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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

AUG 21 2014

CLERK OF THE SUPERIOR COURT
By S. HANCOCK Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 a non-profit corporation,)

14 Plaintiff,)

15 v.)

16 KOOKABURRA LICORICE COMPANY;)
17 AMAZON.COM, INC.; JELLY BELLY)
18 CANDY COMPANY; KING REGAL, SA;)
19 SWEET CANDY, LLC; TANGERINE)
CONFECTIONERY LTD.; GRUPO ERCUS,)
20 S.A. DE C.V.; and DOES 1 through 200,)
inclusive,)

21 Defendants.)

Case No. RG-14733545

**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 information
2 and belief and investigation of counsel, except for information based on knowledge, hereby
3 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' licorice flavored candy (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

1 § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
2 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
3 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
4 cases have resulted in significant public benefit, including the reformulation of thousands of
5 products to remove toxic chemicals and to make them safer. CEH also provides information to
6 Californians about the health risks associated with exposure to hazardous substances, where
7 manufacturers and other responsible parties fail to do so.

8 5. Defendant KOOKABURRA LICORICE COMPANY is a person in the
9 course of doing business within the meaning of Health & Safety Code § 25249.11. Kookaburra
10 Licorice Company manufactures, distributes and/or sells the Products for sale and use in
11 California.

12 6. Defendant AMAZON.COM, INC. is a person in the course of doing
13 business within the meaning of Health & Safety Code § 25249.11. Amazon.com, Inc.
14 manufactures, distributes and/or sells the Products for sale and use in California.

15 7. Defendant JELLY BELLY CANDY COMPANY is a person in the course
16 of doing business within the meaning of Health & Safety Code § 25249.11. Jelly Belly Candy
17 Company manufactures, distributes and/or sells the Products for sale and use in California.

18 8. Defendant KING REGAL, SA is a person in the course of doing business
19 within the meaning of Health & Safety Code § 25249.11. King Regal, SA manufactures,
20 distributes and/or sells the Products for sale and use in California.

21 9. Defendant SWEET CANDY, LLC is a person in the course of doing
22 business within the meaning of Health & Safety Code § 25249.11. Sweet Candy, LLC
23 manufactures, distributes and/or sells the Products for sale and use in California.

24 10. Defendant TANGERINE CONFECTIONERY LTD. is a person in the
25 course of doing business within the meaning of Health & Safety Code § 25249.11. Tangerine
26 Confectionery Ltd. manufactures, distributes and/or sells the Products for sale and use in
27 California.

28 11. Defendant GRUPO ERCUS, S.A. DE C.V. is a person in the

1 course of doing business within the meaning of Health & Safety Code § 25249.11. Grupo Ercus,
2 S.A. de C.V. manufactures, distributes and/or sells the Products for sale and use in California.

3
4 12. DOES 1 through 200 are each a person in the course of doing business
5 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 200 manufacture,
6 distribute and/or sell the Products for sale or use in California.

7 13. The defendants identified in paragraphs 5 through 11 and DOES 1 through
8 200 are collectively referred to herein as “Defendants.”

9 14. The true names of DOES 1 through 200 are unknown to CEH at this time
10 or were unknown when CEH issued the 60-Day Notice of Violation of Proposition 65 to
11 Kookaburra Licorice Company. When their identities are ascertained or the applicable 60-Day
12 Notice of Violation of Proposition 65 runs, the Complaint shall be amended to reflect their true
13 names.

14 **JURISDICTION AND VENUE**

15 15. The Court has jurisdiction over this action pursuant to Health & Safety
16 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
17 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
18 to other trial courts.

19 16. This Court has jurisdiction over Defendants because each is a business
20 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
21 intentionally avails itself of the California market through the sale, marketing or use of the
22 Products in California and/or by having such other contacts with California so as to render the
23 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
24 play and substantial justice.

25 17. Venue is proper in Alameda County Superior Court because one or more
26 of the violations arise in the County of Alameda.

27 **BACKGROUND FACTS**

28 18. The People of the State of California have declared by initiative under

1 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
2 defects, or other reproductive harm.” Proposition 65, § 1(b).

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

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

12 20. On February 27, 1987, the State of California officially listed lead as a
13 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
14 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
15 the developing fetus, “female reproductive toxicity,” which means harm to the female
16 reproductive system, and “male reproductive toxicity,” which means harm to the male
17 reproductive system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On February 27,
18 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead
19 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
20 under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

21 21. On October 1, 1992, the State of California officially listed lead and lead
22 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
23 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
24 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
25 § 27001(c); Health & Safety Code § 25249.10(b).

26 22. There is no safe level of exposure to Lead and even minute amounts of
27 Lead have been proven harmful to children and adults. *See* Report of the Advisory Committee
28 on Childhood Lead Poisoning Prevention of the Centers For Disease Control and Prevention,
“Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention,” January

1 4, 2012. A study performed by the California Office of Environmental Health Hazard
2 Assessment determined that exposures to Lead even at levels previously considered safe have
3 now been shown to cause adverse health effects including reduced cognitive ability and
4 significant diminution of intellectual potential. Carlisle, *et al.*, "A Blood Lead Benchmark for
5 Assessing Risks from Childhood Lead Exposure," *Journal of Environmental Science and Health*,
6 44, 2009. This conclusion is based on a meta study of 1,333 children who participated in seven
7 international studies. Lanphear, *et al.*, "Low-Level Environmental Lead Exposure and Children's
8 Intellectual Function: An International Pooled Analysis," *Environmental Health Perspectives*,
9 113:7, 2005.

10 23. Young children are especially susceptible to the toxic effects of Lead.
11 Children show a greater sensitivity to Lead's effects than do adults. Adverse health impacts from
12 Lead exposure generally occur in children at lower blood Lead levels than in adults. Children
13 absorb and retain more Lead in proportion to their weight than do adults. Young children also
14 show a greater prevalence of iron deficiency, a condition that can increase gastrointestinal
15 absorption of Lead. The body accumulates Lead over a lifetime and releases it slowly, so even
16 small doses received in childhood, over time, can cause adverse health impacts, including but not
17 limited to reproductive toxicity, later in life. For example, in times of physiological stress, such
18 as pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby
19 increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

20 24. Lead exposures for pregnant women are also of particular concern in light
21 of evidence that even short term lead exposures *in utero* may have long-term harmful effects.
22 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
23 Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, Lourdes, *et al.*,
24 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
25 *Health Perspectives* 114:5, 2006. Increased lead exposure during pregnancy has also been shown
26 to cause increased risk of premature birth and increased blood pressure in both the mother during
27 pregnancy and the child after birth. Vigeh, *et al.*, "Blood Lead at Currently Acceptable Levels
28 May Cause Preterm Labour," *Occupational Environmental Medicine*, 68:231-234, 2010; Zhang,

1 *et al.*, “Association Between Prenatal Lead Exposure and Blood Pressure in Children,”
2 *Environmental Health Perspectives*, 120:3, 2012; Wells, *et al.*, “Low-Level Lead Exposure and
3 Elevations in Blood Pressure During Pregnancy,” 119:5, 2011.

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

9 26. No clear and reasonable warning is provided with the Products regarding
10 the carcinogenic or reproductive hazards of Lead.

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

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

25 29. CEH also sent a Certificate of Merit for each Notice to the California
26 Attorney General, the District Attorneys of every county in California, the City Attorneys of
27 every California city with a population greater than 750,000 and to each of the named
28 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each

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

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

14 31. Defendants both know and intend that individuals, including pregnant
15 women and children, will consume the Products, thus exposing them to Lead.

16 32. Under Proposition 65, an exposure is “knowing” where the party
17 responsible for such exposure has:

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

21 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
22 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
23 § 12201).

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

26 34. Defendants also have constructive knowledge that their Products contain
27 Lead due to the widespread industry knowledge regarding Lead in both molasses and licorice
28 root.

 35. As companies that manufacture, import, distribute and/or sell the Products

1 for use in the California marketplace, Defendants know or should know that the Products contain
2 Lead and that individuals who consume the Products will be exposed to Lead. The Lead
3 exposures to consumers who consume the Products are a natural and foreseeable consequence of
4 Defendants' placing the Products into the stream of commerce.

5 36. Nevertheless, Defendants continue to expose consumers, including
6 pregnant women and children, to Lead without prior clear and reasonable warnings regarding the
7 carcinogenic or reproductive hazards of Lead.

8 37. CEH has engaged in good-faith efforts to resolve the claims alleged herein
9 prior to filing this Complaint.

10 38. Any person "violating or threatening to violate" Proposition 65 may be
11 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
12 violate" is defined to mean "to create a condition in which there is a substantial probability that a
13 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
14 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

15 **FIRST CAUSE OF ACTION**

16 **(Violations of the Health & Safety Code § 25249.6)**

17 39. CEH realleges and incorporates by reference as if specifically set forth
18 herein Paragraphs 1 through 38, inclusive.

19 40. By placing the Products into the stream of commerce, each Defendant is a
20 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

21 41. Lead is a chemical listed by the State of California as known to cause
22 cancer, birth defects and other reproductive harm.

23 42. Defendants know that average use of the Products will expose users of the
24 Products to Lead. Defendants intend that the Products be used in a manner that results in
25 exposures to Lead from the Products.

26 43. Defendants have failed, and continue to fail, to provide clear and
27 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of
28 the Products.

