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CENTER FOR ENVIRONMENTAL HEALTH
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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

13 CENTER FOR ENVIRONMENTAL HEALTH,)
14 a non-profit corporation,)
15)
16) Plaintiff,)

17 v.)

18 FAYEON DISTRIBUTORS, INC.; AMERICAN)
IMPORTING COMPANY, INC.; DRAEGER'S)
19 SUPER MARKETS; FOODNET)
SUPERMARKET, INC.; FORTUNE)
20 COMMERCIAL CORPORATION; H MART,)
INC.; HAR GRAND CORP.; HAR GRAND)
21 CORP.; HAN AH REUM CORP.; ISLAND)
PACIFIC SUPERMARKETS, INC.; JADE)
22 FOOD PRODUCTS, INC.; MARUHANA)
U.S.A. CORPORATION; MARUKAI)
23 CORPORATION U.S.A.; MITSUWA)
CORPORATION; REED'S, INC.; SUN HOP)
24 FAT CORPORATION; TRADER JOE'S)
COMPANY; T-WEST, INC.; WHOLESALE)
25 UNLIMITED, INC.; NEW ALBERTSON'S,)
INC.; ALBERTSON'S LLC; SUPERVALU)
26 INC., and DOES 1 through 200, inclusive,)
27)
Defendants.)

ENDORSED
FILED
Superior Court of California
County of San Francisco

DEC 20 2012

CLERK OF THE COURT
BY: WESLEY RAMIREZ
Deputy Clerk

Case No. CGC-12-526396

**FIRST AMENDED 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 lead and lead compounds (collectively,
7 "Lead"), chemicals known to the State of California to cause cancer and birth defects and other
8 reproductive harm. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and consumption of Defendants' ginger and fruit snack food (the
10 "Products"). Consumers, including pregnant women and children, are exposed to Lead when
11 they consume the Products.

12 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
13 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
14 to chemicals known to the State to cause cancer, birth defects or other reproductive harm without
15 providing clear and reasonable warnings to individuals prior to their exposure. Defendants
16 introduce Products contaminated with significant quantities of Lead into the California
17 marketplace, exposing consumers of their Products, many of whom are pregnant women and
18 children, to Lead.

19 3. Despite the fact that Defendants expose pregnant women, children and
20 other consumers to Lead, Defendants provide no warnings whatsoever about the carcinogenic or
21 reproductive hazards associated with Lead exposure. Defendants' conduct thus violates the
22 warning provision of Proposition 65. Health & 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 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 &

1 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
2 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
3 cases have resulted in significant public benefit, including the reformulation of thousands of
4 products to remove toxic chemicals and to make them safer. CEH also provides information to
5 Californians about the health risks associated with exposure to hazardous substances, where
6 manufacturers and other responsible parties fail to do so.

7 5. Defendant FAYEON DISTRIBUTORS, INC. is a person in the course of
8 doing business within the meaning of Health & Safety Code § 25249.11. Fayeon Distributors,
9 Inc. manufactures, distributes and/or sells the Products for sale and use in California.

10 6. Defendant AMERICAN IMPORTING COMPANY, INC. is a person in
11 the course of doing business within the meaning of Health & Safety Code § 25249.11. American
12 Importing Company, Inc. manufactures, distributes and/or sells the Products for sale and use in
13 California.

14 7. Defendant DRAEGER'S SUPER MARKETS is a person in the
15 course of doing business within the meaning of Health & Safety Code § 25249.11. Draeger's
16 Super Markets manufactures, distributes and/or sells the Products for sale and use in California.

17 8. Defendant FOODNET SUPERMARKET, INC. is a person in the course
18 of doing business within the meaning of Health & Safety Code § 25249.11. Foodnet
19 Supermarket, Inc. manufactures, distributes and/or sells the Products for sale and use in
20 California.

21 9. Defendant FORTUNE COMMERCIAL CORPORATION is a person in
22 the course of doing business within the meaning of Health & Safety Code § 25249.11. Fortune
23 Commercial Corporation manufactures, distributes and/or sells the Products for sale and use in
24 California.

25 10. Defendant H MART, INC. is a person in the course of doing business
26 within the meaning of Health & Safety Code § 25249.11. H Mart, Inc. manufactures, distributes
27 and/or sells the Products for sale and use in California.

28 11. Defendant HAR GRAND CORP. is a person in the course of doing

1 business within the meaning of Health & Safety Code § 25249.11. HAR Grand Corp.
2 manufactures, distributes and/or sells the Products for sale and use in California.

3 12. Defendant HAN AH REUM CORP. is a person in the course of doing
4 business within the meaning of Health & Safety Code § 25249.11. Han Ah Reum Corp.
5 manufactures, distributes and/or sells the Products for sale and use in California.

6 13. Defendant ISLAND PACIFIC SUPERMARKETS, INC. is a person in the
7 course of doing business within the meaning of Health & Safety Code § 25249.11. Island Pacific
8 Supermarkets, Inc. manufactures, distributes and/or sells the Products for sale and use in
9 California.

10 14. Defendant JADE FOOD PRODUCTS, INC. is a person in the course of
11 doing business within the meaning of Health & Safety Code § 25249.11. Jade Food Products,
12 Inc. manufactures, distributes and/or sells the Products for sale and use in California.

13 15. Defendant MARUHANA U.S.A. CORPORATION is a person in the
14 course of doing business within the meaning of Health & Safety Code § 25249.11. Maruhana
15 U.S.A. Corporation manufactures, distributes and/or sells the Products for sale and use in
16 California.

17 16. Defendant MARUKAI CORPORATION U.S.A. is a person in the course
18 of doing business within the meaning of Health & Safety Code § 25249.11. Marukai
19 Corporation U.S.A. manufactures, distributes and/or sells the Products for sale and use in
20 California.

21 17. Defendant MITSUWA CORPORATION is a person in the course of
22 doing business within the meaning of Health & Safety Code § 25249.11. Mitsuwa Corporation
23 manufactures, distributes and/or sells the Products for sale and use in California.

24 18. Defendant REED'S, INC. is a person in the course of doing business
25 within the meaning of Health & Safety Code § 25249.11. Reed's, Inc. manufactures, distributes
26 and/or sells the Products for sale and use in California.

27 19. Defendant SUN HOP FAT CORPORATION is a person in the course of
28 doing business within the meaning of Health & Safety Code § 25249.11. Sun Hop Fat

1 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
2 under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

3 34. On October 1, 1992, the State of California officially listed lead and lead
4 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
5 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
6 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
7 § 27001(c); Health & Safety Code § 25249.10(b).

8 35. There is no safe level of exposure to Lead and even minute amounts of
9 Lead have been proven harmful to children and adults. *See* Report of the Advisory Committee
10 on Childhood Lead Poisoning Prevention of the Centers For Disease Control and Prevention,
11 “Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention,” January
12 4, 2012. A study performed by the California Office of Environmental Health Hazard
13 Assessment determined that exposures to Lead even at levels previously considered safe have
14 now been shown to cause adverse health effects including reduced cognitive ability and
15 significant diminution of intellectual potential. Carlisle, *et al.*, “A Blood Lead Benchmark for
16 Assessing Risks from Childhood Lead Exposure,” *Journal of Environmental Science and Health*,
17 44, 2009. This conclusion is based on a meta study of 1,333 children who participated in seven
18 international studies. Lanphear, *et al.*, “Low-Level Environmental Lead Exposure and Children’s
19 Intellectual Function: An International Pooled Analysis,” *Environmental Health Perspectives*,
20 113:7, 2005.

21 36. Young children are especially susceptible to the toxic effects of Lead.
22 Children show a greater sensitivity to Lead’s effects than do adults. Adverse health impacts from
23 Lead exposure generally occur in children at lower blood Lead levels than in adults. Children
24 absorb and retain more Lead in proportion to their weight than do adults. Young children also
25 show a greater prevalence of iron deficiency, a condition that can increase gastrointestinal
26 absorption of Lead. The body accumulates Lead over a lifetime and releases it slowly, so even
27 small doses received in childhood, over time, can cause adverse health impacts, including but not
28 limited to reproductive toxicity, later in life. For example, in times of physiological stress, such

1 as pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby
2 increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

3 37. Lead exposures for pregnant women are also of particular concern in light
4 of evidence that even short term lead exposures *in utero* may have long-term harmful effects.
5 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
6 Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, Lourdes, *et al.*,
7 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
8 *Health Perspectives* 114:5, 2006. Increased lead exposure during pregnancy has also been shown
9 to cause increased risk of premature birth and increased blood pressure in both the mother during
10 pregnancy and the child after birth. Vigeh, *et al.*, "Blood Lead at Currently Acceptable Levels
11 May Cause Preterm Labour," *Occupational Environmental Medicine*, 68:231-234, 2010; Zhang,
12 *et al.*, "Association Between Prenatal Lead Exposure and Blood Pressure in Children,"
13 *Environmental Health Perspectives*, 120:3, 2012; Wells, *et al.*, "Low-Level Lead Exposure and
14 Elevations in Blood Pressure During Pregnancy," 119:5, 2011.

15 38. The level of exposure to a chemical causing reproductive toxicity under
16 Proposition 65 is determined by multiplying the level in question times the reasonably
17 anticipated rate of exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For
18 exposures to consumer products, the level of exposure is calculated using the reasonably
19 anticipated rate of intake or exposure for average users of the consumer product. 27 C.C.R. §
20 25821(c)(2). The rate of intake or exposure is based on data for use of a general category or
21 categories of consumer products, such as the United States Department of Agriculture's
22 ("USDA") Home Economic Research Report, "Foods Commonly Eaten by Individuals: Amount
23 Per Day and Per Eating Occasion." *Ibid.* The USDA has issued two such reports of data
24 compiled from the years 1977-1978 and 1989-1991.

25 39. The United States Food and Drug Administration ("FDA") has
26 promulgated regulations that estimate serving sizes for a wide variety of food products based on
27 national food consumption surveys such as the USDA's "Foods Commonly Eaten by Individuals:
28 Amount Per Day and Per Eating Occasion." 21 C.F.R. § 101.12. These regulations are designed

1 to determine “the amount of food customarily consumed per eating occasion.” 21 C.F.R. §
2 101.12(a). Based on this data, FDA has determined that the standard single serving size for
3 candied fruits and fruit-based snacks such as the Products is 30 grams per serving. 21 C.F.R. §
4 101.12(b). Based on this serving size, the Products will expose an average consumer to a
5 significant amount of Lead.

6 40. Defendants’ Products contain sufficient quantities of Lead such that
7 consumers, including pregnant women and children, who consume the Products are exposed to
8 Lead. The primary route of exposure for the violations is direct ingestion when consumers eat
9 the Products. These exposures occur in homes, workplaces and everywhere else throughout
10 California where the products are consumed.

11 41. No clear and reasonable warning is provided with the Products regarding
12 the carcinogenic or reproductive hazards of Lead.

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

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

27 44. CEH also sent a Certificate of Merit for each Notice to the California
28 Attorney General, the District Attorneys of every county in California, the City Attorneys of

1 every California city with a population greater than 750,000 and to each of the named
2 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each
3 Certificate certified that CEH's counsel: (1) has consulted with one or more persons with
4 relevant and appropriate experience or expertise who reviewed facts, studies or other data
5 regarding the exposures to Lead alleged in each Notice; and (2) based on the information
6 obtained through such consultations, believes that there is a reasonable and meritorious case for a
7 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health
8 & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney
9 General included factual information – provided on a confidential basis – sufficient to establish
10 the basis for the Certificate, including the identity of the person(s) consulted by CEH's counsel
11 and the facts, studies or other data reviewed by such persons.

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

16 46. Defendants both know and intend that individuals, including pregnant
17 women and children, will consume the Products, thus exposing them to Lead.

18 47. Under Proposition 65, an exposure is “knowing” where the party
19 responsible for such exposure has:

20 knowledge of the fact that a[n] . . . exposure to a chemical listed
21 pursuant to [Health & Safety Code § 25249.8(a)] is occurring. No
22 knowledge that the . . . exposure is unlawful is required.

23 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
24 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
25 § 12201).

26 48. Defendants have been informed of the Lead in their Products by the 60-
27 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

28 49. Defendants also have constructive knowledge that their Products contain

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

Dated: December 20, 2012

Respectfully submitted,
LEXINGTON LAW GROUP



Eric Somers
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH