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SUPERIOR COURT

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AS YOU SOW

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF SAN FRANCISCO**

10 AS YOU SOW, a California Non-Profit  
Public Benefit Corporation,

11 Plaintiff,

12 v.

13 HORMEL FOODS CORPORATION,  
14 MEGAMEX FOODS, LLC, and DOES 1  
through 10, inclusive,

15 Defendants.

Case No. **CGC-14-542879**

**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

California Health and Safety Code §  
25249.5 et seq.

1 Plaintiff As You Sow alleges as follows:

2 **I. INTRODUCTION**

3 1. This Complaint seeks an injunction and civil penalties to remedy the continuing  
4 failure of MegaMex Foods, LLC, and Hormel Foods Corporation (collectively, “Defendants”) to  
5 give clear and reasonable warnings to residents of California prior to exposing those residents to  
6 products containing lead. The State of California has listed lead as a chemical known to cause  
7 reproductive harm. Under the Safe Drinking Water and Toxic Enforcement Act of 1986 – also  
8 known as “Proposition 65” – businesses must provide persons with a “clear and reasonable  
9 warning” before exposing them to such chemicals. Health & Saf. Code § 25249.6.

10 **II. PARTIES**

11 2. Plaintiff As You Sow is a 501(c)(3) nonprofit organization based in Oakland,  
12 California, and incorporated under the laws of the State of California. As You Sow is dedicated  
13 to; among other causes, the protection of the environment, the promotion of human health, the  
14 improvement of worker and consumer safety, and environmental education. As You Sow is a  
15 “person” pursuant to Health and Safety Code section 25249.11(a). As You Sow brings this  
16 action in the interest of the general public pursuant to Health and Safety Code section 25249.7.

17 3. Defendant MegaMex Foods, LLC is a business entity that manufactures,  
18 distributes, markets, and/or sells hot sauce products that contain lead to consumers within the  
19 State of California.

20 4. Defendant Hormel Foods Corporation is a business entity that manufactures,  
21 distributes, markets, and/or sells hot sauce products that contain lead to consumers within the  
22 State of California.

23 5. The true names and capacities of Defendants sued herein as Does 1 through 10 are  
24 unknown to Plaintiff, who therefore sues them by fictitious names. Plaintiff will amend this  
25 Complaint to allege the true names and capacities of these Defendants when they have been  
26 determined. Each of the fictitiously named Defendants is responsible for the manufacture,  
27 distribution, marketing, and/or sale of products containing lead to consumers in California.

28 6. Wherever reference is made to “Defendants” in this Complaint, such reference

1 includes the Defendants named in Paragraphs 3 and 4 and Does 1 through 10, inclusive.

### 2 III. JURISDICTION AND VENUE

3 7. This court has jurisdiction pursuant to California Constitution Article VI, Section  
4 10, because this case is a cause not given by statute to other trial courts.

5 8. This court has jurisdiction over Defendants named above because they do  
6 sufficient business in California, have sufficient minimum contacts in California, or otherwise  
7 intentionally avail themselves of the California market, through the manufacture, distribution,  
8 sale, marketing, and/or use of their products in California, rendering the exercise of jurisdiction  
9 over Defendant by the California courts consistent with traditional notions of fair play and  
10 substantial justice.

11 9. Venue is proper in this Court because Defendants' manufacturing, distributing,  
12 marketing, and/or sales of products containing lead have occurred in the County of San  
13 Francisco, and/or Defendants sold the products containing lead to people who live in the County  
14 of San Francisco, which causes people to be exposed to lead while they are physically present in  
15 the County of San Francisco.

16 10. On August 30, 2013, Plaintiff provided a Notice of Violation of Proposition 65 to  
17 the California Attorney General, the District Attorney of each county in California, the City  
18 Attorney of each California city with a population over 750,000 persons, and Defendants,  
19 pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation included the  
20 following products manufactured, distributed, marketed, and/or sold by Defendants:

- 21 • Bufalo brand Picante Bufalo – Salsa Picante Clasica (Clasica Mexican Hot Sauce)
- 22 • Bufalo brand Picante Bufalo – Salsa Chipotle (Chipotle Mexican Hot Sauce)
- 23 • Bufalo brand Picante Bufalo – Salsa Jalapeno Rojo (Jalapeno Mexican Hot Sauce)

24 11. The Notice of Violation included a Certificate of Merit that Plaintiff's attorneys  
25 had consulted with one or more persons with relevant and appropriate experience or expertise  
26 who has reviewed facts, studies, or other data regarding exposure to lead from the products  
27 manufactured, distributed, marketed, and/or sold by Defendants. The Certificate of Merit  
28 confirms that, based on that information, Plaintiff's attorneys believe that there is a reasonable

1 and meritorious case for this private action. The Notice of Violation also included a Certificate  
2 of Service. The Notice of Violation mailed to Defendants included a document entitled "The  
3 Safe Drinking Water and Toxic Enforcement Act of 1986: A Summary." In compliance with  
4 Health and Safety Code section 25249.7(d) and title 11, section 3102 of the California Code of  
5 Regulations, the Attorney General was served with a Notice of Violation and Certificate of  
6 Merit that included confidential factual information sufficient to establish the basis of the  
7 Certificate of Merit, including the identity of individual(s) with whom Plaintiff's attorneys  
8 consulted and the facts, studies, or other data that was reviewed by such person(s).

9 12. None of the public prosecutors that received the Notices of Violation has  
10 commenced and is diligently prosecuting an action against the named Defendants for the  
11 violations alleged in this Complaint, although the notice period established in Health and Safety  
12 Code section 25249.7(d) has elapsed since the Notices of Violation were served by mail.

13 13. Because Plaintiff has fully complied with the requirements of Health and Safety  
14 Code section 25249.7(d), and neither the Attorney General nor any District Attorney, City  
15 Attorney, or prosecutor has commenced and is diligently pursuing an action against the  
16 violations alleged herein, Plaintiff has standing to bring this Complaint.

#### 17 **IV. STATUTORY BACKGROUND**

18 14. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative  
19 statute passed as "Proposition 65" by a vote of the people in November of 1986.

20 15. The warning requirement of Proposition 65 is contained in Health and Safety Code  
21 section 25249.6, which provides:

22 No person in the course of doing business shall knowingly and intentionally  
23 expose any individual to a chemical known to the state to cause cancer or  
24 reproductive toxicity without first giving clear and reasonable warning to such  
individual, except as provided in Health and Safety Code section 25249.10.

25 16. Regulations promulgated to implement Proposition 65 provide that the warning  
26 method "must be reasonably calculated, considering the alternative methods available under the  
27 circumstances, to make the warning message available to the individual prior to exposure." 27  
28 Cal. Code Regs. § 25601(a).

1 17. Proposition 65 also establishes a procedure by which the state is to develop a list  
2 of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Saf. Code  
3 § 25249.8. No warning need be given concerning a listed chemical until one year after the  
4 chemical first appears on the list.

5 18. Proposition 65 provides that any person “violat[ing] or threaten[ing] to violate”  
6 the statute may be enjoined in any court of competent jurisdiction. Health & Saf. Code §  
7 25249.7. To “threaten to violate” is defined to mean “to create a condition in which there is a  
8 substantial probability that a violation will occur.” Health & Saf. Code § 25249.11(e). In  
9 addition, violators are liable for civil penalties of up to \$2,500 per day for each violation,  
10 recoverable in a civil action. Health & Saf. Code § 25249.7(b).

11 19. Private actions to enforce Proposition 65 “may be brought by a person in the  
12 public interest” if the action is commenced more than sixty days from the date that the person  
13 has given notice of an alleged violation of Health and Safety Code section 25249.5 or 25249.6 to  
14 the Attorney General; to the District Attorney, City Attorney, or prosecutor in whose jurisdiction  
15 the violation occurred; and to the alleged violator. Health & Saf. Code § 25249.7(d). A  
16 certificate of merit shall be included with the notification to the Attorney General, District  
17 Attorney, City Attorney, or prosecutor in each jurisdiction where the violation occurred. *Id.* If  
18 no public prosecutors commence enforcement within sixty days, then the person giving notice  
19 may sue. *Id.*

## 20 V. FACTS

21 20. Lead is listed under Proposition 65 as a chemical known to the State of California  
22 to cause reproductive harm.

23 21. Defendants manufacture, distribute, market, and/or sell products that contain lead  
24 for sale or use in the State of California. Specifically, Defendants sold to consumers in the State  
25 of California the following products containing lead:

- 26 • Bufalo brand Picante Bufalo – Salsa Picante Clasica (Clasica Mexican Hot Sauce)
- 27 • Bufalo brand Picante Bufalo – Salsa Chipotle (Chipotle Mexican Hot Sauce)
- 28 • Bufalo brand Picante Bufalo – Salsa Jalapeno Rojo (Jalapeno Mexican Hot Sauce)

1           22. Use of the products identified in Paragraph 21 results in human exposure to lead  
2 through ingestion when consumers use the products as directed on the label.

3           23. Defendants knew or reasonably should have known that the products that they  
4 manufactured, distributed, marketed, and/or sold contained lead. Defendants have intended that  
5 individuals use and ingest these products. Defendants know that individuals use the products  
6 that Defendants have manufactured, distributed, marketed, and/or sold. Defendants have  
7 knowingly and intentionally exposed individuals to lead through their deliberate act(s) of  
8 manufacturing, distributing, marketing, and/or selling the products.

9           24. The products described in this Complaint were tested in a certified laboratory and  
10 were found to contain sufficiently high levels of lead to necessitate clear and reasonable  
11 warnings under Proposition 65 that use of the products results in exposure to a chemical known  
12 to the State of California to cause reproductive harm.

13           25. Defendants have failed to provide clear and reasonable warnings that the use of  
14 the products described above results in exposure to a chemical known to the State of California  
15 to cause reproductive harm, and no such warning was provided to consumers using those  
16 products.

## 17   VI. FIRST CAUSE OF ACTION

18           26. Paragraphs 1 through 25 are realleged as if fully set forth herein.

19           27. Plaintiff is informed and believes, and based on such information and belief,  
20 alleges that Defendants employ ten or more persons.

21           28. By committing the acts alleged above, Defendants have, within the previous  
22 twelve months and in the course of doing business, knowingly and intentionally exposed  
23 individuals in the State of California to lead, a chemical known to the State of California to  
24 cause reproductive harm, without first giving clear and reasonable warning to such individuals  
25 within the meaning of Health and Safety Code section 25249.6.

26           29. Said violations render Defendants liable for civil penalties of up to \$2,500 per day  
27 for each violation, as well as other remedies.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays that the Court:

3 1. Pursuant to the First Cause of Action, assess civil penalties against Defendants in  
4 the amount of up to \$2,500 per day for each violation of Proposition 65;

5 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary  
6 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting  
7 Defendants from exposing persons within the State of California to lead by use of their products  
8 without providing clear and reasonable warnings, as Plaintiff shall specify in further application  
9 to the court;

10 3. Award Plaintiff its costs of suit;

11 4. Pursuant to section 1021.5 of the Code of Civil Procedure and any other applicable  
12 provision of law, order Defendants to pay Plaintiff such attorneys' fees and costs as Plaintiff  
13 incurs in bringing this enforcement action; and

14 5. Grant such other and further relief as the court deems just and proper.

15 DATED: November 24, 2014

SHUTE, MIHALY & WEINBERGER LLP

17 By:   
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