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ENDORSED
FILED
Superior Court of California
County of San Francisco

MAY 7 - 2009

GORDON PARK-LI, Clerk
BY: CRISTINA BAUTISTA
Deputy Clerk

CASE MANAGEMENT CONFERENCE SET

OCT 9 - 2009 - 9⁰⁰ AM

DEPARTMENT 212

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

12 STEPHEN D. GILLETT, an individual,
13 Plaintiff,

14 vs.

15 WHOLE FOODS MARKET CALIFORNIA,
16 INC.,
17 Defendant.

) Case No. CGC-09-488136

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

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

1 Plaintiff STEPHEN D. GILLETT brings this action in the interest of the general public
2 and, on information and belief, hereby alleges:

3 **INTRODUCTION**

4 1. This action seeks to remedy Defendant's continuing failure to warn thousands
5 of consumers in California that they are being exposed to chemicals known to the State of
6 California to cause cancer and/or reproductive toxicity. Defendant distributes, markets, and/or
7 sells herbal dietary supplements containing lead (referred to collectively herein as the
8 "PRODUCTS").

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

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

16 4. Defendant's continued distribution, marketing and/or sale of the PRODUCTS
17 without the required health hazard warnings, causes individuals to be involuntarily and
18 unwittingly exposed to dangerous levels of the LISTED CHEMICALS.

19 5. By this action Plaintiff seeks the following appropriate relief:

- 20 a. prohibiting the continued distribution, marketing, and sale of the
21 PRODUCTS in California by Defendant without provision of clear and
22 reasonable warnings regarding the risks of cancer and/or reproductive
23 toxicity posed by exposure to the LISTED CHEMICALS through the
24 use of the PRODUCTS; and,
25 b. assessing civil penalties in the amount of \$2,500 per day per violation to
26 remedy Defendant's ongoing failure to provide clear and reasonable

1 warnings to thousands of individuals that they are being exposed and
2 continue to be exposed to LISTED CHEMICALS through the use of the
3 PRODUCTS.
4

5 **JURISDICTION AND VENUE**

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

10 7. This Court has jurisdiction over Defendant because Defendant is a corporation
11 organized under the laws of the State of California and is doing sufficient business in, and
12 having sufficient minimum contacts with, California, or otherwise intentionally availing itself
13 of the California market through the distribution, marketing and/or sale of the PRODUCTS in
14 the State of California to render the exercise of jurisdiction over it by the California courts
15 consistent with traditional notions of fair play and substantial justice.

16 8. Venue in this action is proper in the San Francisco Superior Court because
17 Defendant has violated one or more of the California laws specified herein in the City and
18 County of San Francisco and/or has its principal place of business in San Francisco.
19

20 **PARTIES**

21 9. Plaintiff STEPHEN D. GILLET is a citizen enforcer of Proposition 65 and is
22 bringing this enforcement action in the public interest pursuant to H&S Code §25249.7(d).

23 10. Defendant WHOLE FOODS MARKET OF CALIFORNIA, INC. ("WHOLE
24 FOODS") is a person doing business within the meaning of H&S Code §25249.11.

25 11. WHOLE FOODS distributes, markets and/or sells one or more of the
26 PRODUCTS for sale or use in California.

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 phrase
15 "threaten to violate" is defined to mean "to create a condition in which there is a substantial
16 likelihood that a violation will occur." (H&S Code §25249.11(e).) Violators are liable for civil
17 penalties of up to \$2,500 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

1 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (22 CCR
2 §12000, *et seq.*; H&S Code §25249.6, *et seq.*)

3 17. Plaintiff is informed and believes, and based on such information and belief
4 alleges, that one or more of the PRODUCTS have been sold to, and/or used by, individuals in
5 California without clear and reasonable warning since at least February 28, 2008. The
6 PRODUCTS continue to be offered for sale in California without the requisite warning
7 information.

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

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

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

20 21. 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 22. The PRODUCTS continue to be offered for sale in California without the
24 requisite clear and reasonable warning.

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

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

24. On February 28, 2009, Plaintiff sent a 60-Day Notice of Proposition 65 violations to the requisite public enforcement agencies and to Defendant. The notice was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to be given to certain public enforcement agencies and to the violator. The notice given included, *inter alia*, the following information: the name, address, and telephone number of the noticing individual; the 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 routes of toxic exposure, and the specific products or type of products causing the violations, and was issued as follows:

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

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

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

9 27. By the above-described acts, Defendant is liable, pursuant to H&S Code
10 §25249.7(b), for a civil penalty of up to \$2,500 per day for each unlawful exposure to a
11 LISTED CHEMICAL from the PRODUCTS.

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

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

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

18
19 **PRAYER FOR RELIEF**

20 Wherefore, Plaintiff accordingly prays for the following relief:

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

1 B. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
2 against Defendant in the amount of \$2,500 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: May 7, 2009

Respectfully Submitted,

9 LAW OFFICES OF ANDREW L. PACKARD

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11
12 By 

13 Andrew L. Packard
14 Attorneys for Plaintiff
15 Stephen D. Gillett
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