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ENDORSED
FILED
ALAMEDA COUNTY

NOV 15 2016

CLERK OF THE SUPERIOR COURT
By: ERICA BAKER, Deputy

Attorneys for Plaintiff As You Sow

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

RG16838958

AS YOU SOW,

Plaintiff,

v.

MAINE COAST SEA VEGETABLES, INC.,

Defendant.

Case No.: _____

COMPLAINT

1 INTRODUCTION

2 1. California’s Safe Drinking Water and Toxic Enforcement Act (“Proposition 65”
3 or “the Act”), Health & Safety Code §25249.5 *et seq.*, prohibits any person in the course of
4 doing business from knowingly and intentionally exposing any individual to a chemical known
5 to the State of California to cause cancer or reproductive toxicity, without first giving clear and
6 reasonable warning of such exposure. Health & Safety Code §25249.6. This prohibition applies
7 with equal force against business entities that produce, distribute, or sell consumer products,
8 where the reasonable intended use of such products would result in an exposure to a known
9 carcinogen or reproductive toxin.

10 2. On October 1, 1987, the State of California officially listed cadmium as a
11 chemical known to the State to cause cancer; and, on May 1, 1997, listed it as a chemical known
12 to the State to cause reproductive toxicity.

13 3. On February 27, 1987, the State of California officially listed lead as a chemical
14 known to the State to cause reproductive toxicity; and, on October 1, 1992, listed it as a chemical
15 known to the State to cause cancer.

16 4. On information and belief, Defendant Maine Coast Sea Vegetables, Inc.
17 (hereinafter “Maine Coast” or “Defendant”), produced, distributed, and/or sold Maine Coast Sea
18 Vegetables Kelp Wild Atlantic Kombu (the “Covered Product”), in California.

19 5. Cadmium and lead are present in the Covered Product. Consumers are exposed to
20 these chemicals when they ingest the Covered Product.

21 6. Defendant has failed to provide a clear and reasonable warning that ingestion of
22 the Covered Product will result in exposure to cadmium and lead, chemicals known to the State
23 of California to cause cancer and reproductive toxicity. Accordingly, Plaintiff As You Sow
24 seeks an order requiring that Defendant take measures to ensure that California consumers
25 ingesting the Covered Product are not exposed to cadmium or lead, or provide a clear and
26 reasonable warning that ingestion of the Covered Product will result in exposure to chemicals
27 known to the State of California to cause cancer and reproductive toxicity.

1 **PARTIES**

2 7. Plaintiff AS YOU SOW (“Plaintiff”) is an Oakland-based non-profit corporation
3 dedicated to, among other causes, the protection of the environment, toxics reduction, the
4 promotion of and improvement of human health, the improvement of worker and consumer
5 rights, environmental education, and corporate accountability. As You Sow brings this action on
6 its own behalf and in the public interest pursuant to Health and Safety Code §25249.7(d).

7 8. On information and belief, Defendant MAINE COAST SEA VEGETABLES,
8 INC. is a business entity that has produced, distributed, and/or sold in California a product called
9 Maine Coast Sea Vegetables Kelp Wild Atlantic Kombu, which contains cadmium and lead.

10 **JURISDICTION AND VENUE**

11 9. This Court has jurisdiction over this action pursuant to Article VI, §10 of the
12 California Constitution because this case is not a cause given by statute to other courts.

13 10. This Court has jurisdiction over Defendant because it is a business entity that
14 conducts sufficient business, has sufficient minimum contacts in, or otherwise intentionally
15 avails itself of the market in California through the manufacture, sale, distribution, and/or use of
16 products in California.

17 11. Venue is proper in this Court because the obligation or liability arises, at least in
18 part, in the County of Alameda.

19 **LEGAL BACKGROUND**

20 12. In 1986, the voters of California overwhelmingly enacted Proposition 65.

21 13. Among other requirements, Proposition 65 provides that “[n]o person in the
22 course of doing business shall knowingly and intentionally expose any individual to a chemical
23 known to the State to cause cancer or reproductive toxicity without first giving clear and
24 reasonable warning to such individual, except as provided in Section 25249.10.” Health &
25 Safety Code §25249.6.

26 14. Proposition 65 establishes a procedure by which the State is to develop a list of
27 chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code
28

1 §25249.8. No warning is required for a chemical until one year after the State lists the chemical.
2 Health & Safety Code §25249.10(b).

3 15. “Whenever a clear and reasonable warning is required under Section 25249.6 of
4 the Act, the method employed to transmit the warning must be reasonably calculated,
5 considering the alternative methods available under the circumstances, to make the warning
6 message available to the individual prior to exposure.” Code Regs., tit. 27, §25601. The
7 warning that is provided “must clearly communicate that the chemical in question is known to
8 the State to cause cancer, or birth defects or other reproductive harm.” *Id.* The warning may not
9 include or be accompanied by “additional words or phrases that contradict or obfuscate
10 otherwise acceptable warning language.” Code Regs., tit. 11 §3202(b).

11 16. The warning must be provided “to any person to whom the product is sold or
12 transferred unless the product is packaged or labeled with a clear and reasonable warning.” Code
13 Regs., tit. 27, §25603(c).

14 17. According to the applicable regulations, a clear and reasonable warning may be
15 provided through warnings on a product, or through shelf warnings or signs, but such warnings
16 must be “prominently placed . . . with such conspicuousness, as compared with other words,
17 statements, designs, or devices in the label, labeling or display as to render it likely to be read
18 and understood by an ordinary individual under customary conditions of purchase or use.” Code
19 Regs., tit. 27, §25603.1(a)-(d); *see also Dowhal v. SmithKline Beecham Consumer Healthcare*
20 (2004) 32 Cal.4th 910, 918 (“The warning may be communicated through product labeling,
21 point-of-sale signs, or public advertising.”).

22 18. An exposure to a chemical in a consumer product is one that “results from a
23 person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a
24 consumer good, or any exposure that results from receiving a consumer service.” Code Regs.,
25 tit. 27, §25602(b).

26 19. An exposure is knowing if the person or entity responsible for the exposure had or
27 has “knowledge of the fact that . . . exposure to a chemical listed pursuant to Section 24249.8(a)
28 of the Act is occurring.” Code Regs., tit. 27, §25102(n).

1 20. Pursuant to Health & Safety Code §25249.7, this Court has authority to enjoin
2 “[a]ny person that violates or threatens to violate [§25249.6]” and to impose civil penalties “not
3 to exceed two thousand five hundred dollars (\$2,500) per day for each violation in addition to
4 any other penalty established by law.”

5 21. Private parties are entitled to bring an action to enforce the Act under Health &
6 Safety Code §25249.7(d).

7 **FACTUAL BACKGROUND**

8 22. On October 1, 1987, “cadmium and cadmium compounds” were placed on the
9 Office of Environmental Health Hazard Assessment’s (“OEHHA”) list of chemicals known to
10 cause cancer. On May 1, 1997, cadmium was placed on the list of chemicals known to cause
11 reproductive toxicity. Code Regs. tit. 27, §27001(b)-(c).

12 23. On February 27, 1987, lead was placed on the OEHHA list of chemicals known to
13 the State to cause reproductive toxicity. On October 1, 1992, lead was placed on the list of
14 chemicals known to cause cancer.

15 24. On information and belief, since at least September 17, 2013, Defendant has
16 produced, distributed, and/or sold the Covered Product in the State of California. Defendant has
17 described the Covered Product on its website as a species of large brown algae called
18 “*Saccharina latissima* (formerly known as *Laminaria longicruris*).”

19 25. Defendant has knowledge that the Covered Product, which it produces,
20 distributes, and/or sells in California, contains cadmium and lead.

21 26. The primary route of exposure to cadmium and lead from the Covered Product is
22 ingestion. This exposure to cadmium and lead results from the reasonably foreseeable use of the
23 Covered Product.

24 27. Defendant has produced, distributed, and/or sold the Covered Product within the
25 State of California without providing a clear and reasonable warning that the intended and
26 reasonably foreseeable use of the product will result in consumers’ exposure to chemicals known
27 to the State of California to cause cancer and reproductive toxicity (“Proposition 65 warning”).
28

1 28. On information and belief, Defendant produced, distributed, and/or sold the
2 Covered Product within the State of California, without providing an adequate and reasonable
3 warning as required by Proposition 65 beginning on September 17, 2013.

4 29. On September 17, 2014, Plaintiff served Defendant with a written notice of
5 violation stating that Defendant had violated Proposition 65 by exposing individuals to cadmium
6 and lead in the Covered Product without providing a clear and reasonable warning.

7 30. Also on September 17, 2014, Plaintiff provided written notice of the violation to
8 the Attorney General and the district attorneys and city attorneys in whose jurisdiction the
9 violations are alleged to have occurred.

10 31. Defendant has knowingly and intentionally exposed consumers to cadmium and
11 lead. The exposure has been knowing and intentional in part because it results from Defendant's
12 production, distribution and/or sale of the Covered Product that contains cadmium and lead, with
13 knowledge that reasonably foreseeable use of the product will result in consumers' exposure to
14 chemicals, namely cadmium and lead, known to the State of California to cause cancer and
15 reproductive toxicity.

16 32. In accordance with Health & Safety Code §25249.7(d), this action is being
17 commenced more than 60 days from the date that As You Sow provided notice of the violation
18 of Health & Safety Code §25249.6 alleged herein to the Attorney General and the district
19 attorneys and city attorneys in whose jurisdiction the violations are alleged to have occurred, and
20 to Defendant. The notice provided to Defendant included a certificate of merit that complied
21 with the requirements of Health & Safety Code §25249.7(d)(1). Factual information sufficient to
22 establish the basis of the certificate of merit was attached to the certificate of merit served on the
23 Attorney General.

24 33. Neither the Attorney General, any district attorney, any city attorney, nor any
25 other public prosecutor has commenced and is diligently prosecuting an action to address the
26 violations alleged herein.

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1 **FIRST CAUSE OF ACTION**

2 34. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained
3 in the preceding paragraphs.

4 35. By committing the acts alleged above, Defendant has, in the course of doing
5 business, knowingly and intentionally exposed individuals to chemicals known to the State of
6 California to cause cancer or reproductive toxicity without first giving clear and reasonable
7 warning to such individuals, within the meaning of Health & Safety Code §25249.6.

8 36. These actions violate Health & Safety Code §25249.6 and render Defendant liable
9 for civil penalties up to \$2,500 per day for each violation, as well as other remedies.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays that the Court:

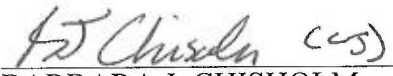
12 A. Grant civil penalties to be paid by Defendant for each violation of Health &
13 Safety Code §25249.6;

14 B. Pursuant to Health and Safety Code §25249.7, enter such injunctions or other
15 orders as are necessary to prevent Defendant from exposing persons within the State of
16 California to known reproductive toxins and cancer-causing chemicals resulting from the
17 reasonably foreseeable use of Defendant's product without providing a clear and reasonable
18 warning calculated to ensure that the warning message is available to individuals prior to
19 exposure;

20 C. Award Plaintiff reasonable attorneys' fees and costs; and

21 D. Grant such other and further relief as the Court deems just and proper.

22 Respectfully submitted,

23 
24 BARBARA J. CHISHOLM
25 TONY LOPRESTI
26 CORINNE JOHNSON
27 Altshuler Berzon LLP

28 Dated: November 15, 2016

Attorneys for Plaintiff As You Sow