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Superior Court Of California,
Sacramento
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kpinnette
By _____, Deputy
Case Number:
34-2009-00039614

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8 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO**

9
10 DAVID COLE,

11 Plaintiff,

12 vs.

13 SOLGAR INC.,

14 Defendant.

CASE NO.

**COMPLAINT FOR CIVIL PENALTY
AND INJUNCTIVE RELIEF**

Department
Assignments
Case Management 43
Law and Motion 54
Minors Compromise 17

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18 Plaintiff David Cole brings this action in the interests of the general public and, on
19 information and belief, hereby alleges:

20 **I. PRELIMINARY STATEMENT**

21 1. This complaint seeks to remedy the failure of Defendant to warn persons of
22 exposure to lead, which is a chemical known to the State of California to cause birth defects, or
23 other reproductive harm, and cancer. Under the Safe Drinking Water and Toxic Enforcement
24 Act of 1986, Health and Safety Code section 25249.6, also known as "Proposition 65,"
25 businesses must provide persons with a "clear and reasonable warning" before exposing
26 individuals to chemicals known to the state to cause cancer or reproductive harm. In this case,
27 exposure to lead occurs when individuals ingest "Solgar Turmeric Root Extract" vegetable
28 capsules No. 04161.

1 **II. THE PARTIES**

2 2. Plaintiff is David Cole, acting in the interests of the general public. Health and
3 Safety Code section 25249.7, subdivision (d) provides that actions to enforce Proposition 65 may
4 be brought by any person in the public interest. David Cole issued that certain 60-Day Notice of
5 Intent to Sue under Proposition 65 to Defendant on June 10, 2008. More than 60 days have
6 elapsed and no public prosecutor has commenced any enforcement action.

7 **III. JURISDICTION AND VENUE**

8 3. This Court has jurisdiction pursuant to California Constitution Article VI, section
9 10.

10 4. This Court has jurisdiction over the Defendant named above, because it is a
11 business entity that does sufficient business, has sufficient minimum contacts in California, or
12 otherwise intentionally avails itself of the California market, through the sale, marketing, and use
13 of its products in California, to render the exercise of jurisdiction over it by the California courts
14 consistent with traditional notions of fair play and substantial justice.

15 5. Venue is proper in this Court because the cause, or part thereof, arises in
16 Sacramento County because Defendant's products are sold, consumed, and are available for sale
17 in this county.

18 **IV. STATUTORY BACKGROUND**

19 ***Proposition 65***

20 6. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative
21 statute passed as "Proposition 65" by a vote of the people in November of 1986.

22 7. The warning requirement of Proposition 65 is contained in Health and Safety
23 Code section 25249.6, which provides as follows: No person in the course of doing business
24 shall knowingly and intentionally expose any individual to a chemical known to the state to
25 cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
26 individual, except as provided in Section 25249.10.

27 8. An exposure to a chemical in a consumer product is one "which results from a
28 person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a

1 consumer good, or any exposure that results from receiving a consumer service.” (Cal. Code
2 Regs., tit. 27, § 25601, subd. (b).)

3 9. Proposition 65 establishes a procedure by which the state is to develop a list of
4 chemicals “known to the State to cause cancer or reproductive toxicity.” (Health & Saf. Code, §
5 25249.8.) No warning need be given concerning a listed chemical until one year after the
6 chemical first appears on the list. (*Id.*, § 25249.10, subd. (b).)

7 10. Any person “violating or threatening to violate” the statute may be enjoined in
8 any court of competent jurisdiction. (Health & Saf. Code, § 25249.7.) To “threaten to violate” is
9 defined to mean “to create a condition in which there is a substantial probability that a violation
10 will occur.” (*Id.*, § 25249.11, subd. (e).) In addition, violators are liable for civil penalties of up
11 to \$2,500 per day for each violation, recoverable in a civil action. (*Id.*, § 25249.7, subd. (b).)

12 11. Actions to enforce the law “may be brought by any person in the public interest”
13 if proper notice is provided and if no public prosecutor has commenced prosecution. (*Id.*, §
14 25249.7, subd. (d).) Private parties are given authority to enforce Proposition 65 “in the public
15 interest” if the private party first provides written notice of a violation to the alleged violator, the
16 Attorney General, and every District Attorney in whose jurisdiction the alleged violation occurs.
17 If no public prosecutors commence enforcement within sixty days, then the private party may
18 sue. (Health & Saf. Code, § 25249.7, subdivision (d).)

19 **V. FACTS**

20 12. “Lead” was placed on the Governor’s list of chemicals known to the State of
21 California to cause reproductive toxicity on February 27, 1987. It is specifically identified under
22 three subcategories: “developmental reproductive toxicity,” which means harm to the
23 developing fetus, “female reproductive toxicity,” which means harm to the female reproductive
24 system, and “male reproductive toxicity,” which means harm to the male reproductive system.
25 (Cal. Code Regs., tit. 27, § 27001.)

26 13. “Lead and lead compounds” was added to the list of chemicals known to the state
27 to cause cancer on October 1, 1992. (*Id.*)

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1 14. "Solgar Turmeric Root Extract" vegetable capsules No. 04161 made by
2 Defendant contains lead, which is ingested by consumers when they use the products for their
3 intended purpose.

4 15. Plaintiff is informed and believes that Defendant knew that its vitamin
5 supplements contain lead, and that persons using the products as intended would be exposed to
6 lead thereby.

7 16. Defendant has manufactured, distributed, and/or sold "Solgar Turmeric Root
8 Extract" vegetable capsules No. 04161 that contain lead in California, or has made such product
9 available for sale in California.

10 17. Plaintiff is informed and believes, and based on such information and belief,
11 alleges, that Defendant has failed to provide clear and reasonable warnings that the use of the
12 products in question results in exposure to a chemical known to the State of California to cause
13 birth defects or other reproductive harm, and cancer, and that no such warning was provided to
14 those individuals by any other person.

15 **FIRST CAUSE OF ACTION**

16 (Against Each Defendant for Violation of Proposition 65)

17 18. Paragraphs 1 through 17 are realleged as if fully set forth herein.

18 19. Plaintiff is informed and believes, and based on such information and belief,
19 alleges that Defendant employs ten or more persons.

20 20. By committing the acts alleged above, Defendant has, in the course of doing
21 business, knowingly and intentionally exposed individuals to chemicals known to the State of
22 California to cause cancer or reproductive toxicity without first giving clear and reasonable
23 warning to such individuals, within the meaning of Health and Safety Code section 25249.6, or
24 threatened to violate Section 25249.6, within the meaning of Health and Safety Code section
25 25249.7, subdivision (a).

26 21. Said violations render Defendant liable to Plaintiff for civil penalties not to
27 exceed \$2,500 per day for each violation, as well as other remedies.

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1 **VI. PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays that the Court:

- 3 1. Pursuant to the First Cause of Action, grant civil penalties according to proof;
- 4 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary
- 5 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting
- 6 Defendant from exposing persons within the State of California to lead caused by the use of their
- 7 products without providing clear and reasonable warnings, as Plaintiff shall specify in further
- 8 application to the Court;
- 9 3. Award Plaintiff its costs of suit; and
- 10 4. Grant such other and further relief as the court deems just and proper.

11 Dated: March 31, 2009

LINDSAY & STONEBARGER, APC

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14 By: 

Gene J. Stonebarger
Attorneys for Plaintiff

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