation, OAG investigators visited a sampling of CVS stores located throughout the State of New York, checked the expiration dates of OTC drugs, infant formula, milk and eggs on the CVS store shelves, and bought certain of the Expired Products found on the shelves.

8. Despite the commitments CVS made in the 2003 Assurance, the OAG's investigation uncovered that 61% of the CVS stores visited were selling Expired Products, representing over 140 CVS stores statewide. CVS's sales of expired OTC drugs at 88 of these stores blatantly violated the explicit provision in the 2003 Assurance that CVS "shall refrain from selling or offering for sale over-the-counter medicines after the expiration dates listed on the products' packaging" and thus constitutes *prima facie* proof of CVS' violation of GBL § 820 and Executive Law § 63(12) in this proceeding. In several cases, the Expired Products were more than two years past their expiration dates (*i.e.*, as early as March of 2006).¹

9. Once an OTC drug has passed its expiration date, there is no assurance that it is safe and effective. Indeed, the use of expired OTC drugs may have serious consequences. For example, children's liquid medicine can evaporate over time, causing children to receive adult doses, and aspirin can lose its potency, which may critically impact adults with heart disease who take daily aspirin as a blood thinner.

10. Likewise, expired infant formula poses dangers to infant development because expired formula may not provide the nutrient levels required under Section 350a(a)(i) of the

¹ During this same time period, CVS took out a full-page advertisement in the May 2008 issue of Good Housekeeping Magazine urging customers to remove expired products from their home and stating, "[e]xpired products are not just ineffective but can be harmful as well." The same advertisement offered coupons to consumers to be used at CVS to "replace some of the products you tossed."

Federal Food, Drug and Cosmetic Act. See 21 U.S.C. § 350a(a)(i). When infant formula does not meet certain nutrient and quality factor requirements prescribed by the Federal Food, Drug and Cosmetic Act, such infant formula is deemed “adulterated” and therefore prohibited from interstate commerce. In a 1999 Notice to Retailers, the FDA explicitly stated that:

An infant formula that has passed its ‘use by’ date may not provide the nutrient levels required under the Federal Food, Drug and Cosmetic Act (the act). A formula that does not provide the nutrient levels required under the act would be adulterated and subject to seizure by the FDA. *Therefore, a retailer should not offer for sale any infant formula that has passed its ‘use by’ date. Such formula should be pulled off the retail shelf.* (emphasis added)

The International Formula Council, an international association of manufacturers and marketers of infant formula, recognizes that vitamin levels decrease after the expiration date, and encourages stores such as CVS not to sell outdated infant formula.

11. Milk and egg products are date-stamped to help consumers purchase products before bacterial growth and decomposition lead to spoilage and nutritional deterioration. Time and temperature are critical components for maintaining food safety. The probability of spoilage increases as milk and egg products are sold past their expiration or sell-by dates. This is particularly true in New York City, which provides less time in which milk products may be sold beyond their packaging, because of the increased likelihood that the product has not been maintained at proper temperatures during delivery and storage.

12. On June 12, 2008, the OAG sent a five-day notice letter to CVS, as required by Exec. Law § 63(12), providing notice of the OAG’s intent to commence litigation against CVS for its repeated sales of Expired Products. In response, CVS publicly announced the same day, “We will work aggressively to ensure that our review and removal procedures are followed consistently in all our stores. We value the trust our customers have placed in us to sell them

products that are safe and effective, and the findings of New York's attorney general are unacceptable to us."

13. Between June 16 and 18, 2008, the OAG again sent investigators to a sampling of CVS stores statewide to determine whether Expired Products were being removed from CVS store shelves consistent with CVS' publicly announced statements. Yet, despite CVS' public pledge to purge its stores of expired goods, a three-day statewide investigation commenced by the OAG on June 16, 2008 discovered that twelve out of twenty-four, or 50%, of CVS stores in the New York City area continued to sell Expired Products, including many products that expired in 2007. Twenty-two of the fifty-six CVS stores inspected throughout New York State, or 39%, sold Expired Products. These results were clearly inconsistent with CVS' representations to the public.

14. CVS' failure to take steps to ensure its customers are purchasing safe and effective products is not limited to New York, but instead appears to represent a nationwide course of action. In addition to the OAG's investigation, investigations conducted by the California Attorney General's Office and the Fairfield, Pennsylvania Department of Health uncovered expired products, including infant formula, OTC drugs and baby food, offered for sale at CVS stores during similar time periods. On June 19, 2008, the California Attorney General's office announced that its recent investigation into CVS' sales practices discovered 48 expired products on CVS shelves in three counties. In March 2008, inspectors for the Fairfield Department of Health in Pennsylvania found 100 expired baby food items at six CVS stores. The widespread nature of these violations indicates that CVS has not taken seriously its legal obligations or its responsibilities to its consumers vis-a-vis the sale of Expired Products.

FIRST CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW § 63(12)
VIOLATIONS OF GBL § 820

15. GBL § 820 prohibits retailers from knowingly selling or offering for sale any expired OTC drug.

16. As alleged above, between March and May 2008, respondent sold expired OTC cold, pain and allergy medicines at numerous CVS stores statewide. In some cases, these items were more than two years past their expiration dates (*i.e.*, as early as March of 2006).

17. Between June 16 and June 18, 2008, respondent continued to sell expired OTC cold, pain and allergy medicines at numerous CVS stores statewide.

18. By its sales of expired OTC drugs, respondent has violated GBL § 820 and the 2003 Assurance. Pursuant to Executive Law § 63(15), respondent's violation of the 2003 Assurance constitutes *prima facie* proof of its violation of GBL § 820.

19. By its actions in violation of GBL § 820, respondent has engaged in repeated and persistent illegal conduct in violation of Executive Law § 63(12).

SECOND CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW § 63(12)
VIOLATIONS OF 21 U.S.C. §§ 331, 342, 350a AND 21 C.F.R. 107.20

20. The introduction or delivery for introduction into interstate commerce of any adulterated food and/or infant formula is prohibited by 21 U.S.C. §§ 331, 342, 350a and 21 C.F.R. 107.20. For purposes of the aforementioned statute and regulation, food is considered adulterated if a valuable component in whole or in part has been omitted or abstracted. Infant formula is considered adulterated if it does not meet specified nutrient and quality factor requirements, which may occur when it is sold after its "use by" date.

21. As alleged above, respondent engaged in repeated sales of expired milk, eggs and infant formula in violation of 21 U.S.C. §§ 331, 342, 350a and 21 C.F.R. 107.20.

22. By its actions in violation of 21 U.S.C. §§ 331, 342, 350a and 21 C.F.R. 107.20, respondent has engaged in repeated and persistent illegal conduct in violation of Executive Law § 63(12).

THIRD CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW § 63(12)
VIOLATIONS OF NEW YORK CITY HEALTH CODE § 111.33

23. New York City Health Code § 111.33 prohibits the offer for sale or sale of milk beyond its expiration date.

24. As alleged above, respondent engaged in repeated sales of expired milk.

25. By its sales of expired milk at CVS stores in New York City, respondent has violated New York City Health Code § 111.33.

26. By its actions in violation of New York City Health Code § 111.33, respondent has engaged in repeated and persistent illegal conduct in violation of Executive Law § 63(12).

FOURTH CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW § 63(12)
VIOLATIONS OF WESTCHESTER COUNTY CONSUMER PROTECTION CODE, ARTICLE
IV, SECTION 863.91.8

28. Westchester County Consumer Protection Code, Article IV, Section 863.91.8 prohibits the sale or offer for sale of any milk product or perishable foods sold in containers after the date marked as the final date of sale.

29. As alleged above, respondent engaged in repeated sales of expired milk and eggs.

30. By its sales of expired milk and eggs at CVS stores in Westchester County,

respondent has violated Westchester County Consumer Protection Code, Article IV, Section 863.91.8.

31. By its actions in violation of Westchester County Consumer Protection Code, Article IV, Section 863.91.8, respondent has engaged in repeated and persistent illegal conduct in violation of Executive Law § 63(12).

FIFTH CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW § 63(12)
VIOLATIONS OF REGULATORY LOCAL LAWS OF SUFFOLK COUNTY, CHAPTER 301,
ARTICLE I, SECTION 301-4.

32. Regulatory Local Laws of Suffolk County, Chapter 301, Article I, Section 301-4 prohibits the sale of foodstuffs sold past their perishable date unless they are sold in a separate section of the establishment and the items are clearly marked as outdated perishable products.

33. As alleged above, respondent engaged in the repeated sale of expired milk and eggs, none of which were sold in a separate section of the CVS stores nor clearly marked as outdated.

34. Respondent's sales of expired milk and eggs at CVS stores in Suffolk County are in violation of Regulatory Local Laws of Suffolk County, Chapter 301, Article I, Section 301-4.

35. By its actions in violation of Regulatory Local Laws of Suffolk County, Chapter 301, Article I, Section 301-4, respondent has engaged in repeated and persistent illegal conduct in violation of Executive Law § 63(12).

WHEREFORE, petitioner requests an order and judgment pursuant to Executive Law § 63(12):

1. Permanently enjoining respondent from violating Executive Law § 63(12), GBL §

820, 21 U.S.C. §§ 331, 342, 350a and 21 C.F.R. 107.20, New York City Health Code § 111.33, Westchester County Consumer Protection Code, Article IV, Section 863.91, and Regulatory Local Laws of Suffolk County, Chapter 301, Article I, Section 301-4 and from engaging in the illegal acts and practices alleged in the Verified Petition;

2. Directing respondent to within two weeks inspect and remove all Expired Products from its store shelves throughout the State of New York and provide certification to the OAG from a corporate senior-level employee that it has done so and, further, if CVS is unable to provide the aforementioned certification within the two-week period, prohibit CVS from selling any retail product in its stores throughout New York State until such certification is provided to the OAG;

3. Directing respondent to institute enhanced training and compliance procedures and systems in CVS stores throughout the State of New York to ensure that Expired Products are not displayed on store shelves, offered for sale or sold;

4. Directing respondent to retain a permanent independent monitor to perform monthly, randomized compliance checks at CVS stores throughout the State of New York to ensure that Expired Products are not displayed on store shelves, offered for sale or sold;

5. Directing respondent to post signs at the entrance, exit and each check-out counter of each and every CVS store throughout the State of New York and on its website, www.CVS.com, which clearly and prominently inform CVS customers that they are entitled to a full refund of the purchase price or an exchange for each and every Expired Product purchased at any CVS store throughout the State of New York and which warn CVS customers of the health and safety risks of Expired Products;

6. Directing respondent to make full monetary restitution to all consumers who purchased Expired Products during the period of December 4, 2002 through the present;
7. Directing respondent to disgorge all revenues illegally obtained from the sale of Expired Products commencing from December 4, 2002 in order to effectuate justice;
8. Directing respondent to pay a civil penalty to the State of New York in the sum of \$500.00 for each and every violation of GBL § 820, pursuant to GBL § 821;
9. Directing respondent to provide an accounting relevant to restitution, disgorgement and penalties, including a full accounting of: (a) every Expired Product offered for sale and/or sold by CVS during the period from December 4, 2002 through the present; (b) every Expired Product removed from CVS store shelves throughout New York State during the period from June 12, 2008 through the present; and (c) the names and addresses of consumers who purchased Expired Products during the period from December 4, 2002 through the present and the amount of money, if any, refunded to each of them;
10. Awarding petitioner the costs of this proceeding, including additional costs of two thousand dollars pursuant to CPLR § 8303(a)(6);
11. Granting such other and further relief as the Court deems just and proper.

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LAURA J. LEVINE, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Andrew M. Cuomo, Attorney General of the State of New York, and am duly authorized to make this verification.

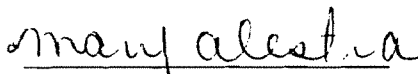
I have read the foregoing petition and know the contents thereof, which are to my knowledge true, except as to matters stated to be alleged on information and belief, and as to those matters, I believe them to be true. The grounds of my belief as to all matters stated upon information and belief are investigative materials contained in the files of the Attorney General's office.

The reason this verification is not made by petitioner is that petitioner is a body politic and the Attorney General is its duly authorized representative.



LAURA J. LEVINE

Sworn to before me this
4th day of December, 2008



Assistant Attorney General