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ENDORSED
FILED
San Francisco County Superior Court
SEP 28 2012
CLERK OF THE COURT
RONNIE OTERO
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

STEPHEN D. GILLETT, an individual,) Case No. CGC-09-494987
Plaintiff,)
v.) **THIRD AMENDED COMPLAINT FOR**
METAGENICS, INC., a corporation,) **INJUNCTIVE RELIEF AND CIVIL**
Defendant.) **PENALTIES**
Health & Safety Code §25249.5, *et seq.*

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

INTRODUCTION

1. This action seeks to remedy Defendant's continuing failure to warn thousands
of consumers in California that they are being exposed to lead, a substance known to the State
of California to cause cancer, birth defects and other reproductive harm. Defendant
manufactures, packages, distributes, markets, and/or sells in California certain herbal products
containing lead and subject to notices of violations of Health & Safety Code §25249.5 *et seq.*
(also known as "Proposition 65") issued by Plaintiff on August 31, 2009, ("Nazanol",
"Exhiliran," "Zinlori 75") and March 8, 2012, ("Andographis Plus, Herbal Immune Support,"

1 “Essential Defense, Immune Support,” “Ulcinex, Stomach Formula”) (collectively referred to
2 hereinafter as the “PRODUCTS”).

3 2. Lead and lead compounds (hereinafter, the “LISTED CHEMICALS”) are
4 substances known to the State¹ of California to cause cancer, birth defects and other
5 reproductive harm.

6 3. The use and/or handling of the PRODUCTS causes exposures to the LISTED
7 CHEMICALS at levels requiring a “clear and reasonable warning” under California’s Safe
8 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code (“H&S Code”)
9 §25249.5, *et seq.* (also known as “Proposition 65”). Defendant has failed to provide the health
10 hazard warnings required by Proposition 65.

11 4. Defendant’s continued manufacturing, packaging, distributing, marketing and/or
12 sales of the PRODUCTS without the required health hazard warnings, causes individuals to be
13 involuntarily and unwittingly exposed to levels of the LISTED CHEMICALS that violate
14 Proposition 65.

15 5. Plaintiff seeks injunctive relief enjoining Defendant from the continued
16 manufacturing, packaging, distributing, marketing and/or sales of the PRODUCTS in
17 California without provision of clear and reasonable warnings regarding the risks of cancer,
18 birth defects and other reproductive harm posed by exposure to the LISTED CHEMICALS
19 through the use and/or handling of the PRODUCTS. Plaintiff seeks an injunctive order
20 compelling Defendant to bring its business practices into compliance with Proposition 65 by
21 providing a clear and reasonable warning to each individual who has been and who in the
22 future may be exposed to LISTED CHEMICALS from the use of the PRODUCTS. Plaintiff
23 also seeks an order compelling Defendant to identify and locate each individual person who in
24 the past has purchased the PRODUCTS, and to provide to each such purchaser a clear and
25
26

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

1 reasonable warning that the use of the PRODUCTS will cause exposures to LISTED
2 CHEMICALS.

3 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to
4 remedy Defendant's failure to provide clear and reasonable warnings regarding exposures to
5 LISTED CHEMICALS.

6 **JURISDICTION AND VENUE**

7 7. This Court has jurisdiction over this action pursuant to California Constitution
8 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes
9 except those given by statute to other trial courts." The statute under which this action is
10 brought does not specify any other basis for jurisdiction.

11 8. This Court has jurisdiction over Defendant because, based on information and
12 belief, Defendant is a business having sufficient minimum contacts with California, or
13 otherwise intentionally availing itself of the California market through the distribution and sale
14 of the PRODUCTS in the State of California, to render the exercise of jurisdiction over it by
15 the California courts consistent with traditional notions of fair play and substantial justice.

16 9. Venue in this action is proper in the San Francisco Superior Court because the
17 Defendant has violated California law in the City and County of San Francisco.

18 **PARTIES**

19 10. Plaintiff STEPHEN D. GILLETT ("SDG") is a citizen enforcer dedicated to the
20 protection of the environment, the promotion of human health and the improvement of worker
21 and consumer safety. SDG resides in San Francisco, California.

22 11. SDG is a person within the meaning of H&S Code §25118 and brings this
23 enforcement action in the public interest pursuant to H&S Code §25249.7(d).

24 12. Defendant METAGENICS, INC. ("METAGENICS") is a corporation organized
25 under the laws of the State of Delaware and a person doing business within the meaning of
26 H&S Code §25249.11.

1 13. METAGENICS manufactures, packages, distributes, markets and/or sells one or
2 more of the PRODUCTS for sale or use in California.

3 **STATUTORY BACKGROUND**

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

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

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

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

20 **FACTUAL BACKGROUND**

21 17. On February 27, 1987, the State of California officially listed the chemical lead
22 as a chemical known to cause reproductive toxicity. Lead became subject to the warning
23 requirement one year later and was therefore subject to the “clear and reasonable” warning
24 requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
25 Regulations (“CCR”) §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

26 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

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 19. Plaintiff is informed and believes, and based on such information and belief
4 alleges the PRODUCTS have been distributed and/or sold to individuals in California without
5 clear and reasonable warning since at least November 4, 2006 with respect to the PRODUCTS
6 subject to Plaintiff’s August 31, 2009 notice of violations of Proposition 65 and since at least
7 May 12, 2009 with respect to the PRODUCTS subject to Plaintiff’s March 8, 2012 notice of
8 violations of Proposition 65. The PRODUCTS continue to be distributed and sold in
9 California without the requisite warning information.

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

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

19 22. Individuals using or handling the PRODUCTS are exposed to the LISTED
20 CHEMICALS in excess of the “maximum allowable daily” and “no significant risk ” levels
21 determined by the State of California, as applicable, within the meaning of H&S Code
22 §25249.10(c).

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

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

1 **FIRST CAUSE OF ACTION**

2 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, et seq. concerning**
3 **those PRODUCTS described in Plaintiff's August 31, 2009 60-Day Notice of Violation)**

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

6 26. On August 31, 2009, Plaintiff sent a 60-Day Notice of Proposition 65 violations
7 to the requisite public enforcement agencies and to Defendant ("First Notice"). The First
8 Notice was issued pursuant to, and in compliance with, the requirements of H&S Code
9 §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to
10 be given to certain public enforcement agencies and to the violator. The notice given included,
11 *inter alia*, the following information: the name, address, and telephone number of the noticing
12 individual; the name of the alleged violator; the statute violated; the approximate time period
13 during which violations occurred; and descriptions of the violations, including the chemicals
14 involved, the routes of toxic exposure, and the specific products or type of products causing the
15 violations, 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 27. 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 28. 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 29. By the above-described acts, Defendant has violated H&S Code § 25249.6 and
11 is therefore subject to an injunction ordering Defendant to stop violating Proposition 65, to
12 provide warnings to all present and future customers and to provide warnings to Defendant's
13 past customers who purchased or used the PRODUCTS set forth in the First Notice without
14 receiving a clear and reasonable warning.

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

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

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

21 **SECOND CAUSE OF ACTION**
22 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**
23 **those PRODUCTS described in Plaintiff's August 31, 2009 60-Day Notice of Violation)**

24 32. Plaintiff realleges and incorporates by reference Paragraphs 1 through 31,
25 inclusive, as if specifically set forth herein.

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

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

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

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

25 35. By committing the acts alleged in this Complaint, Defendant at all times relevant
26 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the
course of doing business, knowingly and intentionally exposing individuals who use or handle

1 the PRODUCTS set forth in the First Notice to the LISTED CHEMICALS, without first
2 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6
3 and 25249.11(f).

4 36. By the above-described acts, Defendant is liable, pursuant to H&S Code
5 §25249.7(b), for a civil penalty of \$2,500 per day for each unlawful exposure to a LISTED
6 CHEMICAL from the PRODUCTS set forth in the First Notice.

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

8 **THIRD CAUSE OF ACTION**

9 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, et seq. concerning
10 those PRODUCTS described in Plaintiff’s March 8, 2012 60-Day Notice of Violation)**

11 37. Plaintiff realleges and incorporates by reference Paragraphs 1 through 36,
12 inclusive, as if specifically set forth herein.

13 38. On March 8, 2012, Plaintiff sent a 60-Day Notice of Proposition 65 violations to
14 the requisite public enforcement agencies and to Defendant (“Second Notice”). The Second
15 Notice was issued pursuant to, and in compliance with, the requirements of H&S Code
16 §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to
17 be given to certain public enforcement agencies and to the violator. The notice given included,
18 *inter alia*, the following information: the name, address, and telephone number of the noticing
19 individual; the name of the alleged violator; the statute violated; the approximate time period
20 during which violations occurred; and descriptions of the violations, including the chemicals
21 involved, the routes of toxic exposure, and the specific products or type of products causing the
22 violations, and was issued as follows:

- 23 a. Defendant and the California Attorney General were provided copies of
24 the Second Notice by Certified Mail.
25 b. Defendant was provided a copy of a document entitled “The Safe
26 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
Summary,” which is also known as Appendix A to Title 27 of CCR

1 §25903.

2 c. The California Attorney General was provided with a Certificate of Merit
3 by the attorney for the noticing party, stating that there is a reasonable
4 and meritorious case for this action, and attaching factual information
5 sufficient to establish a basis for the certificate, including the identity of
6 the persons consulted with and relied on by the certifier, and the facts,
7 studies, or other data reviewed by those persons, pursuant to H&S Code
8 §25249.7(h) (2).

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

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

18 41. By the above-described acts, Defendant has violated H&S Code § 25249.6 and
19 is therefore subject to an injunction ordering Defendant to stop violating Proposition 65, to
20 provide warnings to all present and future customers and to provide warnings to Defendant's
21 past customers who purchased or used the PRODUCTS set forth in the Second Notice without
22 receiving a clear and reasonable warning.

23 42. An action for injunctive relief under Proposition 65 is specifically authorized by
24 Health & Safety Code §25249.7(a).

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

1 studies, or other data reviewed by those persons, pursuant to H&S Code
2 §25249.7(h) (2).

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

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

12 48. By the above-described acts, Defendant is liable, pursuant to H&S Code
13 §25249.7(b), for a civil penalty of \$2,500 per day for each unlawful exposure to a LISTED
14 CHEMICAL from the PRODUCTS set forth in the Second Notice.

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

16 **THE NEED FOR INJUNCTIVE RELIEF**

17 49. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 48,
18 as if set forth below.

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

24 **PRAYER FOR RELIEF**

25 Wherefore, Plaintiff accordingly prays for the following relief:

26 A. a preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),

1 enjoining Defendant, its agents, employees, assigns and all persons acting in concert or
2 participating with Defendant, from distributing or selling the PRODUCTS in California
3 without first providing a clear and reasonable warning, within the meaning of Proposition 65,
4 that the users and/or handlers of the PRODUCTS are exposed to the LISTED CHEMICALS.

5 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling Defendant
6 to identify and locate each individual who has purchased the PRODUCTS set forth in the First
7 Notice since November 4, 2006 and to provide a warning to such person that the use of the
8 PRODUCTS set forth in the First Notice will expose the user to chemicals known to cause
9 cancer, birth defects, and other reproductive harm; and compelling Defendant to identify and
10 locate each individual who has purchased the PRODUCTS set forth in the Second Notice since
11 May 12, 2009 and to provide a warning to such person that the use of the PRODUCTS set forth
12 in the Second Notice will expose the user to chemicals known to cause cancer, birth defects,
13 and other reproductive harm .

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

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

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

20 DATED: May 12, 2012

21
22 LAW OFFICES OF ANDREW L. PACKARD

23 

24 _____
25 Andrew L. Packard
26 Attorneys for Plaintiff
STEPHEN D. GILLETT

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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 CITY AND COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION
11

12 STEPHEN D. GILLETT,
13 Plaintiff,
14 vs.
15 METAGENICS, INC., a corporation
16 Defendant.
17

Case No. CGC-09-494987

PROOF OF SERVICE

LAW OFFICES OF
ANDREW L. PACKARD

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PROOF OF SERVICE

I, Laurie A. Mikkelsen, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 100 Petaluma Blvd North, Suite 301, Petaluma, CA 94952.

On September, 2012, I served the following documents:

1. THIRD AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES (CASE NO. CGC-09-494987)

on the following parties in this action by Electronic Service (E-mail) per agreement of the parties to accept service by electronic transmission as follows:

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Executed on September 28, 2012, at San Francisco, California.



Laurie A. Mikkelsen