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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY
SEP 10 2014
CLERK OF THE SUPERIOR COURT
By Anita Dhill Deputy

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 REED'S, INC. DBA REED'S GINGER)
16 PRODUCTS; and DOES 1 through 100,)
17 inclusive,)
Defendants.)

Case No. **RG 14739997**
**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**
Health & Safety Code § 25249.6, *et seq.*
(Other)

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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 REED’S, INC. DBA REED’S GINGER PRODUCTS is a
8 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.
9 REED’S, INC. DBA REED’S GINGER PRODUCTS manufactures, distributes, and/or sells
10 Products for sale or use in California.

11 6. DOES 1 through 100 are each a person in the course of doing business
12 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture,
13 distribute, and/or sell Products for sale or use in California.

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

16 8. Defendant REED’S, INC. DBA REED’S GINGER PRODUCTS and
17 DOES 1 through 100 are collectively referred to herein as “Defendants.”

18 **JURISDICTION AND VENUE**

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

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

1 11. Venue is proper in the Alameda Superior Court because one or more of the
2 violations arise in the County of Alameda.

3 **BACKGROUND FACTS**

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

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

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

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

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

24 16. Caramel coloring and flavoring agents containing 4-MEI are added to
25 Products, such as colas. Defendants’ Products contain sufficient quantities of 4-MEI such that
26 individuals are exposed to 4-MEI through the average use of the Products. The primary route of
27 exposure is direct ingestion by individuals when consumers drink the Products. These exposures
28 occur in homes, workplaces, and everywhere else throughout California where the Products are

1 consumed.

2 17. No clear and reasonable warning is provided with Products regarding the
3 carcinogenic hazards of 4-MEI.

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

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

18 20. More than sixty days prior to naming each Defendant in this lawsuit,
19 concurrent with sending the Notices described in the preceding paragraph, CEH also sent a
20 Certificate of Merit for each Notice to the California Attorney General, the District Attorneys of
21 every county in California, the City Attorneys of every California city with a population greater
22 than 750,000, and to each of the named Defendants. In compliance with Health & Safety Code §
23 25249.7(d) and 11 C.C.R. § 3101, each of the Certificates certified that CEH's counsel: (1) has
24 consulted with one or more persons with relevant and appropriate experience or expertise who
25 reviewed facts, studies, or other data regarding the exposures to 4-MEI alleged in each of the
26 Notices; and (2) based on the information obtained through such consultations, believes that
27 there is a reasonable and meritorious case for a citizen enforcement action based on the facts
28 alleged in each of the Notices. In compliance with Health & Safety Code § 25249.7(d) and 11

1 C.C.R. § 3102, each of the Certificates served on the Attorney General included factual
2 information – provided on a confidential basis – sufficient to establish the basis for the
3 Certificate, including the identity of the person(s) consulted by CEH’s counsel and the facts,
4 studies, or other data reviewed by such persons.

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

9 22. Each Defendant both knows and intends that consumers in California will
10 consume the Products, thus exposing them to 4-MEI.

11 23. Under Proposition 65, an exposure is “knowing” where the party
12 responsible for such exposure has:

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

16 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
17 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
18 12201).

19 24. Each Defendant has been informed of the 4-MEI in its Products by the 60-
20 Day Notice of Violation and accompanying Certificate of Merit served on each Defendant by
21 CEH.

22 25. Each Defendant also has constructive knowledge that its Products contain
23 4-MEI due to the widespread media coverage concerning the problem of 4-MEI in consumer
24 products in general and in carbonated soft drinks in particular. The problem of 4-MEI in
25 carbonated soft drink products has been the subject of articles in national newspapers, industry
26 trade papers, and scholarly journals, as well as numerous Internet weblog postings.

27 26. As companies that manufacture, import, distribute, and/or sell Products for
28 use in the California marketplace, each Defendant knows or should know that the Products

1 contain 4-MEI and that individuals who consumer the Products will be exposed to 4-MEI. These
2 4-MEI exposures are a natural and foreseeable consequence of each Defendant's placing
3 Products into the stream of commerce.

4 27. Nevertheless, each Defendant continues to expose consumers in California
5 to 4-MEI without prior clear and reasonable warnings regarding the carcinogenic hazards of
6 4-MEI.

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

13 **FIRST CAUSE OF ACTION**
14 **(Violations of Health & Safety Code § 25249.6)**

15 29. CEH realleges and incorporates by reference as if specifically set forth
16 herein Paragraphs 1 through 28, inclusive.

17 30. 4-MEI is a chemical listed by the State of California as known to cause
18 cancer.

19 31. By placing their Products into the stream of commerce, Defendants are
20 each a person in the course of doing business within the meaning of Health & Safety Code §
21 25249.11.

22 32. Each Defendant knows that average use of its Products will expose users
23 of Products to 4-MEI. Each Defendant intends that its Products be used in a manner that results
24 in consumers of its Products being exposed to 4-MEI contained therein.

25 33. Each Defendant has failed, and continues to fail, to provide prior clear and
26 reasonable warnings regarding the carcinogenicity of 4-MEI to users of its Products.

27 34. By committing the acts alleged above, each Defendant has at all times
28 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing

1 individuals to 4-MEI without first giving clear and reasonable warnings to such individuals
2 regarding the carcinogenicity of 4-MEI.

3 Wherefore, CEH prays for judgment against each Defendant , as set forth
4 hereafter.

5 **PRAYER FOR RELIEF**

6 Wherefore, CEH prays for judgment against each Defendant as follows:

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

10 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
11 preliminarily and permanently enjoin each Defendant from offering Products for sale in
12 California without providing prior clear and reasonable warnings, as CEH shall specify in further
13 application to the Court;

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

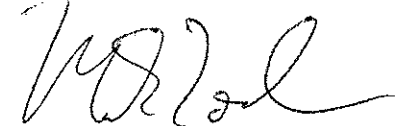
17 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
18 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

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22 Dated: September 10, 2014

Respectfully submitted,

23 LEXINGTON LAW GROUP

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25 _____
26 Mark N. Todzo
27 Attorneys for Plaintiff
28 CENTER FOR ENVIRONMENTAL HEALTH