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10 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA

14 CENTER FOR ENVIRONMENTAL HEALTH,)
15 a non-profit corporation,)
16 Plaintiff,)
17 v.)
18 PEPSI BEVERAGES COMPANY; PEPSICO,)
19 INC.; and DOES 1 through 100, inclusive,)
20 Defendants.)

**ENDORSED
FILED
ALAMEDA COUNTY**
JAN 23 2014
CLERK OF THE SUPERIOR COURT
By Barbara LaMonte Deputy

Case No. **RG14711020**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code § 25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to 4-Methylimidazole ("4-MEI"), a
7 chemical known to the State of California to cause cancer. 4-MEI is a toxic chemical that is
8 found in certain caramel coloring agents added to carbonated soft drinks, among other food and
9 beverage products. This Complaint addresses exposures that have occurred, and continue to
10 occur, through the manufacture, distribution, sale, and/or use of Defendants' carbonated soft
11 drinks containing caramel coloring (the "Products"). Individuals in California are exposed to
12 4-MEI when they ingest the Products.

13 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
14 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
15 to chemicals known to the State to cause cancer without providing clear and reasonable warnings
16 to individuals prior to their exposure. Defendants introduce Products contaminated with
17 significant quantities of 4-MEI into the California marketplace, exposing consumers of their
18 Products to 4-MEI.

19 3. Despite the fact that Defendants expose individuals to 4-MEI, Defendants
20 provide no warnings whatsoever about the carcinogenic hazards associated with these 4-MEI
21 exposures. Defendants' conduct thus violates the warning provision of Proposition 65. Health &
22 Safety Code § 25249.6.

23 **PARTIES**

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
25 non-profit corporation dedicated to protecting the public from environmental health hazards and
26 toxic exposures. CEH is based in Oakland, California and is incorporated under the laws of the
27 State of California. CEH is a "person" within the meaning of Health & Safety Code §
28 25249.11(a) and brings this enforcement action in the public interest pursuant to Health & Safety

1 intentionally avails itself of the California market through the sale, marketing, or use of Products
2 in California and/or by having such other contacts with California so as to render the exercise of
3 jurisdiction over it by the California courts consistent with traditional notions of fair play and
4 substantial justice.

5 12. Venue is proper in the Alameda Superior Court because one or more of the
6 violations arise in the County of Alameda.

7 **BACKGROUND FACTS**

8 13. The People of the State of California have declared by initiative under
9 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
10 defects, or other reproductive harm.” Proposition 65, § 1(b).

11 14. To effectuate this goal, Proposition 65 prohibits exposing people to
12 chemicals listed by the State of California as known to cause cancer, birth defects, or other
13 reproductive harm without a “clear and reasonable warning” unless the business responsible for
14 the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
15 states, in pertinent part:

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

19 15. On January 7, 2011, the State of California officially listed 4-MEI as a
20 chemical known to cause cancer. 27 Cal. Code Regs. (“C.C.R.”) § 27001(b). In making this
21 listing determination, the California Environmental Protection Agency’s Office of Environmental
22 Health Hazard Assessment (“OEHHA”) credited the U.S. National Toxicology Program as an
23 “authoritative body” under 27 C.C.R. § 25306, citing to that agency’s 2007 findings regarding
24 the carcinogenic properties of 4-MEI.

25 16. Following the listing of 4-MEI, the American Beverage Association,
26 among other trade groups, sued OEHHA to have 4-MEI removed from the Proposition 65 list,
27 but were unsuccessful. On January 7, 2012, one year after it was listed as a chemical known to
28 cause cancer, 4-MEI became subject to the clear and reasonable warning requirement regarding

1 carcinogens under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code § 25249.10(b).

2 17. Caramel coloring agents containing 4-MEI are added to Products, such as
3 colas. Defendants' Products contain sufficient quantities of 4-MEI such that individuals are
4 exposed to 4-MEI through the average use of the Products. The primary route of exposure is
5 direct ingestion by individuals when consumers drink the Products. These exposures occur in
6 homes, workplaces, and everywhere else throughout California where the Products are
7 consumed.

8 18. No clear and reasonable warning is provided with Products regarding the
9 carcinogenic hazards of 4-MEI.

10 19. Any person acting in the public interest has standing to enforce violations
11 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
12 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
13 action within such time. Health & Safety Code § 25249.7(d).

14 20. More than sixty days prior to naming each Defendant in this lawsuit, CEH
15 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
16 the District Attorneys of every county in California, the City Attorneys of every California city
17 with a population greater than 750,000, and to each of the named Defendants. In compliance
18 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
19 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
20 time period during which violations occurred; (4) specific descriptions of the violations,
21 including (a) the routes of exposure to 4-MEI from Products, and (b) the specific type of
22 Products sold and used in violation of Proposition 65; and (5) the name of the specific
23 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

24 21. More than sixty days prior to naming each Defendant in this lawsuit,
25 concurrent with sending the Notices described in the preceding paragraph, CEH also sent a
26 Certificate of Merit for each Notice to the California Attorney General, the District Attorneys of
27 every county in California, the City Attorneys of every California city with a population greater
28 than 750,000, and to the named Defendants. In compliance with Health & Safety Code §

1 25249.7(d) and 11 C.C.R. § 3101, each of the Certificates certified that CEH’s counsel: (1) has
2 consulted with one or more persons with relevant and appropriate experience or expertise who
3 reviewed facts, studies, or other data regarding the exposures to 4-MEI alleged in each of the
4 Notices; and (2) based on the information obtained through such consultations, believes that
5 there is a reasonable and meritorious case for a citizen enforcement action based on the facts
6 alleged in each of the Notices. In compliance with Health & Safety Code § 25249.7(d) and 11
7 C.C.R. § 3102, each of the Certificates served on the Attorney General included factual
8 information – provided on a confidential basis – sufficient to establish the basis for the
9 Certificate, including the identity of the person(s) consulted by CEH’s counsel and the facts,
10 studies, or other data reviewed by such persons.

11 22. None of the public prosecutors with the authority to prosecute violations
12 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
13 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in the
14 Notices.

15 23. After receiving CEH’s 60-Day “Notice of Violation of Proposition 65,”
16 Defendants contacted CEH and stated that they had fully reformulated their Products to remove
17 all 4-MEI, such that no exposure requiring a warning under Proposition 65 could occur in the
18 future. At that time, Defendants provided information to support their claims that the Products
19 had been fully reformulated for the California market. In July 2013, Defendants responded to
20 publicity demanding that they reformulate their Products nationally by reiterating their assertion
21 that they had already reformulated their Products in California and would eventually do so
22 nationally. Based on Defendants’ information and representations, CEH did not file a
23 Proposition 65 enforcement suit against Defendants earlier.

24 24. Recently, however, additional testing on Defendants’ Products has
25 demonstrated that Defendants’ claims regarding complete reformulation are not correct. In fact,
26 some of Defendants’ Products – such as Pepsi ONE – continue to contain substantial quantities
27 of 4-MEI such that individuals are exposed to 4-MEI through the average use of Products.

28 25. Defendants both know and intend that consumers in California will

1 consume the Products, thus exposing them to 4-MEI.

2 26. Under Proposition 65, an exposure is “knowing” where the party
3 responsible for such exposure has:

4 knowledge of the fact that a[n] ... exposure to a chemical listed
5 pursuant to [Health and Safety Code § 25249.8(a)] is occurring.
6 No knowledge that the ... exposure is unlawful is required.

7 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
8 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
9 12201).

10 27. Defendants have been informed of the 4-MEI in their Products by the 60-
11 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

12 28. Defendants clearly knew that their Products contained 4-MEI even earlier,
13 which is why they engaged their trade association to sue OEHHA to have 4-MEI removed from
14 the Proposition 65 list. Defendants also have constructive knowledge that their Products contain
15 4-MEI due to the widespread media coverage concerning the problem of 4-MEI in consumer
16 products in general and in carbonated soft drinks in particular. The problem of 4-MEI in
17 carbonated soft drink products has been the subject of articles in national newspapers, industry
18 trade papers, and scholarly journals, as well as numerous Internet weblog postings.

19 29. As companies that manufacture, import, distribute, and/or sell Products for
20 use in the California marketplace, Defendants know or should know that the Products contain
21 4-MEI and that individuals who consumer the Products will be exposed to 4-MEI. These 4-MEI
22 exposures are a natural and foreseeable consequence of Defendants’ placing Products into the
23 stream of commerce.

24 30. Nevertheless, Defendants continue to expose consumers in California to
25 4-MEI without prior clear and reasonable warnings regarding the carcinogenic hazards of 4-MEI.

26 31. Any person “violating or threatening to violate” Proposition 65 may be
27 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to
28 violate” is defined to mean “to create a condition in which there is a substantial probability that a

1 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
2 penalties not to exceed \$2,500 per day for each violation of Proposition 65. Health & Safety
3 Code § 25249.7(b).

4 **FIRST CAUSE OF ACTION**
5 **(Violations of Health & Safety Code § 25249.6)**

6 32. CEH realleges and incorporates by reference as if specifically set forth
7 herein Paragraphs 1 through 31, inclusive.

8 33. 4-MEI is a chemical listed by the State of California as known to cause
9 cancer.

10 34. By placing their Products into the stream of commerce, Defendants are
11 each a person in the course of doing business within the meaning of Health & Safety Code §
12 25249.11.

13 35. Defendants know that average use of their Products will expose users of
14 Products to 4-MEI. Defendants intend that their Products be used in a manner that results in
15 consumers of their Products being exposed to 4-MEI contained therein.

16 36. Defendants have failed, and continue to fail, to provide prior clear and
17 reasonable warnings regarding the carcinogenicity of 4-MEI to users of their Products.

18 37. By committing the acts alleged above, Defendants have at all times
19 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
20 individuals to 4-MEI without first giving clear and reasonable warnings to such individuals
21 regarding the carcinogenicity of 4-MEI.

22 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.

23 **PRAYER FOR RELIEF**

24 Wherefore, CEH prays for judgment against Defendants as follows:

25 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess
26 civil penalties against each Defendant in the amount of \$2,500 per day for each violation of
27 Proposition 65 alleged herein according to proof;

28 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),

1 preliminarily and permanently enjoin Defendants from offering Products for sale in California
2 without providing prior clear and reasonable warnings, as CEH shall specify in further
3 application to the Court;

4 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
5 Defendants to take action to stop ongoing unwarned exposures to 4-MEI resulting from use of
6 Products sold by Defendants, as CEH shall specify in further application to the Court;

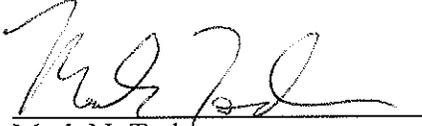
7 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
8 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

9 5. That the Court grant such other and further relief as may be just and
10 proper.

11
12 Dated: January 23, 2014

Respectfully submitted,

13 LEXINGTON LAW GROUP

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15 Mark N. Todzo
16 Attorneys for Plaintiff
17 CENTER FOR ENVIRONMENTAL HEALTH

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