

**ENDORSED
FILED**
San Francisco County Superior Court

MAR - 6 2007

GORDON PARK-LI, Clerk
BY: PARAMNATT
Deputy Clerk

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CASE MANAGEMENT CONFERENCE SET

7 **AUG - 3 2007 9:00 AM**

8 **DEPARTMENT 212**

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SAN FRANCISCO

CGC -07-461057

12 STEPHEN D. GILLETT, an individual,
13 Plaintiff,

Case No. _____

14 vs.

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

15 SHEN HERB, INC.; WHOLE FOODS
16 MARKET CALIFORNIA, INC.; VITAMIN
EXPRESS, INC.;

Health & Safety Code §25249.5, *et seq.*;

17 Defendants.
18
19

20 Plaintiff STEPHEN D. GILLETT brings this action in the interest of the general public
21 and, on information and belief, hereby alleges:

22 **INTRODUCTION**

23 1. This action seeks to remedy Defendants' continuing failure to warn hundreds of
24 thousands of consumers of health products in California that they are being exposed to lead, a
25 substance known to the State of California to cause both cancer and reproductive toxicity.
26

1 Defendants manufacture, distribute, market, and/or sell dietary supplements and herbal
2 products sold under the brand name “Dr. Shen’s”, “Shen Herbal Products” and “Shen Herb,
3 Inc.”, including but not limited to Dr. Shen’s™ Sinus, Dr. Shen’s™ Allergy, Dr. Shen’s™ Yin
4 Chao; Dr. Shen’s™ Zong Gan Ling; Dr. Shen’s™ Stomach Curing; and Dr. Shen’s™ Two
5 Immortals (referred to collectively herein as the “PRODUCTS”). The PRODUCTS contain
6 lead and lead compounds.

7 2. Lead and lead compounds (the “LISTED CHEMICALS”) are chemicals known
8 to the State of California to cause cancer and/or reproductive toxicity.

9 3. The use of the PRODUCTS causes exposures to the LISTED CHEMICALS at
10 levels requiring a “clear and reasonable warning” under California's Safe Drinking Water and
11 Toxic Enforcement Act of 1986, Health & Safety Code (“H&S Code”) §25249.5, *et seq.* (also
12 known as "Proposition 65"). Defendants have failed to provide the health hazard warnings
13 required by Proposition 65.

14 4. Defendants’ continued manufacture, distribution, marketing, and/or sale of the
15 PRODUCTS without the required health hazard warnings, causes individuals to be
16 involuntarily and unwittingly exposed to dangerous levels of the LISTED CHEMICALS.

17 5. By this action Plaintiff seeks the following appropriate relief:

18 a. prohibiting the continued manufacture, distribution, marketing, and/or
19 sale of the PRODUCTS in California by Defendants without provision
20 of clear and reasonable warnings regarding the risks of cancer and/or
21 reproductive toxicity posed by exposure to the LISTED CHEMICALS
22 through the use of the PRODUCTS; and,

23 b. assessing civil penalties in the amount of \$2,500 per day per violation to
24 remedy Defendants’ ongoing failure to provide clear and reasonable
25 warnings to consumers that they are being exposed and continue to be
26 exposed to LISTED CHEMICALS through the use of the PRODUCTS.

1 **JURISDICTION AND VENUE**

2 6. This Court has jurisdiction over this action pursuant to California Constitution
3 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes
4 except those given by statute to other trial courts." The statutes under which this action is
5 brought do not specify any other basis for jurisdiction.

6 7. This Court has jurisdiction over Defendants because Defendants are either
7 corporations organized under the laws of the State of California and doing sufficient business
8 in, and having sufficient minimum contacts with, California, or otherwise intentionally availing
9 themselves of the California market through the manufacture, distribution, marketing and/or
10 sale of the PRODUCTS in the State of California to render the exercise of jurisdiction over
11 them by the California courts consistent with traditional notions of fair play and substantial
12 justice.

13 8. Venue in this action is proper in the San Francisco Superior Court because
14 Defendants have violated one or more of the California laws specified herein in the City and
15 County of San Francisco and/or have their principal place of business in San Francisco.

16 **PARTIES**

17 9. Plaintiff STEPHEN D. GILLETT ("SDG") is a citizen enforcer dedicated to the
18 protection of the environment, the promotion of human health and the improvement of worker
19 and consumer safety. SDG resides in San Francisco, California

20 10. SDG brings this enforcement action in the public interest pursuant to H&S Code
21 §25249.7(d).

22 11. Defendants SHEN HERB, INC., WHOLE FOODS MARKET CALIFORNIA,
23 INC. and VITAMIN EXPRESS, INC. ("DEFENDANTS") are persons doing business within
24 the meaning of H&S Code §25249.11.

25 12. DEFENDANTS manufacture, distributes, markets and/or sell one or more of the
26 PRODUCTS for sale or use in California.

1 **STATUTORY BACKGROUND**

2 **A. Proposition 65**

3 13. The People of the State of California have declared in Proposition 65 their right
4 "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
5 reproductive harm." (Section 1(b) of Initiative Measure, Proposition 65).

6 14. Towards this goal, Proposition 65 requires that individuals be provided with a
7 "clear and reasonable warning" before being exposed to chemicals listed by the State of
8 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
9 part:

10 No person in the course of doing business shall knowingly and intentionally
11 expose any individual to a chemical known to the state to cause cancer or
12 reproductive toxicity without first giving clear and reasonable warning to such
13 individual....

14 15. Proposition 65 provides that any person "violating or threatening to violate" the
15 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7.) The phrase
16 "threaten to violate" is defined to mean "to create a condition in which there is a substantial
17 likelihood that a violation will occur." (H&S Code §25249.11(e).) Violators are liable for civil
18 penalties of up to \$2,500 per day for each such violation." (H&S Code §25249.7.)

19 **FACTUAL BACKGROUND**

20 16. On February 27, 1987, the State of California officially listed the chemical lead
21 as a chemical known to cause reproductive toxicity. Lead became subject to the warning
22 requirement one year later and was therefore subject to the "clear and reasonable" warning
23 requirements of Proposition 65 beginning on February 27, 1988. (22 California Code of
24 Regulations ("CCR") §12000, *et seq.*; H&S Code §25249.5, *et seq.*)

25 17. On October 1, 1992, the State of California officially listed the chemicals lead
26 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became
subject to the warning requirement one year later and were therefore subject to the "clear and

1 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (22 CCR
2 §12000, *et seq.*; H&S Code §25249.6, *et seq.*)

3 18. Plaintiff is informed and believes, and based on such information and belief
4 alleges, that one or more of the PRODUCTS have been sold to, and/or used by, individuals in
5 California without clear and reasonable warning since at least March 6, 2006. The
6 PRODUCTS continue to be offered for sale in California without "clear and reasonable" health
7 hazard warnings.

8 19. As a proximate result of acts by DEFENDANTS, as persons in the course of
9 doing business within the meaning of Health & Safety Code §25249.11, individuals throughout
10 the State of California, including in the County of San Francisco, have been exposed to the
11 LISTED CHEMICALS without clear and reasonable warning. The individuals subject to the
12 violative exposures include normal and foreseeable users of the PRODUCTS, as well as all
13 other persons exposed to the PRODUCTS.

14 20. At all times relevant to this action, DEFENDANTS knowingly and intentionally
15 exposed the users of the PRODUCTS to the LISTED CHEMICALS without first giving a clear
16 and reasonable warning to such individuals.

17 21. Individuals using the PRODUCTS are exposed to the LISTED CHEMICALS in
18 excess of the levels determined to cause "no observable effect" or "no significant risk", as
19 applicable, within the meaning of H&S Code §25249.10(c).

20 22. At all times relevant to this action, DEFENDANTS have, in the course of doing
21 business, failed to provide individuals using and/or handling the PRODUCTS with clear and
22 reasonable warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.

23 23. The PRODUCTS continue to be offered for sale in California without "clear
24 and reasonable" health hazard warnings.

25 **FIRST CAUSE OF ACTION**
26 **(Violations of Health and Safety Code § 25249.6, *et seq.*)**

24. Plaintiff realleges and incorporates by reference Paragraphs 1 through 23,

1 inclusive, as if specifically set forth herein.

2 25. On September 26, 2006, SDG sent a 60-Day Notice of Proposition 65 violations
3 concerning the PRODUCTS to the requisite public enforcement agencies and to Defendant
4 WHOLE FOODS MARKET CALIFORNIA, INC. On December 23, 2006, SDG sent a 60-Day
5 Notice of Proposition 65 violations concerning the PRODUCTS to the requisite public
6 enforcement agencies and to DEFENDANTS. These notices were issued pursuant to, and in
7 compliance with, the requirements of H&S Code §25249.7(d) and the statute's implementing
8 regulations regarding the notice of the violations to be given to certain public enforcement
9 agencies and to the violator. The notices given included, *inter alia*, the following information:
10 the name, address, and telephone number of the noticing individual; the name of the alleged
11 violator; the statute violated; the approximate time period during which violations occurred; and
12 descriptions of the violations, including the chemicals involved, the routes of toxic exposure,
13 and the specific products or type of products causing the violations, and was issued as follows:

- 14 a. DEFENDANTS and the California Attorney General were provided
15 copies of the 60-Day Notice by Certified Mail.
- 16 b. DEFENDANTS were provided a copy of a document entitled "The Safe
17 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
18 Summary," which is also known as Appendix A to Title 22 of CCR
19 §12903.
- 20 c. The California Attorney General was provided with a Certificate of Merit
21 by the attorney for the noticing party, stating that there is a reasonable
22 and meritorious case for this action, and attaching factual information
23 sufficient to establish a basis for the certificate, including the identify of
24 the persons consulted with and relied on by the certifier, and the facts
25 studies, or other data reviewed by those persons, pursuant to H&S Code
26 §25249.7(h)(2).

1 26. The appropriate public enforcement agencies have failed to commence and
2 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against
3 DEFENDANTS based on the allegations herein.

4 27. By committing the acts alleged in this First Amended Complaint, DEFENDANTS
5 at all times relevant to this action and continuing through the present, have violated H&S Code
6 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals
7 who use the PRODUCTS to the LISTED CHEMICALS, without first providing a clear and
8 reasonable warning to such individuals pursuant to H&S Code §§ 25249.6 and 25249.11(f).

9 28. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code
10 §25249.7(b), for a civil penalty of up to \$2,500 per day for each unlawful exposure to a
11 LISTED CHEMICAL from the PRODUCTS.

12 29. An action for injunctive relief under Proposition 65 is specifically authorized by
13 Health & Safety Code §25249.7(a).

14 30. Continuing commission by DEFENDANTS, of the acts alleged above will
15 irreparably harm the citizens of the State of California, for which harm they have no plain,
16 speedy, or adequate remedy at law.

17 Wherefore, Plaintiff prays judgment against DEFENDANTS, as set forth
18 hereafter.

19 **PRAYER FOR RELIEF**

20 Wherefore, Plaintiff accordingly prays for the following relief:

21 A. a preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),
22 enjoining DEFENDANTS, their agents, employees, assigns and all persons acting in concert or
23 participating with DEFENDANTS from distributing, marketing or selling the PRODUCTS in
24 California without first providing a clear and reasonable warning that the user and/or handlers
25 of the PRODUCTS are exposed, within the meaning of Proposition 65, to the LISTED
26 CHEMICALS;

1 B. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
2 against DEFENDANTS in the amount of \$2,500 per day for each violation of Proposition 65;

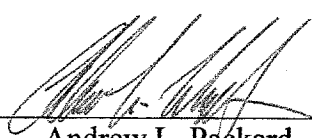
3 C. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
4 California Code of Civil Procedure §1021.5, as Plaintiff shall specify in further application to
5 the Court; and,

6 D. such other and further relief as may be just and proper.

7 DATED: March 6, 2007

Respectfully Submitted,

8 LAW OFFICES OF ANDREW L. PACKARD
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11
12 By 
13 Andrew L. Packard
14 Attorneys for Plaintiff
15 Stephen D. Gillett
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