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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA**

**DAVID STEINMAN**

**Plaintiff,**

**v.**

**THE KROGER CO. and DOES  
1-100**

**Defendants.**

**Case No.**

**COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF  
AND CIVIL PENALTIES**

**[Miscellaneous Civil Complaint (42)]  
Proposition 65, Health & Safety Code  
Section 25249.5 et seq.**

\_\_\_\_\_/

Plaintiff David Steinman hereby alleges:

**I**

**INTRODUCTION**

1. Plaintiff David Steinman (hereinafter “plaintiff”) brings this action as a private attorney general and in the public interest pursuant to Health & Safety Code section 25249.7 (d). This complaint seeks injunctive and declaratory relief and civil penalties to remedy The Kroger Co.’s (hereinafter “defendant”) failure to warn consumers that Kroger Pyrithione Zinc Dandruff

Shampoo containing 1,4-dioxane sold by defendant exposes consumers to a chemical known to the State of California to cause cancer. Based on the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Safety Code section 25249.5 et seq) also known as “Proposition 65,” businesses with ten or more employees must provide a “clear and reasonable warning” prior to exposing persons to certain listed chemicals.

## **II**

### **PARTIES**

2. Plaintiff David Steinman is a committed environmentalist, journalist, consumer health advocate, publisher and author. His major books include Diet for a Poisoned Planet (1990, 2007); The Safe Shopper’s Bible (1995); Living Healthy in a Toxic World (1996); and Safe Trip to Eden: Ten Steps to Save the Planet Earth from Global Warming Meltdown (2007). Through this legal action, Mr. Steinman seeks to eliminate exposure to 1,4-dioxane.

3. Defendant The Kroger Co. is a business entity that manufactures, distributes and/or sells Kroger Pyrithione Zinc Dandruff Shampoo to consumers within the State of California.

4. Defendants Does I-100, are named herein under fictitious names, as their true names and capacities are unknown to Plaintiff. David Steinman is informed and believes, and thereon alleges, that each of said Does is responsible, in some actionable manner, for the events and happenings hereinafter referred to, either through said defendant’s conduct, or through the conduct of its agents, servants or employees, or in some other manner, causing the harms alleged by plaintiff in this complaint. When said true names and capacities of Does are ascertained, David Steinman will seek leave to amend this complaint to set forth the same.

## **III**

## **JURISDICTION AND VENUE**

5. This Court has jurisdiction pursuant to California Constitution Article VI, section 10 because this case is a cause not given by statute to other trial courts.

6. David Steinman has performed any and all conditions precedent to the filing of a legal action pursuant to Proposition 65 by serving by mail a Notice of Violation, dated January 19, 2010 to the Attorney General of the State of California, the State's district attorneys, the appropriate city attorney's and to defendant. A true and correct copy of this Notice is attached herein as Exhibit A. More than 60 days have passed since the Notice of Violation was mailed and no public enforcement entity has filed a complaint in this case.

7. This Court is the proper venue for the action because the causes of action have arisen in Alameda County where some of the violations of law have occurred. Furthermore, this Court is the proper venue under Code of Civil Procedure section 395.5 and Health & Safety Code section 25249.7.

## **IV**

### **STATUTORY BACKGROUND**

#### **A. Proposition 65**

8. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as "Proposition 65" by an overwhelming majority vote of the people in November of 1986.

9. The warning requirement of Proposition 65 is contained in Health & Safety Code section 25249.6, which provides:

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, except as provided in Section 25249.10.

10. Implementing regulations for Proposition 65 provide that warnings are required for

consumer product exposures. A “consumer product exposure is an exposure which results from a person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.” 27 CCR section 25601 (b).

11. Whenever a clear and reasonable warning is required under Health & Safety Code section 25249.6, the “method employed to transmit the warning must be reasonably calculated considering the alternative methods available under the circumstances, to make the warning message available prior to exposure.” 27 CCR section 25601 (a). The warning requirement may be satisfied by a warning that appears on a product’s label or other labeling, shelf labeling, signs, a system of signs, public advertising identifying the system and toll-free information services, or any other, system, that provides clear and reasonable warnings. Id., section 25601 (b) (1) (A)-(C).

12. Proposition 65 establishes a procedure by which the State is to develop a list of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code section 25249.8. There is no duty to provide a clear and reasonable warning until 12-months after the chemical was published on the State list. Id., section 25249.10(b). 1,4 dioxane was listed as a chemical known to the State of California to cause cancer on January 1, 1988. Title 27, Cal. Code Regs., section 27001.

13. Proposition 65 may be enforced by any person in the public interest who provides notice sixty days before filing suit to both the violator and designated law enforcement officials. The failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed pursuant to Health & Safety Code section 25249.7 (c).

14. Proposition 65 provides that any person “violating or threatening to violate” Proposition 65 may be enjoined in any court of competent jurisdiction. Health & Safety Code section 25249.7

(a). To “threaten to violate” means “to create a condition in which there is a substantial probability that a violation will occur.” Id., section 25249.11 (e). Furthermore, violators are subject to a civil penalty of up to \$2,500 per day for each violation. Id., section 25249.7 (b).

## V

### **STATEMENT OF FACTS**

15. Defendant manufactures, distributes and/sells Kroger Pyrithione Zinc Dandruff Shampoo. This product contains 1,4-dioxane.

16. Defendant has knowingly and intentionally exposed numerous persons to 1,4-dioxane, without providing a Proposition 65 warning. The company has at all times relevant hereto been aware that its dandruff shampoo contains 1,4-dioxane and that persons using the product are exposed to the chemical. Defendant markets its product with knowledge that exposures to 1,4-dioxane occur.

17. Defendant has failed to provide consumers of Kroger Pyrithione Zinc Dandruff Shampoo with a clear and reasonable warning that they are being exposed to a chemical known to the State of California to cause cancer.

### **FIRST CAUSE OF ACTION**

#### **(Violation of section 25249.6 of the Health and Safety Code, Failure to Provide Clear and Reasonable Warning under Proposition 65)**

18. David Steinman refers to paragraphs 1-17, inclusive, and incorporates them herein by this reference.

19. Defendant operates a business, which employs ten or more persons.

20. By committing the acts alleged above, defendant has, in the course of doing business, knowingly and intentionally exposed individuals to a chemical known to the State of California to

cause cancer without first giving clear and reasonable warning to such individuals, within the meaning of Health & Safety Code section 25249.6.

21. Said violations render each defendant liable for civil penalties up to \$2,500 (two thousand, five hundred dollars) per day, for each violation.

22. Defendant's continued violation of the law will irreparably harm David Steinman and the public interest in whose behalf Plaintiff brings this action, for which there is no adequate remedy at law.

## **SECOND CAUSE OF ACTION**

### **(Declaratory Relief)**

23. David Steinman refers to paragraphs 1-22, inclusive, and incorporates them herein by this reference.

24. There exists an actual controversy relating to the legal rights and duties of the parties, within the meaning of Code of Civil Procedure section 1060, between plaintiff and defendant concerning:

a) whether defendant has exposed individuals to a chemical known to the State of California to cause cancer without providing clear and reasonable warning.

## **VI**

### **PRAYER**

WHEREFORE plaintiff prays for relief as follows:

1. On the First Cause of Action, for civil penalties for each and every violation according to proof;

2. On the First Cause of Action, and pursuant to Health & Safety Code section 25249.7 (a), for such temporary restraining orders, preliminary and permanent injunctive orders, or other orders,

prohibiting defendant from exposing persons to 1,4-dioxane without providing clear and reasonable warnings;

3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil Procedure section 1060 declaring:

a. that defendant has exposed individuals to a chemical known to the State of California to cause cancer without providing clear and reasonable warning; and

4. On all Causes of Action, for reasonable attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure or the substantial benefit theory;

5. For costs of suit herein; and

6. For such other relief as the Court may deem just and proper.

Dated: March 29, 2010

By \_\_\_\_\_  
Michael Freund  
Attorney for David Steinman