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**ENDORSED  
FILED**  
San Francisco County Superior Court

OCT 30 2007  
GORDON PARK-LI, Clerk  
PARAM NATT  
BY: \_\_\_\_\_ Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SAN FRANCISCO

13 AS YOU SOW, a non-profit corporation,

14 Plaintiff,

15 v.

16 WHOLISTIC BOTANICALS, LLC,

17 Defendant.

18 Case No. CGC-07-468669

19 **COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

20 (Cal. Health & Safety Code §25249.5, et seq.)  
21 **CASE MANAGEMENT CONFERENCE SET**

22 MAR 28 2008 -9<sup>00</sup>AM

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

25 **INTRODUCTION**

26 1. This action seeks to remedy Defendant's continuing failure to warn thousands  
of consumers in California that they are being exposed to chemicals known to the State of  
California to cause cancer and/or reproductive toxicity. Defendant imports, manufactures,  
packages, distributes, markets and/or sells herbs and herbal products, traditional patent  
medicines, bulk herbs, infusions, extracted powders, tea pills, traditional pills, patent formulas,  
bulk teas, liquid extracts, tablets and/or capsules containing lead or lead compounds (referred  
to collectively hereinafter as the "PRODUCTS").

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



1 manufacture, packaging, distribution, marketing and/or sale of the PRODUCTS in the State of  
2 California to render the exercise of jurisdiction over it by the California courts consistent with  
3 traditional notions of fair play and substantial justice.

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

7 **PARTIES**

8 8. Plaintiff AS YOU SOW ("AYS") is a non-profit foundation organized under the  
9 State of California's Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among  
10 other causes, the protection of the environment, the promotion of human health, the  
11 improvement of worker and consumer safety, and environmental education. AYS is based in  
12 San Francisco, California.

13 9. AYS brings this enforcement action in the public interest pursuant to H&S Code  
14 §25249.7(d).

15 10. Defendant WHOLISTIC BOTANICALS, LLC ("WHOLISTIC") is a person  
16 within the meaning of H&S Code § 25249.11.

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

21 **STATUTORY BACKGROUND**

22 **A. Proposition 65**

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

26 13. To effect this goal, Proposition 65 requires that individuals be provided with a  
"clear and reasonable warning" before being exposed to chemicals listed by the State of

1 California as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent  
2 part:

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

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

### 12 FACTUAL BACKGROUND

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

18 16. On October 1, 1992, the State of California officially listed the chemicals lead  
19 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became  
20 subject to the warning requirement one year later and were therefore subject to the "clear and  
21 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (22 CCR  
22 § 12000, *et seq.*; H&S Code § 25249.6, *et seq.*)

23 17. Plaintiff is informed and believes, and based on such information and belief  
24 alleges, that one or more of the PRODUCTS have been sold to and/or ingested by individuals  
25 in California without clear and reasonable warning since October 30, 2006. The PRODUCTS  
26 continue to be offered for sale in California without the requisite warning information.

18. As a proximate result of acts by Defendant, as a person in the course of doing  
business within the meaning of Health & Safety Code § 25249.11, individuals throughout the

1 State of California, including in the County of San Francisco, have been exposed to the  
2 LISTED CHEMICALS without clear and reasonable warning. The individuals subject to the  
3 violative exposures include normal and foreseeable users of the PRODUCTS, as well as all  
4 other persons exposed to the PRODUCTS.

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

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

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

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

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

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

20 24. Beginning on August 20, 2007, AYS sent 60-Day Notices of Proposition 65  
21 violations to the requisite public enforcement agencies and to Defendant. These notices were  
22 issued pursuant to, and in compliance with, the requirements of H&S Code § 25249.7(d) and the  
23 statute's implementing regulations regarding the notice of the violations to be given to certain  
24 public enforcement agencies and to the violator. The notices given included, *inter alia*, the  
25 following information: the name, address, and telephone number of the noticing individual; the  
26 name of the alleged violator; the statute violated; the approximate time period during which  
violations occurred; and descriptions of the violations, including the chemicals involved, the

1 routes of toxic exposure, and the specific products and type of products causing the violations.  
2 The named defendant(s) and the California Attorney General were provided copies of the 60-  
3 Day Notice by certified mail. Additionally, the named defendant(s) was provided a copy of a  
4 document entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition  
5 65): A Summary," which is also known as Appendix A to Title 22 of CCR § 12903.

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

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

14 27. By the above-described acts, Defendant is liable, pursuant to H&S Code §  
15 25249.7(b), for a civil penalty of up to \$2500 per day for each unlawful exposure to a LISTED  
16 CHEMICAL from the PRODUCTS.

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

19 29. Continuing commission by Defendant, of the acts alleged above will irreparably  
20 harm the citizens of the State of California, for which harm they have no plain, speedy, or  
21 adequate remedy at law.

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

23 **INJUNCTIVE RELIEF**

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

26 31. By committing the acts alleged in this Complaint, the Defendant has caused  
irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence

1 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by:

- 2 a. continuing to cause consumers to be involuntarily and unwittingly  
3 exposed to the LISTED CHEMICALS through the ingestion of the  
4 PRODUCTS; and,  
5 b. preventing consumers from distinguishing products that cause exposures  
6 to lead and lead compounds from similar products that do not cause such  
7 exposures.

8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiff accordingly prays for the following relief:

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

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

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

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

22 DATED: 10/30/07

23 Respectfully Submitted,  
24 LAW OFFICES OF ANDREW L. PACKARD

25   
26 Andrew L. Packard  
Attorneys for Plaintiff  
AS YOU SOW