

1 LAURA J. BAUGHMAN (SBN 263944)
2 BARON & BUDD, P.C.
3 3102 Oak Lawn Avenue, Suite 1100
4 Dallas, TX 75219
5 Tel.: (214) 521-3605/Fax: (214) 520-1181
6 lbaughman@baronbudd.com

7 APRIL STRAUSS (SBN 163327)
8 LAW OFFICE OF APRIL STRAUSS
9 2500 Hospital Drive, Suite 3B
10 Mountain View, CA 94040
11 Tel: 650-281-7081
12 astrauss@sfaclp.com

13 Attorneys for Plaintiffs,
14 CHRIS MANTHEY and BENSON CHILES

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
(Unlimited Jurisdiction)

CHRIS MANTHEY and BENSON CHILES,

Plaintiffs,

v.

CVS PHARMACY, INC.; GENERAL
NUTRITION CORPORATION; NBTY, INC.;
NOW HEALTH GROUP, INC.; OMEGA
PROTEIN, INC.; PHARMAVITE LLC; RITE
AID CORPORATION; SOLGAR, INC.; and
TWINLAB CORPORATION,

Defendants.

Case No.: CGC-10-497334

**PLAINTIFFS' FIRST AMENDED
COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

ELECTRONICALLY

FILED

*Superior Court of California,
County of San Francisco*

DEC 11 2012

Clerk of the Court

BY: ANNIE PASCUAL

Deputy Clerk

CHRIS MANTHEY and BENSON CHILES allege as follows:

INTRODUCTION

1. This Complaint seeks civil penalties and an injunction to remedy the continuing failure of defendants CVS PHARMACY, INC.; GENERAL NUTRITION CORPORATION; NOW HEALTH GROUP, INC.; OMEGA PROTEIN, INC.; PHARMAVITE LLC; RITE AID CORPORATION; SOLGAR, INC.; NBTY, INC.¹; and TWINLAB CORPORATION, (hereinafter “Defendants”), to give clear and reasonable warnings to those residents of California, who handle, ingest and use dietary supplements that are, or that are made from, fish oil, fish liver oil, shark oil or shark liver oil (hereinafter “fish oil supplements”), that ingestion of these products causes those residents to be exposed to polychlorinated biphenyls (hereinafter, collectively, “PCBs”). PCBs are known to the State of California to cause cancer and birth defects. Defendants manufacture, distribute, and/or market fish oil supplements. Defendants’ products cause exposures to PCBs, which are chemicals known to the State of California to cause cancer, birth defects and other reproductive harm.

2. Defendants are businesses that manufacture, market, and/or distribute fish oil supplements. Defendants intend that residents of California ingest fish oil supplements that Defendants manufacture, market, and/or distribute. When these products are ingested in their normally intended manner, they expose people to PCBs. In spite of knowing that residents of California were and are being exposed to PCBs when they ingest Defendants’ fish oil supplements, Defendants did not and do not provide clear and reasonable warnings that these products cause exposure to chemicals known to cause cancer, birth defects and other reproductive harm. The fish oil supplements to which this Complaint pertains are those referenced in the Products Lists that accompanied the 60 Day Notice Letters, which are appended to and incorporated by reference in this Complaint.

¹ On information and belief, Plaintiffs allege that NBTY, Inc. is liable for the actions alleged herein that may have been caused by its direct or indirect subsidiaries, if any, under the theory of agency.

3. Plaintiffs seek injunctive relief pursuant to Health & Safety Code Section 25249.7 to compel Defendants to bring their business practices into compliance with section 25249.5 et seq. by providing a clear and reasonable warning to each individual who has been and who in the future may be exposed to the above mentioned toxic chemicals from the reasonably anticipated and intended use of Defendants' products.

4. In addition to injunctive relief, Plaintiffs seek civil penalties to remedy the failure of Defendants to provide clear and reasonable warnings regarding exposure to chemicals known to cause cancer, birth defects and other reproductive harm. Plaintiffs also seek an order that Defendants identify and locate each individual person who in the past has purchased Defendants' fish oil supplements and to provide to each such purchaser a clear and reasonable warning that those fish oil supplements cause exposures to chemicals known to cause cancer and birth defects.

PARTIES

5. Plaintiffs Christopher Manthey and Benson Chiles are individuals concerned about human health and environmental protection. Plaintiffs are “persons” pursuant to Health & Safety Code Section 25118. Plaintiffs bring this enforcement action in the public interest pursuant to Health & Safety Code §25249.7(d). Residents of California are regularly exposed to PCBs from fish oil supplements manufactured, distributed or marketed by Defendants and are intentionally so exposed without a clear and reasonable Proposition 65 warning.

6. Each Defendant is a person doing business within the meaning of Health & Safety Code Section 25249.11. Each defendant is a business that manufactures, distributes, and/or markets fish oil supplements in California, including in the City and County of San Francisco. Manufacture, distribution and/or marketing of these products in the City and County of San Francisco, and/or to the people who live in San Francisco, causes people to be intentionally exposed to PCBs while they are physically present in the City and County of San Francisco.

7. Plaintiffs bring this enforcement action against Defendants pursuant to Health & Safety Code Section 25249.7 (d). Attached hereto and incorporated by reference are copies of the 60 – day Notice letters, dated August 6, 2009, August 5, 2011, and February 1, 2012, which

1 Plaintiffs sent to California's Attorney General. Letters identical in substance were sent to every
2 District Attorney in the state, and to the City Attorneys of every California city with a population
3 greater than 750,000. On the same date, Plaintiffs sent an identical 60 Day Notice letter to
4 Defendants. Attached to each 60-Day Notice Letter sent to the Defendants was a summary of
5 Proposition 65 that was prepared by California's Office of Environmental Health Hazard
6 Assessment. In addition, each 60-Day Notice Letter Plaintiffs sent was accompanied by a
7 Certificate of Service attesting to the service of the 60-Day Notice Letter on each entity which
8 received it. Pursuant to California Health & Safety Code Section 25249.7(d), a Certificate of Merit
9 attesting to the reasonable and meritorious basis for the action was also sent with each 60-Day
10 Notice Letter. Factual information sufficient to establish the basis of the Certificate of Merit was
11 enclosed with each 60-Day Notice letter Plaintiffs sent to the Attorney General.

12 8. Each Defendant is a business that employs more than ten people.

13 JURISDICTION

14 9. The Court has jurisdiction over this action pursuant to California Health & Safety
15 Code Section 25249.7. California Constitution Article VI, Section 10 grants the Superior Court
16 "original jurisdiction in all causes except those given by statute to other trial courts." Chapter 6.6
17 of the Health & Safety Code, which contains the statutes under which this action is brought, does
18 not grant jurisdiction to any other trial court.

19 10. This Court also has jurisdiction over Defendants because they are businesses that
20 have sufficient minimum contacts in California and within the City and County of San Francisco.
21 Defendants intentionally availed themselves of the California and San Francisco County markets
22 for fish oil supplements. It is thus consistent with traditional notions of fair play and substantial
23 justice for the San Francisco Superior Court to exercise jurisdiction over them.

24 11. Venue is proper in this Court because Defendants market their products in and
25 around San Francisco and thus intentionally cause people to ingest PCBs while those people are
26 physically present in San Francisco. Liability for Plaintiffs' causes of action, or some parts thereof,
27 has accordingly arisen in San Francisco during the times relevant to this Complaint and Plaintiffs
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1 accordingly seek civil penalties and forfeitures imposed by statutes.

2 **FIRST CAUSE OF ACTION**
3 (Claim for Injunctive Relief)

4 12. Plaintiffs reallege and incorporate by reference into this First Cause of Action, as
5 if specifically set forth herein, paragraphs 1 through 11, inclusive.

6 13. The People of the State of California have declared by referendum under
7 Proposition 65 (California Health & Safety Code § 25249.5 et seq.) their right “[t]o be informed
8 about exposures to chemicals that cause cancer, birth defects, and reproductive harm.”

9 14. To effectuate this goal, Section 25249.6 of the Health and Safety Code mandates
10 that persons who, in the course of doing business, knowingly and intentionally expose any
11 individual to a chemical known to the State of California to cause cancer or birth defects, must
12 first provide a clear and reasonable warning to such individual prior to the exposure.

13 15. Since at least August 6, 2006, Defendants have engaged in conduct that violates
14 Health and Safety Code Section 25249.6 et seq. This conduct includes knowingly and intentionally
15 exposing to PCBs, those California residents who ingest fish oil supplements. The normally
16 intended use of fish oil supplements causes people to ingest PCBs, which are chemicals known to
17 the State of California to cause cancer, birth defects and other reproductive harm. Defendants have
18 not provided clear and reasonable warnings within the meaning of Health & Safety Code Section
19 25249.6 and 25249.11

20 16. At all times relevant to this action, Defendants knew that the fish oil supplements
21 they manufactured, distributed or marketed were causing exposures to PCBs. Defendants intended
22 that residents of California ingest fish oil supplements thereby causing significant exposures to
23 these chemicals.

24 17. By the above described acts, Defendants have violated Cal. Health & Safety Code
25 § 25249.6 and are therefore subject to an injunction ordering them to stop violating Proposition 65,
26 to provide warnings to all present and future customers, and to provide warnings to their past
27 customers who purchased Defendants’ products without receiving a clear and reasonable warning.

1 **SECOND CAUSE OF ACTION**

2 (Claim for Civil Penalties)

3 18. Plaintiffs reallege and incorporate by reference into this Second Cause of Action,
4 as if specifically set forth herein, paragraphs 1 through 17, inclusive.

5 19. By the above described acts, Defendants and each of them are liable, pursuant to
6 Health & Safety Code § 25249.7(b), for a civil penalty of up to \$2,500.00 per day for each
7 exposure of an individual to PCBs without proper warning from the use of Defendants' fish oil
8 supplements.

9 **PRAYER FOR RELIEF**

10 Wherefore, Plaintiffs pray for judgment against DEFENDANTS, as follows:

11 A. Pursuant to the First Cause of Action, that Defendants to be enjoined, restrained,
12 and ordered to comply with the provisions of Section 25249.6 of the California Health & Safety
13 Code;

14 B. Pursuant to the Second Cause of Action, that Defendants be assessed a civil
15 penalty in an amount equal to \$2,500.00 per individual knowingly and intentionally exposed per
16 day, in violation of Section 25249.6 of the California Health & Safety Code, to PCBs as the result
17 of Defendants' manufacturing, distributing or marketing of fish oil supplements;

18 C. That Defendants be ordered to identify and locate each individual who purchased
19 their fish oil supplements and to provide a warning to each such person that the purchased fish oil
20 supplements have exposed, or will expose, that person to chemicals known to cause cancer and
21 birth defects.

22 D. That, pursuant to Civil Procedure Code § 1021.5, Defendants be ordered to pay to
23 Plaintiffs the attorney's fees and costs they incurred in bringing this enforcement action.

24 E. For such other relief as this court deems just and proper.
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1 Dated: Dec. 10, 2012

Respectfully submitted,

BARON & BUDD, P.C.

By: 

Laura J. Baughman
3102 Oak Lawn Avenue, Ste. 1100
Dallas, Texas 75219
Telephone: (214) 521-3605
Facsimile: (214) 520-1181
lbaughman@baronbudd.com

April M. Strauss
LAW OFFICE OF APRIL STRAUSS
2500 Hospital Drive, Suite 3B
Mountain View, CA 94040
Tel: 650-281-7081
astrauss@sfaclp.com

1 LAURA J. BAUGHMAN (SBN 263944)
BARON & BUDD, P.C.
2 3102 Oak Lawn Ave., Suite 1100
Dallas, TX 72519
3 Tel.: 214-521-3605
Fax: 214-520-1181
4 lbaughman@baronbudd.com

5 APRIL STRAUSS (SBN 163327)
LAW OFFICE OF APRIL STRAUSS
6 2500 Hospital Drive, Suite 3B
Mountain View, CA 94040
7 Tel: 650-281-7081
astrauss@sfaclp.com

8 Attorneys for Plaintiffs
9 CHRIS MANTHEY AND BENSON CHILES

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

12 CHRIS MANTHEY; BENSON CHILES; and
13 MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION,

14 Plaintiffs,

15 v.

16 CVS PHARMACY, INC.; GENERAL
17 NUTRITION CORPORATION; NOW
HEALTH GROUP, INC.; OMEGA
18 PROTEIN, INC.; PHARMAVITE LLC; RITE
AID CORPORATION; SOLGAR, INC.; and
19 TWINLAB CORPORATION,

20 Defendants.

Case No. CGC-10-497334

PROOF OF SERVICE

1 **PROOF OF SERVICE**

2 I hereby certify that I am an employee of Baron & Budd, P.C. in the County of Dallas,
3 State of Texas. I am over the age of 18 years and not a party to the within action; my business
4 address is 3102 Oak Lawn Avenue, Suite 1100, Dallas, Texas 75219-4281. On December 10,
5 2012, I served a copy of the attached document titled:

6 **PLAINTIFFS' FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF
7 AND CIVIL PENALTIES**

8 on the parties listed below, as noted:

9 X (BY ELECTRONIC MAIL) By personally e-mailing a copy to the person(s) at the e-mail
10 addresses listed below as follows; and/or

11 X (BY MAIL) I placed such sealed envelope with postage fully prepaid for first class mail,
12 for collection and mailing at Baron & Budd, P.C., Dallas, Texas following ordinary business
13 practices. I am readily familiar with the practice of Baron & Budd, P.C. for collection and
14 processing of correspondence, said practice being that in the ordinary course of business,
15 correspondence is deposited in the United States Postal Service the same day as it is placed for
16 collection. The person(s) served by U.S. mail are named as follows; and/or

17 X (BY LEXIS NEXIS FILE AND SERVE) By personally uploading a copy to Lexis Nexis
18 File and Serve, which will send a notification of filing to the person(s) named as follows:

19 Andrew L. Packard
20 Law Offices of Andrew L. Packard
21 100 Petaluma Boulevard N, Suite 301
22 Petaluma, CA 94952
23 Telephone: (707) 763-7727
24 FAX: (707) 763-9227
25 Andrew@packardlawoffices.com

26 Attorney for Plaintiffs
27 MATEEL ENVIRONMENTAL JUSTICE
28 FOUNDATION

Trenton H. Norris
Sarah Esmaili
ARNOLD & PORTER LLP
One Embarcadero Center, 22nd Floor
San Francisco, California 94111-3711
Telephone: 415-356-3300
Fax: 415-356-3099
trent.norris@aporter.com
sarah.esmaili@aporter.com
Attorneys for Defendants
NOW HEALTH GROUP, INC. and OMEGA
PROTEIN, INC.

Judith M. Praitis
Sidley Austin, LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: 213-896-6000
Fax: 213-896-6600
jpraitis@sidley.com

Attorneys for Defendants
SOLGAR, INC. and TWINLAB
CORPORATION

Susan L. Germaise
Patricia L. Victory
McGuire Woods, LLP
1800 Century Park East, 8th Floor
Los Angeles, CA 90067
FAX:
sgermaise@mcguirewoods.com
pvictory@mcguirewoods.com
Attorneys for Defendant
GENERAL NUTRITION CENTERS, INC.,
sued erroneously herein as GENERAL
NUTRITION CORPORATION

1 Steven R. Tekosky
David B. Sadwick
2 Tatro Tekosky Sadwick, LLP
333 South Grand Avenue, Suite 4270
3 Los Angeles, CA 90071
Telephone: 213-225-7171
4 Fax: 213-225-7151
SteveTekosky@ttsmlaw.com
5 davidsadwick@ttsmlaw.com

6 Attorneys for Defendants
CVS PHARMACY, INC., PHARMAVITE
7 LLC, and THRIFTY PAYLESS, INC., sued
erroneously herein as RITE AID
8 CORPORATION

9 William Verick
10 Klamath Environmental Law Center
421 1st Street
11 Eureka, CA 95501

12 Attorney for Plaintiffs
MATEEL ENVIRONMENTAL JUSTICE
13 FOUNDATION

Honorable Kamala D. Harris
Attorney General of California
Janill Richards
Supervising Deputy Attorney General
Susan S. Fiering
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: 510-622-2142
Fax: 510-622-2270
Susan.Fiering@doj.ca.gov

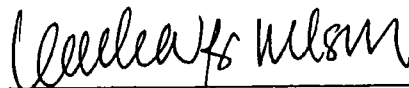
Attorneys for the PEOPLE OF THE
STATE OF CALIFORNIA

David Roe
Law Offices of David Roe
1061 Walker Avenue
Oakland, CA 94610

Attorney for Plaintiffs
MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

14 I declare under penalty of perjury under the laws of the United States of America and the
15 State of Texas that the foregoing is true and correct.

16 Dated: December 10, 2012



17 Amelia B. Wilson
18 Legal Secretary to Laura J. Baughman