

DEC 22 2011

By

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF YOLO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

FLEMING PHARMACEUTICALS,
a Missouri Corporation

Defendant.

NO. CV11-2793

**COMPLAINT FOR
INJUNCTION, CIVIL
PENALTIES, AND OTHER
RELIEF**

JEFF W. REISIG, District Attorney of Yolo County, by LAWRENCE BARLLY, Deputy
District Attorney; and JAN SCULLY, District Attorney for the County of Sacramento, by Deputy
District Attorney RUTH YOUNG; acting on information and belief, allege:

JURISDICTION AND VENUE

1. Acting to protect the general public from untrue and misleading representations
and unlawful business practices, plaintiffs brings this suit in the name of THE PEOPLE OF THE
STATE OF CALIFORNIA. Plaintiffs, by this action and pursuant to Business and Professions
Code sections 17200, 17203, 17204, 17205, 17206, 17500, 17535 and 17536, seek to enjoin
defendant from engaging in unfair and unlawful business practices as alleged herein and seek to

1 obtain civil penalties and remedies for the defendant's violation of the above statutes, and seek to
2 recover its costs and cost of investigation pursuant Business and Professions Code section
3 12015.5.

4 2. At all times mentioned herein, defendant has transacted business and committed
5 violations of law as hereinafter described within the Counties of Sacramento and Yolo, and
6 within the State of California.

7 **DEFENDANT**

8 3. Defendant, FLEMING PHARMACEUTICALS is, and was at all times mentioned
9 herein, a Missouri corporation, with its principal offices located at 1733 Gilsinn Lane, Fenton,
10 Missouri 63026

11 4. At all times herein mentioned in this Complaint, defendant has been, and is
12 engaged in the business of manufacturing, and/or packaging, and/or distributing, saline nose
13 sprays, which are offered for sale to California consumers.

14 5. When reference is made to any act or omission of defendant or its officers, agents
15 or employees, such allegations shall be deemed to mean that the officers, directors, employees or
16 representatives of defendant did, or authorized, such act while engaged in the management,
17 direction, representation or control of the affairs of said defendant, and did so while acting within
18 the course and scope of their duties.

19 **FIRST CAUSE OF ACTION**

20 **UNTRUE OR MISLEADING STATEMENTS**
21 **(Business and Professions Code section 17500)**

22 6. Plaintiff incorporates paragraphs 1 through 5 of this Complaint herein by
23 reference.

24 7. Beginning on an exact date unknown to the plaintiff, but at least within three (3)
25 years prior to the date of filing of this Complaint, defendant, with the intent to induce members
26 of the general public to purchase its "Ocean Saline Premium Saline Nose Spray" product
27 (hereinafter "product" or "products") made, or caused to be made, representations to the public
28 which were untrue and misleading. Said untrue or misleading statements, which are unlawful

1 under Business and Professions Code section 17500, included, but were not limited to,
2 advertizing and packaging of products in containers which had:

3 (A) a void space not visible by consumers, referred to as "nonfunctional slack
4 fill." This nonfunctional slack fill packaging, when displayed for sale to
5 the public of the State of California, caused false representations to the
6 public by implying that defendant's products filled the entire package, or

7 (B) false sidewalls or were otherwise so constructed as to facilitate the
8 perpetration of deception or fraud which, when displayed for sale to the
9 public of the State of California, caused false representations by implying
10 that defendant's products filled the entire package.

11 8. The representations and statements made by defendant, as set forth in the
12 paragraphs above, and as demonstrated in the photograph attached hereto as Exhibit 1, were
13 untrue or misleading when made, and were known, or should have been known, by defendant to
14 be untrue or misleading.

15 9. Unless enjoined by order of this court, defendant will retain the ability to and
16 could make untrue or misleading statements in violation of Business and Professions Code
17 section 17500.

18 **SECOND CAUSE OF ACTION**
19 **UNFAIR COMPETITION**

20 **(Business and Professions Code section 17200)**

21 10. Plaintiff re-alleges and incorporates herein by reference all allegations contained
22 in paragraphs 1 through 9 inclusive, of this Complaint.

23 11. Beginning on an exact date unknown to plaintiff, but at least within four (4) years
24 prior to the filing of this Complaint, defendant engaged in unlawful acts or practices in the
25 conduct of its business, which acts or practices constituted unfair competition within the meaning
26 of section 17200 of the Business and Professions Code, and which included, but are not limited
27 to:
28

1 (A) Defendant made, or caused to be made, untrue or misleading
2 representations regarding the packaging of its products as more fully
3 described in paragraph 7 above, in violation of Business and Professions
4 Code section 17500.

5 (B) Defendant violated section 12602 of the Business and Professions Code,
6 in that defendant packaged its products in non-conforming type packages.
7 Said non-conforming packages contained extra space by volume in the
8 interior of the package. The extra space provided no benefit to the
9 contents of the packaging and misled consumers.

10 (C) Defendant violated section 12606(a) of the California Business and
11 Professions Code, in that defendant packaged its products in containers
12 that had false sidewalls or were otherwise so constructed or filled, wholly
13 or partially, so as to facilitate the perpetration of deception or fraud.

14 (D) Defendant violated section 12606(b) of the California Business and
15 Professions Code, in that defendant packaged its products in containers
16 made, formed, or filled as to be misleading to a potential customer as to
17 the actual size and filling of the package with defendant's products.

18 12. The conduct of defendant as set forth above demonstrates the necessity for
19 granting injunctive relief restraining such and similar acts of unfair competition pursuant to
20 California Business and Professions Code section 17203 and 17535. Unless enjoined and
21 restrained by order of the court, defendant will retain the ability to, and may engage in, said acts
22 of unfair competition, and misleading advertising.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT AS FOLLOWS:

25 1. Pursuant to California Business & Professions Code sections 17204 and 17535,
26 defendant and its officers, directors, agents, employees, representatives, and all persons acting in
27 concert or participating with it, with actual or constructive notice of this injunction, be
28

1 permanently enjoined and restrained from engaging in the following acts while advertising or
2 attempting to sell its products as set forth above:

- 3 (A) Making any oral or written representations in violation of California
4 Business and Professions Code section 17500 including, but not limited to,
5 those acts set forth in the first cause of action of this complaint.
6 (B) Engaging in any business practices in violation of California Business and
7 Professions Code section 17200 including, but not limited to, those acts
8 set forth in the second cause of action of this complaint.

9 2. Defendant herein be assessed a civil penalty of Two Thousand Five Hundred
10 Dollars (\$2,500) for each act of false or misleading advertising engaged in, in violation of
11 California Business and Professions Code section 17500 as provided in section 17536.

12 3. Defendant herein be assessed a civil penalty of Two Thousand Five Hundred
13 Dollars (\$2,500) for each act of unlawful or unfair business practice engaged in, in violation of
14 California Business and Professions Code section 17200 as provided in section 17206.

15 4. Plaintiff recover its costs.

16 5. Plaintiff have such other and further relief as the nature of the case may require,
17 and the Court deems proper to fully and successfully dissipate the false and misleading
18 representations, and the unfair, unlawful and fraudulent business practices complained of herein,
19 and the effects thereof.

20 DATED: December 20, 2011

Respectfully submitted,

JEFF W. REISIG
DISTRICT ATTORNEY

23 By: Larry Barilly
24 LARRY BARILLY
25 Deputy District Attorney
Attorney for Plaintiff

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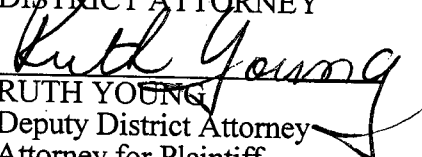
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1 DATED: 12-20-11

Respectfully submitted,

JAN SCULLY
DISTRICT ATTORNEY

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3
4 By:


RUTH YOUNG
Deputy District Attorney
Attorney for Plaintiff