

AUG 3 0 2013

CLERK OF THE COURT BY: MARY ANN MORAN Deputy Clerk



1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Clifford A. Chanler, State Bar No. 135534 Josh Voorhees, State Bar No. 241436 THE CHANLER GROUP 2560 Ninth Street Parker Plaza, Suite 214 Berkeley, CA 94710-2565 Telephone: (510) 848-8880 Facsimile: (510) 848-8118

Attorneys for Plaintiff WHITNEY R. LEEMAN, PH.D.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D.,

Plaintiff,

SETHNESS PRODUCTS COMPANY; and DOES 1-150, inclusive,

Defendants.

Case No.

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

(Health & Safety Code. § 25249.6 et seq.)

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

- 1. This Complaint is a representative action brought by plaintiff WHITNEY R. LEEMAN, Ph.D. in the public interest of the citizens of the State of California to enforce the People's right to be informed of the presence of a carcinogenic chemical known as 4-Methylimidazole ("4-MEI") found in certain caramel colorings for food and beverage products sold by defendants in California.
- 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to warn California citizens about the risk of exposure to 4-MEI, a cancer-causing chemical present in caramel colorings for food and beverage products manufactured, distributed, and offered for sale or use to consumers throughout the State of California.
- 3. Detectable levels of 4-MEI are commonly found in caramel colorings for food and beverage products that defendants manufacture, distribute, and offer for sale to consumers throughout the State of California.
- 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code § 25249.6 et seq. ("Proposition 65"), "[n]o 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 . . ." Health & Safety Code § 25249.6.
- 5. Pursuant to Proposition 65, on January 7, 2011, California identified and listed 4-MEI as a chemical known to cause cancer. 4-MEI became subject to the "clear and reasonable warning" requirements of the act one year later on January 7, 2012. Cal. Code Regs. tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 & 25249.10(b).
- 6. Defendants manufacture, distribute, sell and offer for sale caramel colorings containing 4-MEI at levels that require a warning under Proposition 65 that are added to various food and beverage products including, but not limited to, the *Sierra Brand Premium Products Imitation Maple Flavor*, #011031 (#8 40825 00122 2). All such caramel colorings for food and beverage products containing 4-MEI are referred to collectively hereinafter as "PRODUCTS."

- 7. Defendants' failure to warn consumers and other individuals and workers (specifically those not subject to California's Occupational Health Act, Labor Code section 6300 et seq. or exempted under the out-of-state manufacturer rule) in the state of California about their exposure to 4-MEI in conjunction with defendants' sale of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinment of such conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).
- 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and permanent injunctive relief to compel defendants to provide purchasers or consumers of the PRODUCTS with the required warning regarding the health hazards of 4-MEI. Health & Safety Code § 25249.7(a).
- 9. Pursuant to Health and Safety Code § 25249.7(b), plaintiff also seeks civil penalties against defendants for their violations of Proposition 65.

PARTIES

- 10. Plaintiff WHITNEY R. LEEMAN, Ph.D. is a citizen of the state of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products and she brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).
- 11. Defendant SETHNESS PRODUCTS COMPANY ("SETHNESS") is a person in the course of doing business within the meaning of Health and Safety Code § 25249.11(b).
- 12. SETHNESS offers the PRODUCTS for sale in the state of California without a "clear and reasonable warning."
- 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons in the course of doing business within the meaning of Health and Safety Code section 25249.11.
- 14. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate, and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate, and manufacture one or more of the PRODUCTS offered for sale or use in the State of California.

- 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person in the course of doing business within the meaning of Health and Safety Code section 25249.11.
- 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in the State of California.
- 17. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in the course of doing business within the meaning of Health and Safety Code section 25249.11.
- 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the State of California.
- 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
- 20. SETHNESS, MANUFACTURER DEFENDANTS, DISTRIBUTOR
 DEFENDANTS, and RETAILER DEFENDANTS are collectively referred to herein as
 "DEFENDANTS."

VENUE AND JURISDICTION

- 21. Venue is proper in the San Francisco County Superior Court, pursuant to Code of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of competent jurisdiction, because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of wrongful conduct occurred, and continue to occur, in San Francisco County, and/or because DEFENDANTS conducted, and continues to conduct, business in this county with respect to the PRODUCTS.
- 22. The California Superior Court has jurisdiction over this action pursuant to California Constitution Article VI, § 10, which grants the Superior Court "original jurisdiction in all causes

except those given by statute to other trial courts." The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.

23. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that is a citizen of the state of California, has sufficient minimum contacts in the state of California, and/or otherwise purposefully avails itself of the California market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts over DEFENDANTS consistent with traditional notions of fair play and substantial justice.

FIRST CAUSE OF ACTION

(Violation of Proposition 65 - Against All Defendants)

- 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 23, inclusive.
- 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986, the People of California expressly declared their right "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm."
- 26. Proposition 65 states, "[n]o 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 . . . "

 Health & Safety Code § 25249.6.
- 27. On June 14, 2013, plaintiff's sixty-day notice of violation—together with the certificate of merit required by Health & Safety Code § 25249.7(d)(1)—was served on SETHNESS and the requisite public prosecutors pursuant to California Code of Regulations title 27, § 25903(c)(3), stating that, as a result of DEFENDANTS' sales of the PRODUCTS containing 4-MEI, purchasers and consumers in the state of California were being exposed to 4-MEI resulting from their reasonably foreseeable use and consumption of the PRODUCTS, without having been provided with a "clear and reasonable warning" regarding such toxic exposures, as required by Proposition 65.

- 28. DEFENDANTS have engaged in the manufacture, distribution, sale, and offering of the PRODUCTS for sale or consumption in violation of Health and Safety Code § 25249.6, and DEFENDANTS' violations have continued to occur beyond their receipt of plaintiff's sixty-day notice of violation. As such, DEFENDANTS' violations are ongoing and continuous in nature, and will continue to occur in the future.
- 29. After receiving the claims asserted in the sixty-day notice of violation, the appropriate public enforcement agencies have failed to commence and diligently prosecute a cause of action against DEFENDANTS under Proposition 65.
- 30. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale or use in California by DEFENDANTS contain 4-MEI such that it requires a "clear and reasonable" warning under Proposition 65.
- 31. DEFENDANTS knew or should have known that the PRODUCTS they manufacture, import, distribute, sell, and offer for sale or use in California contain 4-MEI.
- 32. 4-MEI is present in the PRODUCTS in such a way as to expose individuals to 4-MEI through ingestion during reasonably foreseeable use of the PRODUCTS including through workplace exposure of the PRODUCTS.
- 33. The normal and reasonably foreseeable consumption of the PRODUCTS has caused, and continues to cause, consumer exposures to 4-MEI, as such exposures are defined by California Code of Regulations title 27, § 25602(b).
- 34. DEFENDANTS have actual and/or constructive knowledge that the normal and reasonably foreseeable consumption of the PRODUCTS would ultimately expose individuals to 4-MEI through ingestion.
- 35. DEFENDANTS intended that such exposures to 4-MEI from the reasonably foreseeable consumption of the PRODUCTS would occur by DEFENDANTS' deliberate, non-accidental participation in the manufacture, importation, distribution, sale, and/or offering of the PRODUCTS for sale to individuals in the state of California.

- 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those consumers and other individuals in the state of California who were or who would become exposed to 4-MEI through ingestion during the consumption of the PRODUCTS including through workplace exposure of the PRODUCTS.
- 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted directly by California voters, individuals exposed to 4-MEI through ingestion resulting from the consumption of the PRODUCTS including through workplace exposure of the PRODUCTS sold by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.
- 38. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day for each violation.
- 39. As a consequence of the above-described acts, Health and Safety Code § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against defendants as follows:

- 1. That the Court, pursuant to Health and Safety Code § 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;
- 2. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from preparing, distributing, or offering the PRODUCTS for sale or consumption in California without first providing a "clear and reasonable warning" as defined by California Code of Regulations title 27, § 25601 et seq., as to the harms associated with exposures to 4-MEI;
- 3. That the Court, pursuant to Health and Safety Code § 25249.7(a), issue preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS currently in the chain of commerce in California without a "clear and reasonable warning" as defined by California Code of Regulations title 27, § 25601 et seq.
 - 4. That the Court grant plaintiff her reasonable attorneys' fees and costs of suit; and
 - 5. That the Court grant such other and further relief as may be just and proper.

Dated: August 30, 2013

Respectfully Submitted, THE CHANLER GROUP

Clifford A. Chanler
Attorneys for Plaintiff

WHITNEY R. LEEMAN, PH.D.