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AS YOU SOW

ENDORSED
FILED
Superior Court of California
County of San Francisco

NOV 06 2014

CLERK OF THE COURT
BY: DAVID W. YUEN
Deputy Clerk

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

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

12 Plaintiff,

13 v.

14 GENERAL NUTRITION
15 CORPORATION, and DOES 1 through
10, inclusive,

16 Defendants.
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Case No. **CGC-14-542561**

**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 General Nutrition Corporation (“Defendant”) to give clear and reasonable warnings to
5 residents of California prior to exposing those residents to a product containing lead and
6 cadmium. The State of California has listed lead as a chemical known to cause cancer. The
7 State of California has listed both lead and cadmium as a chemicals known to cause
8 reproductive harm. Under the Safe Drinking Water and Toxic Enforcement Act of 1986 – also
9 known as “Proposition 65” – businesses must provide persons with a “clear and reasonable
10 warning” before exposing them to such chemicals. Health & Saf. Code § 25249.6.

11 **II. PARTIES**

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

18 3. Defendant General Nutrition Corporation is a business entity that manufactures,
19 distributes, markets, and/or sells a product that contain lead and cadmium to consumers within
20 the State of California.

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

27 5. Wherever reference is made to “Defendant” in this Complaint, such reference
28 includes the Defendant named in Paragraph 3 and Does 1 through 10, inclusive.

III. JURISDICTION AND VENUE

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

7. This Court has jurisdiction over Defendant named above because it does sufficient business in California, has sufficient minimum contacts in California, or otherwise intentionally avails itself of the California market, through the manufacture, distribution, sale, marketing, and/or use of its products in California, rendering the exercise of jurisdiction over Defendant by the California courts consistent with traditional notions of fair play and substantial justice.

8. Venue is proper in this Court because Defendant's manufacturing, distributing, marketing, and/or sales of a product containing lead and cadmium has occurred in the County of San Francisco, and/or Defendant sold the product containing lead and cadmium to people who live in the County of San Francisco, which causes people to be exposed to lead and cadmium while they are physically present in the County of San Francisco.

9. On June 2, 2014, Plaintiff provided a Notice of Violation of Proposition 65 to the California Attorney General, the District Attorney of each county in California, the City Attorney of each California city with a population over 750,000 persons, and Defendant, pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation involved the following product manufactured, distributed, marketed, and/or sold by Defendant: GNC SuperFoods 25 Berry Flavor.

10. The Notice of Violation included a Certificate of Merit that Plaintiff's attorneys had consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding exposure to lead and cadmium from the product manufactured, distributed, marketed, and/or sold by Defendant. The Certificate of Merit confirms that, based on that information, Plaintiff's attorneys believe that there is a reasonable and meritorious case for this private action. The Notice of Violation also included a Certificate of Service. The Notice of Violation mailed to Defendant included a document entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986: A Summary." In compliance with Health and Safety Code section 25249.7(d) and title 11, section 3102 of the California Code of

1 Regulations, the Attorney General was served with a Notice of Violation and Certificate of
2 Merit that included confidential factual information sufficient to establish the basis of the
3 Certificate of Merit, including the identity of individual(s) with whom Plaintiff consulted and
4 the facts, studies, or other data that was reviewed by such person(s).

5 11. None of the public prosecutors that received the Notice of Violation has
6 commenced and is diligently prosecuting an action against the named Defendant for the
7 violations alleged in this Complaint, although the notice period established in Health and Safety
8 Code section 25249.7(d) has elapsed since the Notice of Violation was served by mail.

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

13 IV. STATUTORY BACKGROUND

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

16 14. The warning requirement of Proposition 65 is contained in Health and Safety Code
17 section 25249.6, which provides:

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

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

25 17. Proposition 65 also establishes a procedure by which the state is to develop a list
26 of chemicals "known to the State to cause cancer or reproductive toxicity." Health & Saf. Code
27 § 25249.8. No warning need be given concerning a listed chemical until one year after the
28 chemical first appears on the list.

1 18. Proposition 65 provides that any person “violat[ing] or threaten[ing] to violate”
2 the statute may be enjoined in any court of competent jurisdiction. Health & Saf. Code
3 § 25249.7. The statute defines “threaten to violate” as “creat[ing] a condition in which there is a
4 substantial probability that a violation will occur.” Health & Saf. Code § 25249.11(e). In
5 addition, violators are liable for civil penalties of up to \$2,500 per day for each violation,
6 recoverable in a civil action. Health & Saf. Code § 25249.7(b).

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

16 V. FACTS

17 20. Lead is listed under Proposition 65 as a chemical known to the State of California
18 to cause cancer. Both lead and cadmium are listed under Proposition 65 as chemicals known to
19 the State of California to cause reproductive harm.

20 21. Defendant manufactures, distributes, markets, and/or sells a product for sale or use
21 in the State of California that contains lead and cadmium. Specifically, Defendant sold to
22 consumers in the State of California the following product containing lead and cadmium: GNC
23 SuperFoods 25 Berry Flavor.

24 22. Use of the product identified in Paragraph 21 results in human exposure to lead
25 and cadmium when consumers use the product as directed on the label.

26 23. Defendant knew or reasonably should have known that the product that it
27 manufactured, distributed, marketed, and/or sold contained lead and cadmium. Defendant has
28 intended that individuals use this product. Defendant knows that individuals use the product

1 that Defendant has manufactured, distributed, marketed, and/or sold. Defendant has knowingly
2 and intentionally exposed individuals to lead and cadmium through its deliberate act(s) of
3 manufacturing, distributing, marketing, and/or selling the product.

4 24. The product described in this complaint was tested in a certified laboratory and
5 was found to contain sufficiently high levels of lead and cadmium to necessitate clear and
6 reasonable warnings under Proposition 65 that use of the product results in exposure to
7 chemicals known to the State of California to cause cancer and reproductive harm.

8 25. Defendant has failed to provide clear and reasonable warnings that the use of the
9 product described above results in exposure to chemicals known to the State of California to
10 cause cancer and reproductive harm, and no such warning was provided to consumers using that
11 product.

12 VI. FIRST CAUSE OF ACTION

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

14 27. Plaintiff is informed and believes, and based on such information and belief,
15 alleges that Defendant employs ten or more persons.

16 28. By committing the acts alleged above, Defendant has, within the previous twelve
17 months and in the course of doing business, knowingly and intentionally exposed individuals in
18 the State of California to lead and cadmium, chemicals known to the State of California to cause
19 cancer and/or reproductive harm, without first giving clear and reasonable warning to such
20 individuals within the meaning of Health and Safety Code section 25249.6.

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

23 PRAYER FOR RELIEF

24 WHEREFORE, Plaintiff prays that the Court:

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

27 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary
28 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting

1 Defendant from exposing persons within the State of California to lead and cadmium by use of
2 their product without providing clear and reasonable warnings, as Plaintiff shall specify in
3 further application to the Court;

4 3. Award Plaintiff its costs of suit;

5 4. Pursuant to Code of Civil Procedure section 1021.5 and any other applicable
6 provision of law, order Defendant to pay Plaintiff such attorneys' fees and costs as Plaintiff
7 incurs in bringing this enforcement action; and

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

9 DATED: November 5, 2014

SHUTE, MIHALY & WEINBERGER LLP

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By: 

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