

ENDORSED
FILED
ALAMEDA COUNTY

JUN 24 2014

CLERK OF THE SUPERIOR COURT
By ~~Rosa Angela Snook~~ Deputy

1 LEXINGTON LAW GROUP
Mark N. Todzo, State Bar No. 168389
2 Joseph Mann, State Bar No. 207968
503 Divisadero Street
3 San Francisco, CA 94117
Telephone: (415) 913-7800
4 Facsimile: (415) 759-4112
mtodzo@lexlawgroup.com
5 jmann@lexlawgroup.com

6 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

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

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

13 Plaintiff,)

14 v.)

15 COMPAÑÍA CERVECERA DE PUERTO)
16 RICO, INC.; WAL-MART STORES, INC.; and)
Does 1 Through 100, Inclusive,)

17 Defendants.)

Case No. **RG14730384**

**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 4-Methylimidazole ("4-MEI"), a
7 chemical known to the State of California to cause cancer. 4-MEI is a toxic chemical that is
8 found in certain caramel coloring and flavoring agents added to carbonated soft drinks, among
9 other food and beverage products. This Complaint addresses exposures that have occurred, and
10 continue to occur, through the manufacture, distribution, sale, and/or use of Defendants'
11 carbonated soft drinks containing caramel coloring (the "Products"). Individuals in California
12 are exposed to 4-MEI when they ingest the Products.

13 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
14 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
15 to chemicals known to the State to cause cancer without providing clear and reasonable warnings
16 to individuals prior to their exposure. Defendants introduce Products contaminated with
17 significant quantities of 4-MEI into the California marketplace, exposing consumers of their
18 Products to 4-MEI.

19 3. Despite the fact that Defendants expose individuals to 4-MEI, Defendants
20 provide no warnings whatsoever about the carcinogenic hazards associated with these 4-MEI
21 exposures. Defendants' conduct thus violates the warning provision of Proposition 65. Health &
22 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 is 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 & Safety

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

7 5. Defendant COMPAÑÍA CERVECERA DE PUERTO RICO, INC. is a
8 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.
9 COMPAÑÍA CERVECERA DE PUERTO RICO, INC. manufactures, distributes, and/or sells
10 Products for sale or use in California.

11 6. Defendant WAL-MART STORES, INC. is a person in the course of doing
12 business within the meaning of Health & Safety Code § 25249.11. WAL-MART STORES, INC.
13 manufactures, distributes, and/or sells Products for sale or use in California. For the purposes of
14 this Complaint, CEH's claims against Defendant WAL-MART STORES, INC. are limited to the
15 sale of Products manufactured or distributed by Defendant COMPAÑÍA CERVECERA DE
16 PUERTO RICO, INC.

17 7. DOES 1 through 100 are each a person in the course of doing business
18 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture,
19 distribute, and/or sell Products for sale or use in California. Defendants COMPAÑÍA
20 CERVECERA DE PUERTO RICO, INC.; WAL-MART STORES, INC.; and DOES 1 through
21 100 are collectively referred to herein as "Defendants."

22 8. The true names of DOES 1 through 100 are unknown to CEH at this time.
23 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

24 9. The defendants identified in paragraphs 5 and 6 and DOES 1 through 100
25 are collectively referred to herein as "Defendants."

26 **JURISDICTION AND VENUE**

27 10. The Court has jurisdiction over this action pursuant to Health & Safety
28 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant

1 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
2 to other trial courts.

3 11. This Court has jurisdiction over Defendants because each is a business
4 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
5 intentionally avails itself of the California market through the sale, marketing, or use of Products
6 in California and/or by having such other contacts with California so as to render the exercise of
7 jurisdiction over it by the California courts consistent with traditional notions of fair play and
8 substantial justice.

9 12. Venue is proper in the Alameda Superior Court because one or more of the
10 violations arise in the County of Alameda.

11 BACKGROUND FACTS

12 13. The People of the State of California have declared by initiative under
13 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
14 defects, or other reproductive harm.” Proposition 65, § 1(b).

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

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

23 15. On January 7, 2011, the State of California officially listed 4-MEI as a
24 chemical known to cause cancer. 27 Cal. Code Regs. (“C.C.R.”) § 27001(b). In making this
25 listing determination, the California Environmental Protection Agency’s Office of Environmental
26 Health Hazard Assessment (“OEHHA”) credited the U.S. National Toxicology Program as an
27 “authoritative body” under 27 C.C.R. § 25306, citing to that agency’s 2007 findings regarding
28 the carcinogenic properties of 4-MEI.

1 16. On January 7, 2012, one year after it was listed as a chemical known to
2 cause cancer, 4-MEI became subject to the clear and reasonable warning requirement regarding
3 carcinogens under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code § 25249.10(b).

4 17. Caramel coloring and flavoring agents containing 4-MEI are added to
5 Products, such as colas and non-alcoholic malt beverages. Defendants' Products contain
6 sufficient quantities of 4-MEI such that individuals are exposed to 4-MEI through the average
7 use of the Products. The primary route of exposure is direct ingestion by individuals when
8 consumers drink the Products. These exposures occur in homes, workplaces, and everywhere
9 else throughout California where the Products are consumed.

10 18. No clear and reasonable warning is provided with Products regarding the
11 carcinogenic hazards of 4-MEI.

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

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

26 21. More than sixty days prior to naming each Defendant in this lawsuit,
27 concurrent with sending the Notices described in the preceding paragraph, CEH also sent a
28 Certificate of Merit for each Notice to the California Attorney General, the District Attorneys of

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

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

17 23. Defendants both know and intend that consumers in California will
18 consume the Products, thus exposing them to 4-MEI.

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

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

24 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
25 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
26 12201).

27 25. Defendants have been informed of the 4-MEI in their Products by the 60-
28 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

1 26. Defendants also have constructive knowledge that their Products contain
2 4-MEI due to the widespread media coverage concerning the problem of 4-MEI in consumer
3 products in general and in carbonated soft drinks in particular. The problem of 4-MEI in
4 carbonated soft drink products has been the subject of articles in national newspapers, industry
5 trade papers, and scholarly journals, as well as numerous Internet weblog postings.

6 27. As companies that manufacture, import, distribute, and/or sell Products for
7 use in the California marketplace, Defendants know or should know that the Products contain
8 4-MEI and that individuals who consumer the Products will be exposed to 4-MEI. These 4-MEI
9 exposures are a natural and foreseeable consequence of Defendants' placing Products into the
10 stream of commerce.

11 28. Nevertheless, Defendants continue to expose consumers in California to
12 4-MEI without prior clear and reasonable warnings regarding the carcinogenic hazards of 4-MEI.

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

19 **FIRST CAUSE OF ACTION**
20 **(Violations of Health & Safety Code § 25249.6)**

21 30. CEH realleges and incorporates by reference as if specifically set forth
22 herein Paragraphs 1 through 29, inclusive.

23 31. 4-MEI is a chemical listed by the State of California as known to cause
24 cancer.

25 32. By placing their Products into the stream of commerce, Defendants are
26 each a person in the course of doing business within the meaning of Health & Safety Code §
27 25249.11.

28 33. Defendants know that average use of their Products will expose users of

1 Products to 4-MEI. Defendants intend that their Products be used in a manner that results in
2 consumers of their Products being exposed to 4-MEI contained therein.

3 34. Defendants have failed, and continue to fail, to provide prior clear and
4 reasonable warnings regarding the carcinogenicity of 4-MEI to users of their Products.

5 35. By committing the acts alleged above, Defendants have at all times
6 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
7 individuals to 4-MEI without first giving clear and reasonable warnings to such individuals
8 regarding the carcinogenicity of 4-MEI.

9 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.

10 **PRAYER FOR RELIEF**

11 Wherefore, CEH prays for judgment against Defendants as follows:

12 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess
13 civil penalties against each Defendant in the amount of \$2,500 per day for each violation of
14 Proposition 65 alleged herein according to proof;

15 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
16 preliminarily and permanently enjoin Defendants from offering Products for sale in California
17 without providing prior clear and reasonable warnings, as CEH shall specify in further
18 application to the Court;

19 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
20 Defendants to take action to stop ongoing unwarned exposures to 4-MEI resulting from use of
21 Products sold by Defendants, as CEH shall specify in further application to the Court;

22 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
23 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and
24
25
26
27
28

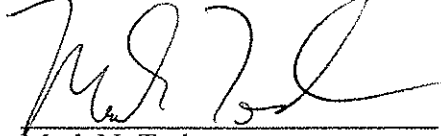
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Dated: June 24, 2014

Respectfully submitted,

LEXINGTON LAW GROUP



Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH