

ENDORSED
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CASE MANAGEMENT CONFERENCE SET

Attorneys for Plaintiff
AS YOU SOW

JAN 30 2009 - 9:00 AM

DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

AS YOU SOW, a non-profit corporation,

Case No. CEC-38-479176

Plaintiff,

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

v.

(Cal. Health & Safety Code §25249.5, *et seq.*)

ARIZONA NUTRITIONAL
SUPPLEMENTS, INC.; J&D
LABORATORIES, INC.; and KABCO
PHARMACEUTICALS, INC.,

Defendants.

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

INTRODUCTION

1. This action seeks to remedy Defendants' 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. Defendants import, manufacture, package, distribute, market and/or sell herbs and herbal products, traditional patent medicines, bulk herbs, infusions, extracted powders, tea pills, traditional pills, patent formulas, bulk teas,

1 liquid extracts, tablets and/or capsules containing lead or lead compounds (referred to
2 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 Defendants have 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 Defendants
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 Defendants' 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 **JURISDICTION AND VENUE**

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

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

1 for sale or use in California or otherwise causes or contributes to exposures within the meaning
2 of H&S Code § 25249.6, *et seq.* to the LISTED CHEMICALS from the PRODUCTS.

3 **STATUTORY BACKGROUND**

4 **A. Proposition 65**

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

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

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

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

20 **FACTUAL BACKGROUND**

21 17. On February 27, 1987, the State of California officially listed the chemical lead
22 as a chemical known to cause reproductive toxicity. Lead became subject to the warning
23 requirement one year later and was therefore subject to the "clear and reasonable" warning
24 requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
25 Regulations ("CCR") § 25000, *et seq.*; H&S Code § 25249.5, *et seq.*)

26 18. 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

1 subject to the warning requirement one year later and were therefore subject to the "clear and
2 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR
3 § 25000, *et seq.*; H&S Code § 25249.6, *et seq.*)

4 19. Plaintiff is informed and believes, and based on such information and belief
5 alleges, that one or more of the PRODUCTS have been sold to and/or ingested by individuals
6 in California without clear and reasonable warning since at least August 14, 2006. The
7 PRODUCTS continue to be offered for sale in California without the requisite warning
8 information.

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

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

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

21 23. At all times relevant to this action, Defendants have, in the course of doing
22 business, failed to provide individuals ingesting the PRODUCTS with a clear and reasonable
23 warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.

24 24. The PRODUCTS continue to be offered for sale in California without the
25 requisite clear and reasonable warning.
26

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

1
2
3 25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,
4 inclusive, as if specifically set forth herein.

5 26. Beginning on or about June 17, 2008, AYS sent 60-Day Notices of Proposition
6 65 violations to the requisite public enforcement agencies and to Defendants. These notices
7 were issued pursuant to, and in compliance with, the requirements of H&S Code § 25249.7(d)
8 and the statute's implementing regulations regarding the notice of the violations to be given to
9 certain public enforcement agencies and to the violator. The notices given included, *inter alia*,
10 the following information: the name, address, and telephone number of the noticing individual;
11 the name of the alleged violators; the statute violated; the approximate time period during which
12 violations occurred; and descriptions of the violations, including the chemicals involved, the
13 routes of toxic exposure, and the specific products and type of products causing the violations.
14 The named defendant(s) and the California Attorney General were provided copies of the 60-
15 Day Notice by certified mail. Additionally, the named defendant(s) was provided a copy of a
16 document entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition
17 65): A Summary," which is also known as Appendix A to Title 27 of CCR § 25903.

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

21 28. By committing the acts alleged in this Complaint, Defendants, at all times
22 relevant to this action, and continuing through the present, have violated H&S Code § 25249.6
23 by, in the course of doing business, knowingly and intentionally exposing individuals who ingest
24 the PRODUCTS to the LISTED CHEMICALS, without first providing a clear and reasonable
25 warning to such individuals pursuant to H&S Code §§ 25249.6 and 25249.11(f).

26 29. By the above-described acts, Defendants are liable, pursuant to H&S Code §
25249.7(b), for a civil penalty of up to \$2500 per day for each unlawful exposure to a LISTED

1 CHEMICAL from the PRODUCTS.

2 30. An action for injunctive relief under Proposition 65 is specifically authorized by
3 Health & Safety Code § 25249.7(a).

4 31. Continuing commission by Defendants, of the acts alleged above will
5 irreparably harm the citizens of the State of California, for which harm they have no plain,
6 speedy, or adequate remedy at law.

7 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

8 **INJUNCTIVE RELIEF**

9 32. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 31,
10 as if specifically set forth herein.

11 33. By committing the acts alleged in this Complaint, the Defendants have caused
12 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
13 of equitable relief, Defendants will continue to create a substantial risk of irreparable injury by:

14 a. continuing to cause consumers to be involuntarily and unwittingly exposed
15 to the LISTED CHEMICALS through the ingestion of the PRODUCTS;
16 and,

17 b. preventing consumers from distinguishing products that cause exposures to
18 lead and lead compounds from similar products that do not cause such
19 exposures.

20 **PRAYER FOR RELIEF**

21 Wherefore, Plaintiff accordingly prays for the following relief:

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

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

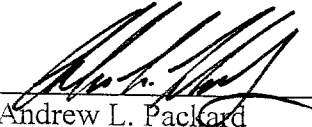
3 C. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
4 California Code of Civil Procedure §1021.5 as Plaintiff shall specify in further application to
5 the Court; and,

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

7
8 DATED: August 27, 2008

Respectfully Submitted,

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10 LAW OFFICES OF ANDREW L. PACKARD

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14 Andrew L. Packard
15 Michael P. Lynes
16 Attorneys for Plaintiff
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