

1 BARBARA J. CHISHOLM (SBN 224656)
2 TONY LOPRESTI (SBN 289269)
3 Altshuler Berzon LLP
4 177 Post Street, Suite 300
5 San Francisco, California 94108
6 Telephone: (415) 421-7151
7 Facsimile: (415) 362-8064
8 E-Mail: bchisholm@altshulerberzon.com

9 Attorneys for Plaintiff

ENDORSED
FILED
ALAMEDA COUNTY

APR 13 2015

CLERK OF THE SUPERIOR COURT

By Amani Barnes
Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF ALAMEDA

RG15766060

12 AS YOU SOW,

13 Plaintiff,

14 v.

15 STARWEST BOTANICALS, INC.; and
16 DOES 1-10

Defendants.

) Case No. _____

)
) **COMPLAINT FOR DAMAGES AND**
) **INJUNCTIVE RELIEF**

) Civil Case

1
2 **INTRODUCTION**

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

10 2. On February 27, 1987, the State of California listed lead as a chemical known to the State
11 to cause reproductive toxicity; and, on October 1, 1992, listed it as a chemical known to the State to
12 cause cancer.

13 3. On information and belief, Defendant Starwest Botanicals, Inc. (hereinafter, “Starwest” or
14 “Defendant”) manufactures, distributes, sells, and/or exercises control or could exercise control in the
15 course of doing business over the packaging of and any warnings provided on Starwest Botanicals
16 Organic Kelp Powder, in California.

17 4. Lead is present in Starwest’s Organic Kelp Powder. Consumers are exposed to this
18 chemical when they use Starwest’s Organic Kelp Powder. The primary route of exposure is ingestion.

19 5. Starwest has failed to provide a clear and reasonable warning that use of the Organic Kelp
20 Powder product it has manufactured, distributed, and/or sold, will result in exposure to lead, a chemical
21 known to the State of California to cause cancer and reproductive toxicity. Accordingly, Plaintiff AS
22 You Sow seeks an order requiring that Starwest either discontinue any manufacture, distribution, and/or
23 sale of its Organic Kelp Powder; take measures to ensure that consumers do not use Organic Kelp
24 Powder in a manner that will expose them to lead; or provide a clear and reasonable warning that use of
25 the Organic Kelp Powder will result in exposure to a chemical known to the State of California to cause
26 cancer and reproductive toxicity, and/or civil penalties as provided for under the Act.

27 **PARTIES**

28 6. Plaintiff AS YOU SOW (“Plaintiff”) is an Oakland-based non-profit corporation
dedicated to, among other causes, the protection of the environment, toxics reduction, the promotion of

1 and improvement of human health, the improvement of worker and consumer rights, environmental
2 education, and corporate accountability. As You Sow brings this action on its own behalf pursuant to
3 Health and Safety Code §25249.7(d).

4 7. Defendant Starwest is a business entity with ten or more employees that has
5 manufactured, distributed, and/or sold for sale or use in California a product called Organic Kelp
6 Powder, which contains lead.

7 8. Plaintiff As You Sow does not know the true names and capacities of Doe Defendants 1-
8 10 and therefore sues said defendants by such fictitious names. As You Sow will amend this Complaint
9 to show the Doe Defendants' true names and capacities when they have been ascertained. Plaintiff is
10 informed and believes, and on the basis of that belief alleges, that each of these Doe Defendants is in
11 some manner legally responsible for the violations of Health & Safety Code §25249.6 alleged herein.

12 **JURISDICTION AND VENUE**

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

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

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

21 **STATUTORY BACKGROUND**

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

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

27 14. Proposition 65 establishes a procedure by which the state is to develop a list of chemicals
28 “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code §25249.8. No

1 warning is required for a chemical until one year after the state lists the chemical. Health & Safety Code
2 §25249.10(b).

3 15. “Whenever a clear and reasonable warning is required under Section 25249.6 of the Act,
4 the method employed to transmit the warning must be reasonably calculated, considering the alternative
5 methods available under the circumstances, to make the warning message available to the individual
6 prior to exposure.” Code Regs., tit. 27, §25601.

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

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

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

17 19. Private parties are entitled to bring an action to enforce the Act under Health & Safety
18 Code §25249.7(d).

19 **FACTS**

20 20. Pursuant to their authority under Health & Safety Code §25249.8 and Code of
21 Regulations, tit. 27, §§25302 and 25305, the Science Advisory Board placed “lead and lead compounds”
22 on the list of chemicals known to cause cancer on October 1, 1992, and the Developmental and
23 Reproductive Toxicant Identification Committee placed lead on the list of chemicals known to cause
24 reproductive toxicity on February 27, 1987. Code Regs. tit. 27, §27001(b)-(c). Lead is specifically
25 identified under three subcategories for reproductive harm: “developmental reproductive toxicity,”
26 “female reproductive toxicity,” and “male reproductive toxicity.” Code Regs. tit. 27, §27001(c).

27 21. Defendant has manufactured, distributed and/or sold Organic Kelp Powder within the
28 State of California without clear and reasonable warnings that the intended and reasonably foreseeable

1 use of the product will result in exposure to a chemical known to the State of California to cause cancer
2 and reproductive toxicity (“Proposition 65 warning”).

3 22. On information and belief, Defendant has manufactured, distributed, sold, and/or
4 exercised or failed to exercise control over packaging and warnings for, Organic Kelp Powder within the
5 State of California, without adequate and reasonable warnings as required by Proposition 65 since at
6 least September 17, 2013.

7 23. Starwest has had knowledge that the Organic Kelp Powder it manufactures, distributes
8 and/or sells contains lead.

9 24. The primary route of exposure to lead from Defendants’ product is ingestion. This
10 exposure to hazardous lead results from the reasonably foreseeable use of Organic Kelp Powder.

11 25. On September 17, 2014, Plaintiff served Starwest with a written notice of violation
12 stating that Starwest had violated Proposition 65 by exposing individuals to lead in Organic Kelp
13 Powder without providing a clear and reasonable warning.

14 26. Also on September 17, 2014, Plaintiff provided notice of the violation to the Attorney
15 General and the district attorneys and city attorneys in whose jurisdiction the violations are alleged to
16 have occurred.

17 27. Starwest has knowingly and intentionally exposed consumers to lead. The exposure has
18 been knowing and intentional in part because it results from Starwest’s manufacture, distribution and/or
19 sale of Organic Kelp Powder that contains lead, with knowledge that reasonably foreseeable use of the
20 product will result in consumers’ exposure to a chemical, namely lead, known to the State of California
21 to cause cancer and reproductive toxicity.

22 28. In accordance with Health & Safety Code §25249.7(d), this action is being commenced
23 more than 60 days from the date that As You Sow provided notice of the violation of Health & Safety
24 Code §25249.6 alleged herein to the Attorney General and the district attorneys and city attorneys in
25 whose jurisdiction the violations are alleged to have occurred, and to Starwest. The notice provided to
26 Starwest included a certificate of merit that complied with the requirements of Health & Safety Code
27 §25249.7(d)(1). Factual information sufficient to establish the basis of the certificate of merit was
28 attached to the certificate of merit served on the Attorney General.

