

1 ANDREW L. PACKARD (State Bar No. 168690)
2 MICHAEL P. LYNES (State Bar No. 230462)
3 Law Offices of Andrew L. Packard
4 294 Page Street
5 San Francisco, CA 94102
6 Tel. (415) 431-2970
7 Fax. (415) 431-0410
8 Email: Andrew@PackardLawOffices.com

ENDORSED
FILED
San Francisco County Superior Court
AUG 14 2007
GORDON PARK-LI, Clerk
BY: PARAM NATT
Deputy Clerk

Attorneys for Plaintiff
AS YOU SOW

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 AS YOU SOW, a non-profit corporation,
12 Plaintiff,

13 v.

14
15 SWANSON HEALTH PRODUCTS, INC.,
16
17 Defendant.

Case No. **CGC-07-466169**
**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**
(Cal. Health & Safety Code §25249.5, *et seq.*)

CASE MANAGEMENT CONFERENCE SET

JAN 25 2008 -9⁰⁰AM

DEPARTMENT 212

19
20 Plaintiff AS YOU SOW ("AYS") brings this action in the interests of the general public
21 and, on information and belief, hereby alleges:

22 **INTRODUCTION**

23 1. This action seeks to remedy Defendant's continuing failure to warn thousands
24 of consumers in California that they are being exposed to chemicals known to the State of
25 California to cause cancer and/or reproductive toxicity. Defendant imports, manufactures,
26 packages, distributes, markets and/or sells herbs and herbal products, traditional patent
medicines, bulk herbs, infusions, extracted powders, tea pills, traditional pills, patent formulas,

1 bulk teas, liquid extracts, tablets and/or capsules containing lead or lead compounds (referred
2 to collectively hereinafter as the "PRODUCTS").

3 2. Lead and lead compounds (collectively, the "LISTED CHEMICALS") are
4 chemicals known to the State of California to cause cancer and/or reproductive toxicity.

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

10 4. By this action, Plaintiff seeks appropriate relief:

- 11 a. prohibiting the continued import, manufacture, packaging, distribution,
12 marketing, or sale of the PRODUCTS in California by Defendant
13 without provision of clear and reasonable warnings regarding the risks of
14 cancer and/or reproductive toxicity posed by exposure to the LISTED
15 CHEMICALS through the ingestion of the PRODUCTS; and,
16 b. assessing civil penalties in the amount of \$2,500 per day per violation to
17 remedy Defendant's ongoing failure to provide clear and reasonable
18 warnings to thousands of individuals that they are being exposed and
19 continue to be exposed to LISTED CHEMICALS through the ingestion
20 of the PRODUCTS.

21
22 **JURISDICTION AND VENUE**

23 5. This Court has jurisdiction over this action pursuant to California Constitution
24 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes
25 except those given by statute to other trial courts." The statutes under which this action is
26

¹ All statutory and regulatory references herein are to California law.

1 brought do not specify any other basis for jurisdiction.

2 6. This Court has jurisdiction over Defendant because, based on information and
3 belief, Defendant is a corporation or association organized under the laws of the State of
4 California or doing sufficient business in, and having sufficient minimum contacts with,
5 California, or otherwise intentionally availing itself of the California market through the
6 manufacture, packaging, distribution, marketing and/or sale of the PRODUCTS in the State of
7 California to render the exercise of jurisdiction over it by the California courts consistent with
8 traditional notions of fair play and substantial justice.

9 7. Venue in this action is proper in the San Francisco Superior Court because
10 Defendant has violated one or more of the California laws specified herein in the City and
11 County of San Francisco and/or has its principal place of business in San Francisco.

12 **PARTIES**

13 8. Plaintiff AS YOU SOW (“AYS”) is a non-profit foundation organized under the
14 State of California’s Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among
15 other causes, the protection of the environment, the promotion of human health, the
16 improvement of worker and consumer safety, and environmental education. AYS is based in
17 San Francisco, California.

18 9. AYS brings this enforcement action in the public interest pursuant to H&S Code
19 §25249.7(d).

20 10. Defendant SWANSON HEALTH PRODUCTS, INC. (“SWANSON”) is a
21 person within the meaning of H&S Code § 25249.11.

22 11. SWANSON imports, manufactures, packages, distributes, markets and/or sells
23 one or more of the PRODUCTS for sale or use in California or otherwise causes or contributes
24 to exposures within the meaning of H&S Code § 25249.6, *et seq.* to the LISTED CHEMICALS
25 from the PRODUCTS.

1 STATUTORY BACKGROUND

2 A. Proposition 65

3 12. 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 13. To effect 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
individual....

13 14. Proposition 65 provides that any person "violating or threatening to violate" the
14 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The
15 phrase "threaten to violate" is defined to mean, "to create a condition in which there is a
16 substantial likelihood that a violation will occur." (H&S Code § 25249.11(e).) Violators are
17 liable for civil penalties of up to \$2500 per day for each such violation. (H&S Code § 25249.7.)

18 FACTUAL BACKGROUND

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

24 16. On October 1, 1992, the State of California officially listed the chemicals lead
25 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became
26 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 17. Plaintiff is informed and believes, and based on such information and belief
3 alleges, that one or more of the PRODUCTS have been sold to and/or ingested by individuals
4 in California without clear and reasonable warning since August 14, 2006. The PRODUCTS
5 continue to be offered for sale in California without the requisite warning information.

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

12 19. At all times relevant to this action, Defendant knowingly and intentionally
13 exposed the users of the PRODUCTS to the LISTED CHEMICALS without first giving a clear
14 and reasonable warning to such individuals.

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

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

21 22. The PRODUCTS continue to be offered for sale in California without the
22 requisite clear and reasonable warning.

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

25 23. Plaintiff realleges and incorporates by reference Paragraphs 1 through 22,
26 inclusive, as if specifically set forth herein.

24. Beginning on or about May 29, 2007, AYS sent 60-Day Notices of Proposition

1 65 violations to the requisite public enforcement agencies and to Defendant. These notices
2 were issued pursuant to, and in compliance with, the requirements of H&S Code § 25249.7(d)
3 and the statute's implementing regulations regarding the notice of the violations to be given to
4 certain public enforcement agencies and to the violator. The notices given included, *inter alia*,
5 the following information: the name, address, and telephone number of the noticing individual;
6 the name of the alleged violator; the statute violated; the approximate time period during which
7 violations occurred; and descriptions of the violations, including the chemicals involved, the
8 routes of toxic exposure, and the specific products and type of products causing the violations.
9 The named defendant(s) and the California Attorney General were provided copies of the 60-
10 Day Notice by certified mail. Additionally, the named defendant(s) was provided a copy of a
11 document entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition
12 65): A Summary," which is also known as Appendix A to Title 22 of CCR § 12903.

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

16 26. By committing the acts alleged in this Complaint, Defendant, at all times relevant
17 to this action, and continuing through the present, has violated H&S Code § 25249.6 by, in the
18 course of doing business, knowingly and intentionally exposing individuals who ingest the
19 PRODUCTS to the LISTED CHEMICALS, without first providing a clear and reasonable
20 warning to such individuals pursuant to H&S Code §§ 25249.6 and 25249.11(f).

21 27. By the above-described acts, Defendant is liable, pursuant to H&S Code §
22 25249.7(b), for a civil penalty of up to \$2500 per day for each unlawful exposure to a LISTED
23 CHEMICAL from the PRODUCTS.

24 28. An action for injunctive relief under Proposition 65 is specifically authorized by
25 Health & Safety Code § 25249.7(a).

26 29. Continuing commission by Defendant, of the acts alleged above will irreparably
harm the citizens of the State of California, for which harm they have no plain, speedy, or

1 adequate remedy at law.

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

3 **INJUNCTIVE RELIEF**

4 30. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 29,
5 as if specifically set forth herein.

6 31. By committing the acts alleged in this Complaint, the Defendant has caused
7 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
8 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by:

- 9 a. continuing to cause consumers to be involuntarily and unwittingly exposed
10 to the LISTED CHEMICALS through the ingestion of the PRODUCTS;
11 and,
12 b. preventing consumers from distinguishing products that cause exposures to
13 lead and lead compounds from similar products that do not cause such
14 exposures.

15
16 **PRAYER FOR RELIEF**

17 Wherefore, Plaintiff accordingly prays for the following relief:

18 A. a preliminary and permanent injunction, pursuant to H&S Code § 25249.7(b)
19 enjoining Defendant, its agents, employees, assigns and all persons acting in concert or
20 participating with Defendant from importing, manufacturing, packaging, distributing,
21 marketing or selling the PRODUCTS in California without first providing a clear and
22 reasonable warning that the users of the PRODUCTS are exposed, within the meaning of
23 Proposition 65, to the LISTED CHEMICALS.

24 B. an assessment of civil penalties pursuant to H&S Code § 25249.7(b), against
25 each Defendant in the amount of \$2500 per day for each violation of Proposition 65;

26 C. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
California Code of Civil Procedure §1021.5 as Plaintiff shall specify in further application to

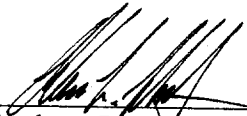
1 the Court; and,

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

3
4 DATED: 8/14/07

Respectfully Submitted,

5 LAW OFFICES OF ANDREW L. PACKARD

6
7
8 
9 _____
10 Andrew L. Packard
11 Michael P. Lynes
12 Attorneys for Plaintiff
13 AS YOU SOW
14
15
16
17
18
19
20
21
22
23
24
25
26