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SAN FRANCISCO COUNTY
SUPERIOR COURT
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SERGEANT AT LAW CLERK
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CASE MANAGEMENT CONFERENCE SET

JUN 11 2010 9:00 AM

DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CGC-10-495959

12 STEPHEN D. GILLETT, an individual,
13 Plaintiff,
14 v.
15 MILK SPECIALTIES, INC., NATURE'S
16 PRODUCTS, INC.,
17 Defendants.

Case No. _____
**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**
Health & Safety Code §25249.5, *et seq.*;

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

INTRODUCTION

21
22 1. This action seeks to remedy Defendants' 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. Defendants
25 manufacture, package, distribute, market, and/or sell in California certain herbal products
26 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"). Defendants have failed to provide the
8 health hazard warnings required by Proposition 65.

9 4. Defendants' 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. Plaintiff seeks injunctive relief enjoining Defendants from the continued
14 manufacturing, packaging, distributing, marketing and/or sales of the PRODUCTS in
15 California without provision of clear and reasonable warnings regarding the risks of cancer,
16 birth defects and other reproductive harm posed by exposure to the LISTED CHEMICALS
17 through the use and/or handling of the PRODUCTS. Plaintiff seeks an injunctive order
18 compelling each Defendant to bring its business practices into compliance with Proposition 65
19 by providing a clear and reasonable warning to each individual who has been and who in the
20 future may be exposed to LISTED CHEMICALS from the use of the PRODUCTS. Plaintiff
21 also seeks an order compelling each Defendant to identify and locate each individual person
22 who in the past has purchased the PRODUCTS, and to provide to each such purchaser a clear
23 and reasonable warning that the use of the PRODUCTS will cause exposures to LISTED
24 CHEMICALS.

25 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to
26

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

1 corporation organized under the laws of the State of California and a person doing business
2 within the meaning of H&S Code §25249.11.

3 15. NATURE'S PRODUCTS manufactures, packages, distributes, markets and/or
4 sells one or more of the PRODUCTS for sale or use in California.

5 **STATUTORY BACKGROUND**

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

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

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

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

22 **FACTUAL BACKGROUND**

23 19. On February 27, 1987, the State of California officially listed the chemical lead
24 as a chemical known to cause reproductive toxicity. Lead became subject to the warning
25 requirement one year later and was therefore subject to the "clear and reasonable" warning
26 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.*)

20. On October 1, 1992, the State of California officially listed the chemicals lead

1 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became
2 subject to the warning requirement one year later and were therefore subject to the "clear and
3 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR §
4 25000, *et seq.*; H&S Code §25249.6, *et seq.*)

5 21. Plaintiff is informed and believes, and based on such information and belief
6 alleges the PRODUCTS have been distributed and/or sold to individuals in California without
7 clear and reasonable warning since at least January 11, 2007. The PRODUCTS continue to be
8 distributed and sold in California without the requisite warning information.

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

15 23. At all times relevant to this action, Defendants have knowingly and
16 intentionally exposed the users and/or handlers of the PRODUCTS to the LISTED
17 CHEMICALS without first giving a clear and reasonable warning to such individuals.

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

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

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

FIRST CAUSE OF ACTION

(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning those PRODUCTS described in Plaintiff's November 2, 2009 60-Day Notice of Violation)

27. Plaintiff realleges and incorporates by reference Paragraphs 1 through 26, inclusive, as if specifically set forth herein.

28. On November 2, 2009, Plaintiff sent a 60-Day Notice of Proposition 65 violations to the requisite public enforcement agencies and to Defendants ("Notice"). 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. Defendants and the California Attorney General were provided copies of the Notice by Certified Mail.
- b. Defendants were 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 27 of CCR §25903.
- 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

1 §25249.7(h) (2).

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

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

11 31. By the above-described acts, Defendants have violated H&S Code § 25249.6
12 and are therefore subject to an injunction ordering Defendants to stop violating Proposition 65,
13 to provide warnings to all present and future customers and to provide warnings to Defendants'
14 past customers who purchased or used the PRODUCTS without receiving a clear and
15 reasonable warning.

16 32. An action for injunctive relief under Proposition 65 is specifically authorized by
17 Health & Safety Code §25249.7(a).

18 33. Continuing commission by Defendants, of the acts alleged above will
19 irreparably harm the citizens of the State of California, for which harm they have no plain,
20 speedy, or adequate remedy at law.

21 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

22 **SECOND CAUSE OF ACTION**

23 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning
24 those PRODUCTS described in Plaintiff's November 2, 2009 60-Day Notice of Violation)**

25 34. Plaintiff realleges and incorporates by reference Paragraphs 1 through 33,
26 inclusive, as if specifically set forth herein.

35. On November 2, 2009, Plaintiff sent a 60-Day Notice of Proposition 65

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

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

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

26 37. By committing the acts alleged in this Complaint, each Defendant at all times
relevant to this action, and continuing through the present, has violated H&S Code §25249.6 by,

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

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

8 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

9 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

17 **PRAYER FOR RELIEF**

18 Wherefore, Plaintiff accordingly prays for the following relief:

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

24 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling Defendants
25 to identify and locate each individual who has purchased the PRODUCTS since November 4,
26 2006 and to provide a warning to such person that the use of the Products will expose the user

1 to chemicals known to cause cancer, birth defects, and other reproductive harm.

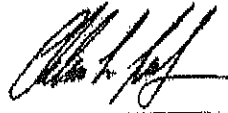
2 C. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
3 against each Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

4 D. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
5 California Code of Civil Procedure §1021.5, as Plaintiff shall specify in further application to
6 the Court; and,

7 E. such other and further relief as may be just and proper.

8 DATED: January 11, 2010

LAW OFFICES OF ANDREW L. PACKARD

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