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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
08/10/2016
Clerk of the Court
BY: MAURA RAMIREZ
Deputy Clerk

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 ERIKA MCCARTNEY, in the public interest,)

13 Plaintiff,)

14 v.)

15 SMOKEHOUSE PRODUCTS, LLC, an Oregon)
16 limited liability company; SMOKEHOUSE)
17 PRODUCTS, INC., a corporation; BEAR)
18 MOUNTAIN FOREST PRODUCTS, INC., a)
19 corporation; and DOES 1 through 500, inclusive,)

20 Defendants.)

CIVIL ACTION NO. CGC-15-548091

FIRST AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF AND CIVIL
PENALTIES

[Cal. Health and Safety Code
Sec. 25249.6, *et seq.*]

1 Plaintiff Erika McCartney, in the public interest, based on information and belief and
2 investigation of counsel, except for information based on knowledge, hereby makes the following
3 allegations.

4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendants' failure to warn individuals in
6 California that they are being exposed to wood dust (hereinafter "Wood Dust"), a substance known
7 to the State of California to cause cancer through. Such exposures have occurred, and continue to
8 occur through the manufacture, distribution, sale and use of the following products:
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10 a. Smokehouse Wood Smoking Chips – All types and flavors including, without
11 limitation: Apple, Alder, Cherry, Hickory and Mesquite;

12 b. Smokehouse Wood Smoking Chunks – All types and flavors including, without
13 limitation: Apple, Alder, Cherry, Hickory and Mesquite;

14 c. Smokehouse Wood Smoking Pellets – All types and flavors including, without
15 limitation: Apple, Alder, Cherry, Hickory and Mesquite;

16 d. Smokehouse Wood Grilling Planks – All types and flavors including, without
17 limitation: Cedar and Alder.

18 e. Bear Mountain Wood Fuel Pellets – All types, including, without limitation:
19 Golden Fire Wood Fuel Pellets, Bear Mountain Premium Wood Fuel Pellets, America's
20 Best Wood Fuel Pellets, and Forest Fuel Wood Pellets;

21 f. Bear Mountain Wood Fire Bricks/Logs – All types, including, without limitation:
22 Bear Mountain Bear Bricks (Regular) and Bear Mountain Bear Bricks (Large);

23 g. Bear Mountain Wood Fire Starters – All types, including, without limitation:
24 Golden Fire Starter Shavings;
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1 h. Bear Mountain Wood BBQ Pellets – All types and flavors, including, without
2 limitation: American Hickory, Texas Mesquite, Cascade Alder, Washington Apple, Hood
3 River Cherry, Smokehouse Maple, Southern Pecan, and Classic Oak;

4 i. Bear Mountain Animal Bedding – All types, including, without limitation: Cozen
5 Den Animal Bedding Premium Cedar Shavings, Cozen Den Animal Bedding Pine
6 Shavings, and Dry Den Animal Bedding.

7
8 2. Under California’s Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
9 unlawful for businesses to knowingly and intentionally expose individuals in California to
10 substances known to the State to cause cancer, birth defects or other reproductive harm without
11 providing clear and reasonable warnings to individuals prior to exposure. Defendants introduce
12 products contaminated with significant quantities of Wood Dust into the California marketplace,
13 exposing consumers to Wood Dust.

14 3. Despite the fact that the Defendants expose consumers to Wood Dust, Defendants
15 have, during the operative period, provided no warnings about the carcinogenic hazards associated
16 with Wood Dust exposure. Defendants’ conduct thus violates the warning provision of Proposition
17 65, Health & Safety Code § 25249.6.

18
19 **PARTIES**

20 4. Plaintiff brings this enforcement action in the public interest pursuant to Health &
21 Safety Code § 25249.7(d).

22 5. Defendants SMOKEHOUSE PRODUCTS, INC., SMOKEHOUSE PRODUCTS,
23 LLC, and BEAR MOUNTAIN FOREST PRODUCTS, INC. are persons in the course of doing
24 business within the meaning of Health & Safety Code § 25249.11. Defendants manufacture,
25 distribute and/or sell the Products for sale and use in California.
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1 6. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When
2 their identities are ascertained, the Complaint shall be amended to reflect their true names.

3 **JURISDICTION AND VENUE**

4 7. The Court has jurisdiction over this action pursuant to Health & Safety Code §
5 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
6 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
7 other trial courts.

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

14
15 9. Venue is proper in San Francisco County Superior Court because Defendants have
16 no designated principal office in California.

17
18 **BACKGROUND FACTS**

19 10. The People of the State of California have declared by initiative under Proposition
20 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
21 other reproductive harm.” Proposition 65 § 1(b).

22
23 11. To effectuate this goal, Proposition 65 prohibits exposing people to substances listed
24 by the State of California as known to cause cancer, birth defects or other reproductive harm
25 without a “clear and reasonable warning” unless the business responsible for the exposure can
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1 prove that it fits within a statutory exemption. Health & Safety Code § 25249.6 states, in pertinent
2 part:

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

7 12. On December 18, 2009, the State of California officially listed Wood Dust as a
8 substance known to cause cancer. On December 18, 2010, one year after it was listed as a
9 substance known to cause cancer, Wood Dust became subject to the clear and reasonable warning
10 requirement regarding carcinogens under Proposition 65. 27 C.C.R. 27001(c); Health & Safety
11 Code § 25249.10(b).

12 13. Defendants' Products contain sufficient quantities of Wood Dust such that
13 consumers using the Product are exposed to Wood Dust. The primary route of exposure for the
14 violations is through inhalation. These exposures occur everywhere throughout California where
15 the Products are used.

16 14. No clear and reasonable warning is provided with the Products regarding the
17 carcinogenic hazards of Wood Dust.

18 15. Any person acting in the public interest has standing to enforce violations of
19 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
20 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
21 within such time. Health & Safety Code § 25249.7(d).

22 16. More than sixty days prior to naming the Defendants herein, Plaintiff provided a 60-
23 Day "Notice of Violation of Proposition 65" to the California Attorney General, the District
24 Attorneys of every county in California, the City Attorneys of every California city with a
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1 population greater than 750,000 and to each of the named Defendants. In compliance with Health
2 & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following
3 information: (1) the name and address of each violator; (2) the statute violated; (3) the time period
4 during which violations occurred; (4) specific descriptions of the violations, including (a) the routes
5 of exposure to Wood Dust from the Products, and (b) the specific type of Products sold and used in
6 violation of Proposition 65; and (5) the name of the specific Proposition 65-listed substance that is
7 the subject of the violations described in each Notice.
8

9 17. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
10 General, the District Attorneys of every county in California, the City Attorneys of every California
11 city 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 11 C.C.R. § 3101, each Certificate certified that
13 Plaintiff's counsel: (1) has consulted with one or more persons with relevant and appropriate
14 experience or expertise who reviewed facts, studies or other data regarding the exposures to Wood
15 Dust alleged in each Notice; and (2) based on the information obtained through such consultations,
16 believes that there is a reasonable and meritorious case for a citizen enforcement action based on
17 the facts alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11
18 C.C.R. § 3102, each Certificate served on the Attorney General included factual information -
19 provided on a confidential basis – sufficient to establish the basis for the Certificate, including the
20 identity of the person(s) consulted by the Plaintiff's counsel and the facts, studies or other data
21 reviewed by such persons.
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23
24 18. None of the public prosecutors with the authority to prosecute violations of
25 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
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1 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
2 Plaintiff's Notices.

3 19. Defendants both know and intend that individuals will use the Product, thus
4 exposing them to Wood Dust.

5 20. Under Proposition 65, an exposure is "knowing" where the party responsible for
6 such exposure has:

7 knowledge of the fact that a[n] ... exposure to a chemical listed pursuant
8 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that
9 the ... exposure is unlawful is required.

10 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
11 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
12 12201).

13 21. Defendants have been informed of the Wood Dust in its Products by the 60-Day
14 Notices of Violation and accompanying Certificate of Merit served on them.

15 22. Defendants further have, throughout the operative period, had knowledge their
16 Products contains Wood Dust.

17 23. As a company that manufactures, imports, distributes and/or sell the Products for use
18 in the California marketplace, Defendants know or should know that the Products contain Wood
19 Dust and that individuals who uses the Products will be exposed to Wood Dust. The exposures to
20 consumers who use the Products are a natural and foreseeable consequence of Defendants' placing
21 the Products into the stream of commerce.

22 24. Nevertheless, during the operative period, Defendants have exposed consumers to
23 Wood Dust without prior clear and reasonable warnings regarding the carcinogenic hazards of
24 Wood Dust.
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25. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior to filing this Complaint.

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

FIRST CAUSE OF ACTION

(Violations of the Health & Safety Code 25249.6)

27. Plaintiff realleges and incorporates by reference as if specifically set forth herein Paragraphs 1 through 26, inclusive.

28. By placing the Products into the stream of commerce, each Defendant is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

29. Wood Dust is a substance listed by the State of California as known to cause cancer.

30. Defendants know that use of the Products will expose users of the Products to Wood Dust. Defendants intend that the Products be used in a manner that results in exposures to Wood Dust from the Products.

31. Defendants failed to provide clear and reasonable warnings regarding the carcinogenic hazards of Wood Dust to users of the Products.

32. By committing the acts alleged above, Defendants have at all times relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to Wood

1 Dust without first giving clear and reasonable warnings to such individuals regarding the
2 carcinogenic effects of Wood Dust.

3 **PRAYER FOR RELIEF**

4 Wherefore, Plaintiff prays for judgment against Defendants as follows:

- 5 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil
6 penalties against each of the Defendant in an amount up to \$2,500 per day for each violation of
7 Proposition 65;
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- 9 2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and
10 permanently enjoin Defendant from offering the Products for sale in California without either
11 reformulating the Products such that no Proposition 65 warnings is required or providing prior clear
12 and reasonable warnings, as Plaintiff shall specify in further application to the Court;
- 13 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendants to
14 take action to stop ongoing unwarranted exposures to Wood Dust resulting from use of the Product
15 sold by Defendant, as Plaintiff shall specify in further application to the Court;
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- 17 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable
18 statute, theory, rule or doctrine, grant Plaintiff 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 proper.

20 Dated: August 8, 2016.

PACIFIC JUSTICE CENTER

21
22 By: Robert B. Hancock
23 Robert B. Hancock
24 Attorneys for Plaintiff
25
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PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of San Francisco, California; my business address is Pacific Justice Center, 50 California Street, Suite 1500, San Francisco, California 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

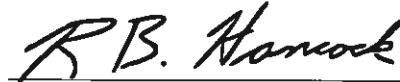
on all interested parties in said case addressed as follows:

Ian Hale
PARSONS FARNELL & GREIN, LLP
1030 S.W. Morrison Street
Portland, OR 97205
Phone: 503.222.1812
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- (BY MAIL)** By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in sealed envelopes with postage fully prepaid.
- (BY HAND)** By placing the documents in an envelope or package addressed to the persons listed above and providing them to a professional messenger service for delivery.
- (BY FEDERAL EXPRESS)** By depositing copies of the above documents in a box or other facility regularly maintained by Federal Express with delivery fees paid or provided for.
- (BY EXPRESS MAIL)** By placing the above documents in the United States mail for Express Mail delivery in a sealed envelope addressed as above, with Express Mail postage thereon fully prepaid.
- (BY FAX)** By use of facsimile machine telephone number (415) 354-3508, I faxed a true copy to the addressee(s) listed at the facsimile number(s) indicated after the party's address. The transmission was reported as complete without error. The attached transmission report, which sets for the date and time for the transmission, was properly issued by the transmitting facsimile machine.
- (BY ELECTRONIC TRANSMISSION)** By sending a file of the above document(s) via electronic transmission (e-mail) using e-mail address at the e-mail address designated for each party identified above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- (BY ONELEGAL E-SERVICE)** By sending a file of the above document(s) via electronic transmission to OneLegal for e-service on each party identified above via the e-mail address indicated.

(BY FILE & SERVEXPRESS E-SERVICE) By sending a file of the above document(s) via electronic transmission to File & ServeXpress for e-service on each party identified above via the e-mail address indicated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed on August 9, 2016.



Robert B. Hancock