

State of California - Department of Justice - Attorney General's Office - Proposition 65 Enforcement Reporting

Attention: Prop 65 Coordinator, 1515 Clay Street, Suite 2000, Oakland, CA 94612

FORM JUS 1500
(03-01)

PRIVATE ENFORCEMENT FILING - Health and Safety Code section 25249.7(e) and (f)

REPORT OF CIVIL COMPLAINT FILING

Please print or type required information

☒ Original Filing ☐ Supplemental Filing ☐ Corrected Filing

PARTIES TO THE ACTION	PLAINTIFF(S) Stephen D. Gillett, an individual		
	DEFENDANT(S) Institute for Traditional Medicine and Preventive Health Care, Inc., a nonprofit corporation		
CASE INFO	COURT DOCKET NUMBER 0007-460692		COURT NAME Superior Court of SF County
	SHORT CASE NAME Gillett v. Institute for Traditional Medicine		
REPORT INFO	TYPE OF CLAIM (Check All That Apply) <input type="checkbox"/> Proposition 65 Unlawful Discharge <input checked="" type="checkbox"/> Proposition 65 Failure to Warn <input type="checkbox"/> B&P Code section 17200 <input type="checkbox"/> Other _____		RELIEF SOUGHT (Check All That Apply) <input checked="" type="checkbox"/> Warning <input type="checkbox"/> Discharge Ban <input checked="" type="checkbox"/> Civil Penalty
	COPY OF COMPLAINT MUST BE ATTACHED		For Internal Use Only
FILER INFO	NAME OF CONTACT Andrew L. Packard		
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FILING INSTRUCTIONS: This form can be completed online and printed. If electronic filing is not available, mail the completed form with a copy of the complaint to the attention of the Prop 65 Coordinator at the address shown above. If you need additional space to complete this form please use an attachment.

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ENDORSED
FILED
San Francisco County Superior Court

FEB 22 2007

GORDON, PAUL H. Clerk
BY: CHRISTINE E. BAUTISTA Deputy Clerk
CASE MANAGEMENT CONFERENCE SET

JUL 27 2007 - 9:00 AM

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SAN FRANCISCO

13 STEPHEN D. GILLETT,

14 Plaintiff,

15 v.

16 INSTITUTE FOR TRADITIONAL
17 MEDICINE & PREVENTIVE HEALTH
18 CARE, INC., a non-profit corporation,

19 Defendant.

Case No. 00007 - 460692

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

JURY TRIAL REQUESTED

20 Plaintiff Stephen D. Gillett ("SDG") brings this action in the interests of the general
21 public and, on information and belief, hereby alleges:

INTRODUCTION

22 1. This action seeks to remedy Defendant's continuing failure to warn thousands
23 of consumers in California that they are being exposed to lead, a substance known to the State
24 of California to cause cancer, birth defects and other reproductive harm. Defendant is a non-
25 profit corporation that operates two clinical facilities offering acupuncture and herbal therapy
26 products and services, and distributes articles and other materials concerning herbal products.
Defendant is also a producer and distributor of products variously referred to as "Chinese

1 Herbal Food Combinations", "herbal formulas" or "formulations." Defendant distributes and
2 sells these lead-containing products in California (these products are collectively referred to
3 herein as the "PRODUCTS").

4 2. Lead and lead compounds (hereafter the "LISTED CHEMICALS") are
5 substances known to the State of California to cause cancer, birth defects and other
6 reproductive harm.

7 3. The use and/or handling of the PRODUCTS causes exposures to the LISTED
8 CHEMICALS at levels requiring a "clear and reasonable warning" under California's Safe
9 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code")
10 §25249.5, *et seq.* (also known as "Proposition 65").¹ Defendant has failed to provide the health
11 hazard warnings required by Proposition 65.

12 4. Defendant's continued distribution and sale of the PRODUCTS without the
13 required health hazard warnings, causes individuals to be involuntarily and unwittingly
14 exposed to dangerous levels of the LISTED CHEMICALS, in violation of Proposition 65.

15 5. By this action Plaintiff seeks appropriate relief:

- 16 a. prohibiting the continued distribution and sale of the PRODUCTS in
17 California by Defendant without provision of clear and reasonable
18 warnings regarding the risks of cancer, birth defects and other
19 reproductive harm posed by exposure to the LISTED CHEMICALS
20 through the use and/or handling of the PRODUCTS; and,
21 b. assessing civil penalties in the amount of \$2,500 per day per violation to
22 remedy Defendant's ongoing failure to provide clear and reasonable
23 warnings to thousands of individuals that they are being exposed and
24 continue to be exposed to LISTED CHEMICALS through the use and/or
25 handling of the PRODUCTS;
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7. This Court has jurisdiction over Defendant because, based on information and belief, Defendant is a corporation organized under the laws of the State of California, or doing sufficient business in, and having sufficient minimum contacts with, California, or otherwise intentionally availing itself of the California market through the distribution and sale of the PRODUCTS in the State of California to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

PARTIES

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

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

11. Defendant INSTITUTE FOR TRADITIONAL MEDICINE & PREVENTIVE HEALTH CARE, INC. (“ITM”) is a person doing business within the meaning of H&S Code §25249.11.

12. ITM distributes and sells one or more of the PRODUCTS for sale or use in California.

¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

STATUTORY BACKGROUND

A. Proposition 65

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

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

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

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

FACTUAL BACKGROUND

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

17. On October 1, 1992, the State of California officially listed the chemicals lead 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 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (22 CCR

1 §12000, *et seq.*; H&S Code §25249.6, *et seq.*)

2 18. Plaintiff is informed and believes, and based on such information and belief
3 alleges, that one or more of the PRODUCTS have been distributed and/or sold to individuals in
4 California without clear and reasonable warning since at least February 22, 2006. The
5 PRODUCTS continue to be distributed and sold in California without the requisite warning
6 information.

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

13 20. At all times relevant to this action, Defendant has knowingly and intentionally
14 exposed the users and/or handlers of the PRODUCTS to the LISTED CHEMICALS without
15 first giving a clear and reasonable warning to such individuals.

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

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

23 23. The PRODUCTS continue to be distributed and sold in California without the
24 requisite clear and reasonable warning.

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 or after December 15, 2006, SDG sent a 60-Day Notice of Proposition 65
3 violations to the requisite public enforcement agencies and to Defendant. The notice was issued
4 pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
5 statute's implementing regulations regarding the notice of the violations to be given to certain
6 public enforcement agencies and to the violator. The notice given included, *inter alia*, the
7 following information: the name, address, and telephone number of the noticing individual; the
8 name of the alleged violator; the statute violated; the approximate time period during which
9 violations occurred; and descriptions of the violations, including the chemicals involved, the
10 routes of toxic exposure, and the specific products or type of products causing the violations,
11 and was issued as follows:

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

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

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

6 28. By the above-described acts, Defendant is liable, pursuant to H&S Code
7 §25249.7(b), for a civil penalty of up to \$2,500 per day for each unlawful exposure to a
8 LISTED CHEMICAL from the PRODUCTS.

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

11 30. Continuing commission by Defendant, of the acts alleged above will irreparably
12 harm the citizens of the State of California, for which harm they have no plain, speedy, or
13 adequate remedy at law.

14 Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

15 **THE NEED FOR INJUNCTIVE RELIEF**

16 31. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 30,
17 as if set forth below.

18 32. By committing the acts alleged in this Complaint, Defendant has caused
19 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
20 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by
21 continuing to cause consumers to be involuntarily and unwittingly exposed to the LISTED
22 CHEMICALS through the use and/or handling of the PRODUCTS.

23 **DEMAND FOR JURY TRIAL**

24 33. Plaintiff demands a jury trial.

25 **PRAYER FOR RELIEF**

26 Wherefore, Plaintiff accordingly prays for the following relief:

A. a preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),

1 enjoining Defendant, its agents, employees, assigns and all persons acting in concert or
2 participating with Defendant, from distributing or selling the PRODUCTS in California
3 without first providing a clear and reasonable warning, within the meaning of Proposition 65,
4 that the users and/or handlers of the PRODUCTS are exposed to the LISTED CHEMICALS.

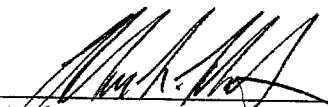
5 B. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
6 against Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

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

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

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12 DATED: February 22, 2007 Respectfully Submitted,

13 LAW OFFICES OF ANDREW L. PACKARD

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16 _____
17 Andrew L. Packard
18 Attorneys for Plaintiff
19 STEPHEN D. GILLET
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