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## SUPERIOR COURT OF THE STATE OF CALIFORNIA

# IN AND FOR THE COUNTY OF SAN FRANCISCO

AS YOU SOW, a non-profit corporation,

CASE NO. CGC-11-509377

Plaintiffs.

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

OLYMPIAN LABS, INC., an Arizona Corporation and DOES 1 through 50, inclusive.

Defendants.

Plaintiff AS YOU SOW ("AYS") brings this action in the interests of the general public and, on information and belief, hereby alleges:

#### INTRODUCTION

- 1. This action seeks to remedy Defendants' continuing failure to warn thousands of consumers in California that they are being exposed to chemicals known to the State of California to cause cancer and/or reproductive toxicity. Defendants import, manufacture, package, distribute, market and/or sell herbs and herbal products, traditional patent medicines, bulk herbs, infusions, extracted powders, tea pills, traditional pills, patent formulas, bulk teas, liquid extracts, tablets and/or capsules containing lead or lead compounds to wit: AllerG Formula 25, Biogra, Cold-X10, Gin-Zing, Olympian Cleanse, Olympian Energy, and Siesta (referred to collectively hereinafter as the "PRODUCTS").
  - 2. Lead and lead compounds (collectively, the "LISTED CHEMICALS") are

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Complaint for Civil Penalties and Injunctive Relief

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chemicals known to the State of California to cause cancer and/or reproductive toxicity.

- 3. The ingestion of the PRODUCTS causes exposures to the LISTED CHEMICALS at levels requiring a "clear and reasonable warning" under California's Sate Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code ("H&S Code") § 25249.5, et seq. (also referred to herein as "Proposition 65").¹ In spite of knowing that residents of California were being exposed to these chemicals when they ingest these PRODUCTS, defendants did not provide clear and reasonable warning to consumers that they are being exposed to chemicals known to cause cancer, birth defects or other reproductive harm, as required by Health & Safety Code §25249 et seq.
  - 4. By this action, Plaintiff seeks appropriate relief including but not limited to:
    - 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 in the future may be exposed to the above mentioned toxic chemicals, and by prohibiting the continued import, manufacture, packaging, distribution, marketing, or sale of the PRODUCTS in California by Defendants without provision of clear and reasonable warnings regarding the risks of cancer and/or reproductive toxicity posed by exposure to the LISTED CHEMICALS through the ingestion of clear and reasonable warnings regarding the risks of cancer and/or reproductive toxicity posed by exposure to the LISTED CHEMICALS through the ingestion of the PRODUCTS;
    - b. Assessing civil penalties in the amount of \$2,500 per day per violation to remedy Defendant's ongoing failure to provide clear and reasonable

<sup>&</sup>lt;sup>1</sup>All statutory and regulatory references herein are to California law.

warnings to thousands of individuals that they are being exposed and continue to be exposed to LISTED CHEMICALS through the ingestion of the PRODUCTS.

## JURISDICTION AND VENUE

- 5. This Court has jurisdiction over the defendants because they are businesses that have sufficient minimum contacts in California and within the City and County of San Francisco. Defendants intentionally availed themselves of the California and San Francisco County markets for the PRODUCTS. It is thus consistent with traditional notions of fair play and substantial justice for the San Francisco Superior Court to exercise jurisdiction over them.
- 6. Venue is proper in this Court because acts of which plaintiff complains occurred within the County of San Francisco during the times relevant to this Complaint.

#### **PARTIES**

- 7. Plaintiff AS YOU SOW ("AYS") is a 501 (c) (3) non-profit corporation dedicated to, among other causes, the protection of the environment, toxics reduction, the promotion of and improvement of human health, the improvement of worker and consumer rights, environmental education and corporate accountability. Plaintiff is based in San Francisco, California and was incorporated in 1992 under the laws of the State of California. AYS brings this enforcement action in the public interest pursuant to Health & Safety Code §25249.7(d).
- 8. Defendant Olympian Labs, Inc. is a person within the meaning of Health & Safety Code § 25249.11.
- 9. Defendant Olympian Labs, Inc., an active Arizona corporation, imports, manufactures, packages, distributes, markets and/or sells one or more of the PRODUCTS for sale or use in California or otherwise causes or contributes to exposures within the meaning of Health & Safety Code § 25249.6, et seq. to the LISTED CHEMICALS from the PRODUCTS in California, including the City and County of San Francisco.

- 10. Each and every Defendant, herein, was, at all times alleged, acting as the agent, actual and ostensible, for each and every other Defendant, as set forth herein.
- Doe Defendants 1 through 50 are sued herein by their fictitious names, as Plaintiffs believe that such Doe Defendants are responsible, in whole or in part, for the incident and damage hereinafter alleged, and the Plaintiffs will amend this Complaint to properly identify such Defendants once their identities become known to Plaintiffs.
- 12. Plaintiffs are informed and believe and thereon alleges that each named or Doe Defendant is responsible in some manner for the acts, occurrences and liability hereinafter alleged and referred to.
- 13. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, each named and/or Doe Defendant was the agent, servant or employee of each and every remaining Defendant, and the acts of each Defendant were within the course and scope of said agency and/or employment.

## STATUTORY BACKGROUND

## Proposition 65

- 14. 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).
- 15. To effect this goal, Proposition 65 requires that individuals be provided with a "clear and reasonable warning" before being exposed to chemicals listed by the State of California as causing cancer or reproductive toxicity. Health & Safety 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....

16. Proposition 65 provides that any person "violating or threatening to violate" the

statute may be enjoined in a court of competent jurisdiction. (Health & Safety Code § 25249.7.) The phrase "threaten to violate" is defined to mean, "to create a condition in which there is a substantial likelihood that a violation will occur." (Health & Safety Code § 25249.11(e).) Violators are liable for civil penalties of up to \$2500 per day for each such violation. (Health & Safety Code § 25249.7.)

## FACTUAL BACKGROUND

- 17. 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. (22 California Code of Regulations ("CCR") § 12000, et seq.; Health & Safety Code § 25249.5, et seq.)
- 18. 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. (22 CCR § 12000, et seq.; Health & Safety Code § 25249.6, et seq.)
- 19. Plaintiff, in San Francisco, ordered the PRODUCTS from defendants.

  Defendants processed plaintiff's order and shipped the PRODUCTS to San Francisco. Plaintiff sent the PRODUCTS to a certified laboratory for analysis. The results of the analysis showed concentrations of lead and/or lead compounds in quantities which require a warning pursuant to Proposition 65.
- 20. Plaintiff is informed and believes, and based on such information and belief alleges, that one or more of the Defendants' PRODUCTS have been sold to and/or ingested by individuals in California without clear and reasonable warning since February 3, 2006. Defendants continue to offer the PRODUCTS for sale in California without the requisite warning information.

- 21. As a proximate result of acts by Defendants, and each of them, as a person in the course of doing business within the meaning of Health & Safety Code § 25249.11, individuals throughout the State of California, including the County of San Francisco, have been exposed to the LISTED CHEMICALS without clear and reasonable warning. The individuals subject to the violative exposure include normal and foreseeable users of the PRODUCTS, as well as all other persons exposed to the PRODUCTS.
- 22. At all times relevant to this action, Defendants knowingly and intentionally exposed the users of the PRODUCTS to the LISTED CHEMICALS without first giving a clear and reasonable warning to such individuals.
- 23. Individuals ingesting the PRODUCTS are exposed to the LISTED CHEMICALS in excess of the levels determined to cause "no observable effect" or "no significant risk, as applicable, within the meaning of Health & Safety Code § 25249.10(c).
- 24. At all times relevant to this action, Defendants have, in the course of doing business, failed to provide individuals ingesting the PRODUCTS with a clear and reasonable warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.
- 25. The PRODUCTS continue to be offered for sale in California without the requisite clear and reasonable warning.
  - 26. Defendants, and each of them, are businesses that employ more than ten people.

# FIRST CAUSE OF ACTION (Violations of Health and Safety Code § 25249.6, et seq.)

- 27. Plaintiff realleges and incorporates by reference Paragraphs 1 through 26, inclusive, as if specifically set forth herein.
- 28. On September 30, 2010, AYS sent 60-day Notices of Proposition 65 violations to the requisite public enforcement agencies and to Defendants Olympian Labs, Inc. These notices were issued pursuant to, and in compliance with, the requirements of Health & Safety 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 notices given included,

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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 and type of products causing the violations. The named defendants and the California Attorney General were provided copies of the 60-Day Notice by certified mail. Additionally, the named 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 22 of CCR § 12903, as well as a Certificate of Merit.

- 29. The appropriate public enforcement agencies have failed to commence and diligently prosecute a cause of action under Health & Safety Code § 25249.5, et seq. against Defendants based on the allegations herein.
- 30. By committing the acts alleged in this Complaint, Defendants, at all times relevant to this action, and continuing through the present, have violated Health & Safety Code § 25249.6 by, in the course of doing business, knowingly and intentionally exposed individuals who ingest the PRODUCTS to the LISTED CHEMICALS, without first providing a clear and reasonable warning to such individuals pursuant to Health & Safety Code §§ 25249.6 and 25249.11(f).
- 31. By the above-described acts, Defendants are liable, pursuant to Health & Safety Code § 25249.7(b), for a civil penalty of up to \$2500 per day for each unlawful exposure to a LISTED CHEMICAL from the PRODUCTS.
- 32. Continuing commission by Defendants, of the acts alleged above will irreparably harm the citizens of the State of California, for which harm they have no plain, speedy, or adequate remedy at law.

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

#### SECOND CAUSE OF ACTION

(Injunctive Relief Pursuant to Health & Safety Code §25249.7)

- 33. Plaintiffs reallege and incorporate by reference into this Second Cause of Action, as if specifically set forth herein, paragraphs 1 through 32.
- 34. Defendants, at all times relevant to this action, have knowingly and intentionally exposed residents of California who purchase the PRODUCTS, to LISTED CHEMICALS. Defendants have not provided clear and reasonable warnings within the meaning of Health & Safety Code Section 25249.6 and 25249.11 to these exposed individuals.
- 35. By intentionally causing such exposures without first providing clear and reasonable warnings, Defendants have violated Proposition 65, Section 25249 et seq. of the California Health & Safety Code.
- 36. An action for injunctive relief is specifically authorized herein pursuant to Health & Safety Code §25249.7(a).
- 37. Plaintiff, in bringing this action, acts within the public interest for the protection of all citizens of the State of California are entitled to injunctive relief for the purpose of deterring and preventing Defendants from failing to warn about possible future exposures to the above mentioned chemicals and/or compounds known to the State of California to cause cancer, birth defects or other reproductive harm or in prohibiting the future sale of the PRODUCTS without a statutory warning.

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

## PRAYER FOR RELIEF

Wherefore, Plaintiff accordingly prays for judgment against Defendants OLYMPIAN LABS, INC. and DOES 1 through 50 as follows :

## FIRST CAUSE OF ACTION

1. For an assessment of civil penalties pursuant to Health & Safety Code § 25249.7(b), against each Defendant in the amount of \$2500 per day for each violation of Proposition 65;

- For an award to Plaintiff of its reasonable attorneys fees and costs of suit 2. pursuant to California Code of Civil Procedure § 1021.5 and/or 1032 as Plaintiff shall specify in further application to the Court; and,
  - For such other and further relief as may be just and proper. 3.

## SECOND CAUSE OF ACTION

- That all defendants be enjoined, restrained, and ordered to comply with the 1. provisions of Section 25249.5, et seq. of the California Health & Safety Code, and not commit any further unlawful or unfair business practices;
- For a preliminary and permanent injunction, pursuant to Health & Safety Code § 2. 25249.7(a) enjoining Defendants, and each of them, their agents, employees, assigns and all persons acting in concert or participating with Defendants from selling, packaging, distributing, or marketing the PRODUCTS in California without first providing a clear and reasonable warning that consumers are exposed, within the meaning of Proposition 65, to the LISTED CHEMICALS.
- For an award to Plaintiff of its reasonable attorneys fees and costs of suit 3. pursuant to California Code of Civil Procedure § 1021.5 and/or § 1032 as Plaintiff shall specify in further application to the Court; and,
  - For such other and further relief as may be just and proper. 4.

Dated: February 2, 2011

POLLOCK & JAMES LE

By:

Mark S. Pollock, Attorney for

Plaintiffs

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