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9 STEPHEN D. GILLETT

ENDORSED  
FILED  
Superior Court of California  
County of San Francisco

NOV 25 2009

GORDON PARK-LI, Clerk  
BY: ROSSALY DE LAVEGA  
Deputy Clerk

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

) **FIRST AMENDED 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 State<sup>1</sup> 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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26  

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





1 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR §  
2 25000, *et seq.*; H&S Code §25249.6, *et seq.*)

3 18. Plaintiff is informed and believes, and based on such information and belief  
4 alleges, that one or more of the PRODUCTS have been distributed and/or sold to individuals in  
5 California without clear and reasonable warning since at least August 20, 2008. The  
6 PRODUCTS continue to be distributed and sold in California without the requisite warning  
7 information.

8 19. 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 20. At all times relevant to this action, Defendant has knowingly and intentionally  
15 exposed the users and/or handlers of the PRODUCTS to the LISTED CHEMICALS without  
16 first giving a clear and reasonable warning to such individuals.

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

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

24 23. The PRODUCTS continue to be distributed and sold in California without the  
25 requisite clear and reasonable warning.  
26

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

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

6 25. On June 11, 2009 Plaintiff sent a 60-Day Notice of Proposition 65 violations to  
7 the requisite public enforcement agencies and to Defendant ("First Notice"). The First Notice  
8 was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)  
9 and the statute's implementing regulations regarding the notice of the violations to be given to  
10 certain public enforcement agencies and to the violator. The notice given included, *inter alia*,  
11 the following information: the name, address, and telephone number of the noticing individual;  
12 the name of the alleged violator; the statute violated; the approximate time period during which  
13 violations occurred; and descriptions of the violations, including the chemicals involved, the  
14 routes of toxic exposure, and the specific products or type of products causing the violations,  
15 and was issued as follows:

- 16 a. Defendant and the California Attorney General were provided copies of  
17 the First Notice by Certified Mail.
- 18 b. Defendant was provided a copy of a document entitled "The Safe  
19 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A  
20 Summary," which is also known as Appendix A to Title 27 of CCR  
21 §25903.
- 22 c. The California Attorney General was provided with a Certificate of Merit  
23 by the attorney for the noticing party, stating that there is a reasonable  
24 and meritorious case for this action, and attaching factual information  
25 sufficient to establish a basis for the certificate, including the identity of  
26 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           26.     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           27.     By committing the acts alleged in this Complaint, Defendant at all times relevant  
5 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the  
6 course of doing business, knowingly and intentionally exposing individuals who use or handle  
7 the PRODUCTS set forth in the First Notice to the LISTED CHEMICALS, without first  
8 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6  
9 and 25249.11(f).

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

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

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

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

19                             **SECOND CAUSE OF ACTION**  
20                             **(Violations of Health and Safety Code § 25249.6, *et seq.* concerning those PRODUCTS**  
21                             **described in Plaintiff's August 31, 2009 60-Day Notice of Violation)**

22           31.     Plaintiff realleges and incorporates by reference Paragraphs 1 through 30,  
23 inclusive, as if specifically set forth herein.

24           32.     On August 31, 2009 Plaintiff sent a 60-Day Notice of Proposition 65 violations  
25 to the requisite public enforcement agencies and to Defendant ("Second Notice"). The Second  
26 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,

1 *inter alia*, the following information: the name, address, and telephone number of the noticing  
2 individual; the name of the alleged violator; the statute violated; the approximate time period  
3 during which violations occurred; and descriptions of the violations, including the chemicals  
4 involved, the routes of toxic exposure, and the specific products or type of products causing the  
5 violations, and was issued as follows:

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

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

22 34. By committing the acts alleged in this Complaint, Defendant at all times relevant  
23 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the  
24 course of doing business, knowingly and intentionally exposing individuals who use or handle  
25 the PRODUCTS set forth in the Second Notice to the LISTED CHEMICALS, without first  
26 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6  
and 25249.11(f).

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

4           36. An action for injunctive relief under Proposition 65 is specifically authorized by  
5 Health & Safety Code §25249.7(a).

6           37. Continuing commission by Defendant, of the acts alleged above will irreparably  
7 harm the citizens of the State of California, for which harm they have no plain, speedy, or  
8 adequate remedy at law.

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

10                           **THE NEED FOR INJUNCTIVE RELIEF**

11           38. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 37,  
12 as if set forth below.

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

18                           **PRAYER FOR RELIEF**

19           Wherefore, Plaintiff accordingly prays for the following relief:

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

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

          C. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to

1 California Code of Civil Procedure §1021.5, as Plaintiff shall specify in further application to  
2 the Court; and,

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

4 DATED: November 25, 2009

LAW OFFICES OF ANDREW L. PACKARD

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10 Attorneys for Plaintiff  
11 STEPHEN D. GILLETT  
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