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8 Attorneys for Plaintiff
9 STEPHEN D. GILLETT

FILED
San Francisco County Superior Court

CASE MANAGEMENT CONFERENCE SET 20 2009

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Deputy Clerk

DEPARTMENT 212

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

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

14 v.

15 NBTY, INC., a corporation,
16 Defendant.

Case No. CGC-09-491662

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

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19 Plaintiff Stephen D. Gillett brings this action in the interests of the general public and,
20 on information and belief, hereby alleges:

21 **INTRODUCTION**

22 1. This action seeks to remedy Defendant's continuing failure to warn thousands
23 of consumers in California that they are being exposed to lead, a substance known to the State
24 of California to cause cancer, birth defects and other reproductive harm. Defendant
25 manufactures, packages, distributes, markets, and/or sells in California certain herbal products
26 containing lead (collectively referred to hereinafter as the "PRODUCTS").

1 2. Lead and lead compounds (hereinafter, the "LISTED CHEMICALS") are
2 substances known to the State¹ of California to cause cancer, birth defects and other
3 reproductive harm.

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

9 4. Defendant's continued manufacturing, packaging, distributing, marketing and/or
10 sales of the PRODUCTS without the required health hazard warnings, causes individuals to be
11 involuntarily and unwittingly exposed to levels of the LISTED CHEMICALS that violate
12 Proposition 65.

13 5. By this action Plaintiff seeks appropriate relief:

- 14 a. prohibiting the continued manufacturing, packaging, distributing,
15 marketing and/or sales of the PRODUCTS in California by Defendant
16 without provision of clear and reasonable warnings regarding the risks of
17 cancer, birth defects and other reproductive harm posed by exposure to
18 the LISTED CHEMICALS through the use and/or handling of the
19 PRODUCTS; and,
20 b. assessing civil penalties in the amount of \$2,500 per day per violation to
21 remedy Defendant's ongoing failure to provide clear and reasonable
22 warnings to thousands of individuals that they are being exposed and
23 continue to be exposed to LISTED CHEMICALS through the use and/or
24 handling of the PRODUCTS;

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¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
2 reproductive harm." (Section 1(b) of Initiative Measure, Proposition 65).

3 14. To effect this goal, Proposition 65 requires that individuals be provided with a
4 "clear and reasonable warning" before being exposed to substances listed by the State of
5 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
6 part:

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

11 15. Proposition 65 provides that any person "violating or threatening to violate" the
12 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7.) The phrase
13 "threatening to violate" is defined to mean creating "a condition in which there is a substantial
14 likelihood that a violation will occur." (H&S Code §25249.11(e).) Violators are liable for civil
15 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

16 FACTUAL BACKGROUND

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

22 17. On October 1, 1992, the State of California officially listed the chemicals lead
23 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became
24 subject to the warning requirement one year later and were therefore subject to the "clear and
25 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR §
26 25000, *et seq.*; H&S Code §25249.6, *et seq.*)

18. Plaintiff is informed and believes, and based on such information and belief
alleges, that one or more of the PRODUCTS have been distributed and/or sold to individuals in

1 California without clear and reasonable warning since at least August 20, 2008. The
2 PRODUCTS continue to be distributed and sold in California without the requisite warning
3 information.

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

10 20. At all times relevant to this action, Defendant has knowingly and intentionally
11 exposed the users and/or handlers of the PRODUCTS to the LISTED CHEMICALS without
12 first giving a clear and reasonable warning to such individuals.

13 21. Individuals using or handling the PRODUCTS are exposed to the LISTED
14 CHEMICALS in excess of the levels determined by the State of California to cause "no
15 observable effect" or "no significant risk", as applicable, within the meaning of H&S Code
16 §25249.10(c).

17 22. At all times relevant to this action, Defendant has, in the course of doing
18 business, failed to provide individuals using and/or handling the PRODUCTS with a clear and
19 reasonable warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.

20 23. The PRODUCTS continue to be distributed and sold in California without the
21 requisite clear and reasonable warning.

22 **FIRST CAUSE OF ACTION**
23 **(Violations of Health and Safety Code § 25249.6, et seq. concerning those PRODUCTS**
24 **described in Plaintiff's June 11, 2009 60-Day Notice of Violation)**

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

26 25. On June 11, Plaintiff sent a 60-Day Notice of Proposition 65 violations to the
requisite public enforcement agencies and to Defendant ("First Notice"). The First Notice was

1 issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
2 statute's implementing regulations regarding the notice of the violations to be given to certain
3 public enforcement agencies and to the violator. The notice given included, *inter alia*, the
4 following information: the name, address, and telephone number of the noticing individual; the
5 name of the alleged violator; the statute violated; the approximate time period during which
6 violations occurred; and descriptions of the violations, including the chemicals involved, the
7 routes of toxic exposure, and the specific products or type of products causing the violations,
8 and was issued as follows:

- 9 a. Defendant and the California Attorney General were provided copies of
10 the First Notice by Certified Mail.
- 11 b. Defendant was provided a copy of a document entitled "The Safe
12 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
13 Summary," which is also known as Appendix A to Title 27 of CCR
14 §25903.
- 15 c. The California Attorney General was provided with a Certificate of Merit
16 by the attorney for the noticing party, stating that there is a reasonable
17 and meritorious case for this action, and attaching factual information
18 sufficient to establish a basis for the certificate, including the identify of
19 the persons consulted with and relied on by the certifier, and the facts
20 studies, or other data reviewed by those persons, pursuant to H&S Code
21 §25249.7(h) (2).

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

25 27. By committing the acts alleged in this Complaint, Defendant at all times relevant
26 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the
course of doing business, knowingly and intentionally exposing individuals who use or handle

1 the PRODUCTS set forth in the First Notice to the LISTED CHEMICALS, without first
2 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6
3 and 25249.11(f).

4 28. By the above-described acts, Defendant is liable, pursuant to H&S Code
5 §25249.7(b), for a civil penalty of up to \$2,500 per day for each unlawful exposure to a
6 LISTED CHEMICAL from these PRODUCTS.

7 29. An action for injunctive relief under Proposition 65 is specifically authorized by
8 Health & Safety Code §25249.7(a).

9 30. Continuing commission by Defendant, of the acts alleged above will irreparably
10 harm the citizens of the State of California, for which harm they have no plain, speedy, or
11 adequate remedy at law.

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

13 **THE NEED FOR INJUNCTIVE RELIEF**

14 31. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 30,
15 as if set forth below.

16 32. By committing the acts alleged in this Complaint, Defendant has caused
17 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
18 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by
19 continuing to cause consumers to be involuntarily and unwittingly exposed to the LISTED
20 CHEMICALS through the use and/or handling of the PRODUCTS.

21 **PRAYER FOR RELIEF**

22 Wherefore, Plaintiff accordingly prays for the following relief:

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

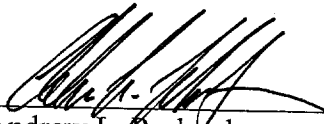
1 B. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
2 against Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

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 DATED: August 20, 2009

LAW OFFICES OF ANDREW L. PACKARD

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12 Attorneys for Plaintiff
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