

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

Monique Bell, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

CVS Pharmacy, Inc.,

Defendant.

CASE NO. 21-cv-06850

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Monique Bell (“Plaintiff”) brings this action on behalf of herself and all others similarly situated against Defendant CVS Pharmacy, Inc. (“Defendant”). Plaintiff makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to the allegations specifically pertaining to herself, which are based on personal knowledge.

INTRODUCTION

1. This is a putative class action lawsuit on behalf of purchasers of Defendant’s lidocaine patches (the “Lidocaine Patches”).¹ Defendant markets, sells and distributes the Lidocaine Patches through numerous brick-and-mortar CVS retail locations and online through www.cvs.com.

¹ The Lidocaine Patches include Defendant’s “MAXIMUM STRENGTH Lidocaine Pain Relief Patch”; “MAXIMUM STRENGTH LIDOCAINE Cold & Hot Patch”; and “MAXIMUM STRENGTH Lidocaine Pain-Relieving Patch.” Plaintiff has standing to sue Defendant for all of the Lidocaine Patches because “1) the products are substantially similar to the products that she did purchase; and 2) the alleged misrepresentation is the same.” *See e.g., Rivera v. S.C. Johnson & Son, Inc.*, No. 20-CV-3588 (RA), 2021 U.S. Dist. LEXIS 183759, at *26 (S.D.N.Y. Sep. 24, 2021)

2. Lidocaine is a topical anesthetic that is used to treat pain by blocking the transmission of pain signals from nerve endings in the skin to the spinal cord and brain. Specifically, lidocaine functions by blocking sodium channels located on nerve endings which prevents action potential from propagating in the nerve cell and thereby interrupting the transmission of the pain signal.

3. Although lidocaine patches are often prescribed by doctors, Defendant offers its Lidocaine Patches over-the-counter to unsuspecting consumers under false pretenses. Defendant takes advantage of these consumers by prominently displaying on the packaging of the Lidocaine Patches that the patches deliver a “Maximum Strength” dose of lidocaine for up to 12 or 8 hours. Plaintiff and the proposed class members relied on those representations when making their purchases. To their dismay, however, Defendant’s Lidocaine Patches regularly peel off their bodies within a few hours, and oftentimes minutes, after being properly applied, and do not deliver a maximum amount of lidocaine available in patch form.

4. As a result of its deceptive conduct, Defendant is, and continues to be, unjustly enriched at the expense of its customers.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over the claims asserted herein individually and on behalf of the class pursuant to 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005. Subject matter jurisdiction is proper because: (1) the amount in controversy in this class action exceeds five million dollars, exclusive of interest and costs; (2) there are more than 100 Class members; (3) at least one member of the Class is diverse from the Defendant; and (4) the Defendant is not a governmental entity.

6. This Court has personal jurisdiction over Defendant because it conducts substantial business within New York, including the sale, marketing, and advertising of the Lidocaine Patches. Furthermore, a substantial portion of the events giving rise to Plaintiff's claims occurred in this State, including Plaintiff's purchases.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant does substantial business in this District and a substantial part of the events giving rise to Plaintiff's claims took place within this District.

THE PARTIES

8. Plaintiff Monique Bell is a citizen of New York, residing in Brooklyn, New York. Plaintiff purchased Defendant's Lidocaine Pain Relief Patch for her personal use for approximately \$9.79 on various occasions within the applicable statute of limitations, with her most recent purchase taking place in September of 2021. Plaintiff made these purchases at a CVS store located in Brooklyn, New York. Prior to her purchases, Plaintiff saw that the Lidocaine Patches were labeled and marketed as "Maximum Strength" patches capable of delivering a 4% lidocaine dose for "UP TO 12 HOURS" and read the directions on the back label, which indicated that she could use "1 patch for up to 12 hours." Plaintiff relied on Defendant's representations when she decided to purchase the Lidocaine Patches over comparable and less expensive pain-relieving patches or gels. Plaintiff saw those representations prior to and at the time of her purchases and understood them as a representation and warranty that the Lidocaine Patches would reliably adhere to her body and deliver a 4% lidocaine dose for 12 hours. Initially, Plaintiff became frustrated when her Lidocaine Patches peeled off her body while engaging in regular activities—such as walking, sitting, stretching, and sleeping—well before the represented 12 hours, through no fault of her own. Plaintiff, nonetheless, continued to purchase other

Lidocaine Patches, believing that such failures were the result of one-off manufacturing flukes. After giving the Lidocaine Patches the benefit of the doubt, however, Plaintiff stopped purchasing them altogether after realizing that the Lidocaine Patches consistently failed to provide pain relief by delivering a 4% lidocaine dose for “UP TO 12 HOURS.” For example, on a couple of occasions, the Lidocaine Patches that Plaintiff bought peeled off her body within an hour or two after she properly applied them pursuant to the directions contained on the products—delivering little to no analgesic effect to her sore muscles. Plaintiff relied on Defendant’s representations and warranties in deciding to purchase her Lidocaine Patches. Accordingly, those representations and warranties were part of the basis of her bargains, in that she would not have purchased her Lidocaine Patches on the same terms had she known those representations and warranties were false. However, Plaintiff remains interested in purchasing Defendant’s Lidocaine Patches and would consider the Lidocaine Patches in the future if Defendant ensured the products actually provide pain relief by delivering a 4% lidocaine dose to her body for “UP TO 12 HOURS.” Additionally, in making her purchases, Plaintiff paid a substantial price premium due to Defendant’s false and misleading claims regarding the qualities of its Lidocaine Patches. However, Plaintiff did not receive the benefit of her bargains because her Lidocaine Patches did not, in fact, provide pain relief by delivering a 4% “Maximum Strength” dose of lidocaine to her body for “UP TO 12 HOURS.”

9. Defendant CVS Pharmacy, Inc. (“Defendant”) is a Rhode Island corporation with its principal place of business in Woonsocket, Rhode Island. Defendant markets, sells, and distributes the Lidocaine Patches and is responsible for the advertising, marketing, trade dress, and packaging of the Lidocaine Patches. Defendant marketed, distributed, and sold the Lidocaine Patches during the class period.

FACTUAL ALLEGATIONS

Defendant's False Advertising

10. Defendant markets, sells, and distributes the Lidocaine Patches through numerous brick-and-mortar CVS retail locations and online through www.cvs.com. On the Lidocaine Patches packaging, Defendant represents that its Lidocaine Patches last up to 12 or 8 hours, depending on the product. The Lidocaine Patches are all substantially similar in that they all share similar adhesiveness misrepresentations:



11. By representing that Lidocaine Patches can be applied “UP TO 12 HOURS” or “UP TO 8 HOURS”—a very specific number²—Defendant induced Plaintiff and the proposed class members into believing that the Lidocaine Patches: (1) would continuously adhere to their bodies up to 12 or 8 hours; (2) were sufficiently flexible to withstand regular activities (such as walking, stretching, and sleeping) for someone who is suffering from sore muscles; and (3) would continuously relieve pain by providing a 4% lidocaine dose throughout the specified

²Although under 2nd Circuit precedent in *Mantikas v. Kellogg Co.*, 910 F.3d 633, 637 (2d Cir. 2018) reasonable consumers are not “expected to look beyond misleading representations on the front of the box” to cure a defendant’s misrepresentation contained therein, the back labels of the Lidocaine Patches reinforce the misrepresentations made on their front labels—i.e., they all misleadingly instruct either to “use 1 patch for up to 12 hours” or to “remove the patch from the skin after, at most, 8-hour application.” Exhibit A.

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