

ENDORSED
FILED
Superior Court of California

NOV 30 2009

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CASE MANAGEMENT CONFERENCE SET

8 Attorneys for Plaintiff
9 STEPHEN D. GILLETT

APR 30 2010 9:00 AM

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

DEPARTMENT 212

11 COUNTY OF SAN FRANCISCO

12 STEPHEN D. GILLETT, an individual,

CGC-09-494854
Case No. _____

13 Plaintiff,

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

14 v.

15 PHARMACA INTEGRATIVE PHARMACY,
16 INC., a corporation,

Health & Safety Code §25249.5, et seq.;

17 Defendant.

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

20 INTRODUCTION

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

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JURISDICTION AND VENUE

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

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

8. Venue in this action is proper in the San Francisco Superior Court because the Defendant has violated California law in the City and County of San Francisco.

PARTIES

9. Plaintiff STEPHEN D. GILLET ("SDG") is a citizen enforcer dedicated to the protection of the environment, the promotion of human health and the improvement of worker and consumer safety. SDG resides in San Francisco, California.

10. SDG is bringing this enforcement action in the public interest pursuant to H&S Code §25249.7(d).

11. Defendant PHARMACA INTEGRATIVE PHARMACY, INC. ("PHARMACA") is a corporation organized under the laws of the State of Colorado and a person doing business within the meaning of H&S Code §25249.11.

12. PHARMACA manufactures, packages, distributes, markets and/or sells one or more of the PRODUCTS for sale or use in California.

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STATUTORY BACKGROUND

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

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

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

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

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FACTUAL BACKGROUND

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

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

1 18. Plaintiff is informed and believes, and based on such information and belief
2 alleges, that one or more of the PRODUCTS have been distributed and/or sold to individuals in
3 California without clear and reasonable warning since at least November 30, 2008. The
4 PRODUCTS continue to be distributed and sold in California without the requisite warning
5 information.

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

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

15 21. Individuals using or handling the PRODUCTS are exposed to the LISTED
16 CHEMICALS in excess of the levels determined by the State of California to be the
17 "maximum allowable daily level" or "no significant risk level", as applicable, within the
18 meaning of H&S Code §25249.10(c).

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

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

24 **FIRST CAUSE OF ACTION**
25 **(Violations of Health and Safety Code § 25249.6, et seq. concerning those PRODUCTS**
26 **described in Plaintiff's August 31, 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.
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1 25. On August 31, 2009 Plaintiff sent a 60-Day Notice of Proposition 65 violations
2 to the requisite public enforcement agencies and to Defendant ("First Notice"). The First
3 Notice was issued pursuant to, and in compliance with, the requirements of H&S Code
4 §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to
5 be given to certain public enforcement agencies and to the violator. The First Notice included,
6 *inter alia*, the following information: the name, address, and telephone number of the noticing
7 individual; the name of the alleged violator; the statute violated; the approximate time period
8 during which violations occurred; and descriptions of the violations, including the chemicals
9 involved, the routes of toxic exposure, and the specific products or type of products causing the
10 violations, and was issued as follows:

- 11 a. Defendant and the California Attorney General were provided copies of
12 the First Notice by Certified Mail;
- 13 b. Defendant was provided a copy of a document entitled "The Safe
14 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
15 Summary," which is also known as Appendix A to Title 27 of CCR
16 §25903; and,
- 17 c. The California Attorney General was provided with a Certificate of Merit
18 by the attorney for the noticing party, stating that there is a reasonable
19 and meritorious case for this action, and attaching factual information
20 sufficient to establish a basis for the certificate, including the identify of
21 the persons consulted with and relied on by the certifier, and the facts
22 studies, or other data reviewed by those persons, pursuant to H&S Code
23 §25249.7(h)(2).

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

27. By committing the acts alleged in this Complaint, Defendant at all times relevant

1 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the
2 course of doing business, knowingly and intentionally exposing individuals who use or handle
3 the PRODUCTS set forth in the First Notice to the LISTED CHEMICALS, without first
4 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6
5 and 25249.11(f).

6 28. By the above-described acts, Defendant is liable, pursuant to H&S Code
7 §25249.7(b), for a civil penalty of up to \$2,500 per day for each unlawful exposure to a
8 LISTED CHEMICAL from these PRODUCTS.

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

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

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

15 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

23 **PRAYER FOR RELIEF**

24 Wherefore, Plaintiff accordingly prays for the following relief:

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

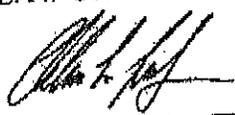
5 B. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
6 against Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

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

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

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12 DATED: November 30, 2009

LAW OFFICES OF ANDREW L. PACKARD



Andrew L. Packard
Attorneys for Plaintiff
STEPHEN D. GILLETT

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