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FILED
Superior Court of California
County of San Francisco
DEC 30 2014
CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CGC-14-543442

ERIKA MCCARTNEY, in the public interest,

Plaintiff,

v.

MANKE LUMBER COMPANY, INC., a
Washington corporation; and DOES 1 through
500, inclusive,

Defendants.

CIVIL ACTION NO.

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

EX FAX

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 Defendant's continuing failure to warn individuals
6 in California that they are being exposed to wood dust (hereinafter "Wood Dust"), a substance
7 known to the State of California to cause cancer through. Such exposures have occurred, and
8 continue to occur through the manufacture, distribution, sale and use of Defendant's "CleanBurn
9 Wood Pellet Fuel" (the "Product").
10

11 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
12 unlawful for businesses to knowingly and intentionally expose individuals in California to
13 substances known to the State to cause cancer, birth defects or other reproductive harm without
14 providing clear and reasonable warnings to individuals prior to exposure. Defendant introduces
15 products contaminated with significant quantities of Wood Dust into the California marketplace,
16 exposing consumers to Wood Dust.
17

18 3. Despite the fact that the Defendant exposes consumers to Wood Dust, Defendant
19 has, during the operative period, provided no warnings about the carcinogenic hazards associated
20 with Wood Dust exposure. Defendant's conduct thus violates the warning provision of Proposition
21 65, Health & Safety Code § 25249.6.
22

23 PARTIES

24 4. Plaintiff brings this enforcement action in the public interest pursuant to Health &
25 Safety Code § 25249.7(d).
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5. Defendant MANKE LUMBER COMPANY, INC. is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant manufactures, distributes and/or sells the Product for sale and use in California.

6. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When their identities are ascertained, the Complaint shall be amended to reflect their true names.

JURISDICTION AND VENUE

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

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

9. Venue is proper in San Francisco County Superior Court because one or more of the violations arise in San Francisco County, and Defendant is an out-of-state corporation that has designated no principal office in California.

BACKGROUND FACTS

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

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

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

9 12. On December 18, 2009, the State of California officially listed Wood Dust as a
10 substance known to cause cancer. On December 18, 2010, one year after it was listed as a
11 substance known to cause cancer, Wood Dust became subject to the clear and reasonable warning
12 requirement regarding carcinogens under Proposition 65. 27 C.C.R. 27001(c); Health & Safety
13 Code § 25249.10(b).
14

15 13. Defendant's Product contains sufficient quantities of Wood Dust such that
16 consumers using the Product are exposed to Wood Dust. The primary route of exposure for the
17 violations is through inhalation. These exposures occur everywhere throughout California where
18 the Product is used.

19 14. No clear and reasonable warning is provided with the Product regarding the
20 carcinogenic hazards of Wood Dust.
21

22 15. Any person acting in the public interest has standing to enforce violations of
23 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
24 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
25 within such time. Health & Safety Code § 25249.7(d).
26

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

12 17. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
13 General, the District Attorneys of every county in California, the City Attorneys of every California
14 city with a population greater than 750,000 and to each of the named Defendants. In compliance
15 with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that
16 Plaintiff's counsel: (1) has consulted with one or more persons with relevant and appropriate
17 experience or expertise who reviewed facts, studies or other data regarding the exposures to Wood
18 Dust alleged in each Notice; and (2) based on the information obtained through such consultations,
19 believes that there is a reasonable and meritorious case for a citizen enforcement action based on
20 the facts alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11
21 C.C.R. § 3102, each Certificate served on the Attorney General included factual information -
22 provided on a confidential basis – sufficient to establish the basis for the Certificate, including the
23 identity of the person(s) consulted by the Plaintiff's counsel and the facts, studies or other data
24 reviewed by such persons.
25
26

1 18. None of the public prosecutors with the authority to prosecute violations of
2 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
3 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
4 Plaintiff's Notices.

5 19. Defendant both knows and intends that individuals will use the Product, thus
6 exposing them to Wood Dust.

7 20. Under Proposition 65, an exposure is "knowing" where the party responsible for
8 such exposure has:
9

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

12 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
13 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
14 12201).

15 21. Defendant has been informed of the Wood Dust in its Products by the 60-Day
16 Notice of Violation and accompanying Certificate of Merit served on it.

17 22. Defendant further has, throughout the operative period, had knowledge its Product
18 contains Wood Dust.
19

20 23. As a company that manufactures, imports, distributes and/or sell the Products for use
21 in the California marketplace, Defendant knows or should know that the Product contains Wood
22 Dust and that individuals who uses the Product will be exposed to Wood Dust. The exposures to
23 consumers who use the Products are a natural and foreseeable consequence of Defendant's placing
24 the Products into the stream of commerce.
25
26

1 24. Nevertheless, Defendant continues to expose consumers to Wood Dust without prior
2 clear and reasonable warnings regarding the carcinogenic hazards of Wood Dust.

3 25. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior
4 to filing this Complaint.

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

11 **FIRST CAUSE OF ACTION**

12 **(Violations of the Health & Safety Code 25249.6)**

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

15 28. By placing the Product into the stream of commerce, each Defendant is a person in
16 the course of doing business within the meaning of Health & Safety Code § 25249.11.
17

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

19 30. Defendant knows that use of the Product will expose users of the Product to Wood
20 Dust. Defendant intends that the Product be used in a manner that results in exposures to Wood
21 Dust from the Product.

22 31. Defendant has failed, and continues to fail, to provide clear and reasonable warnings
23 regarding the carcinogenic hazards of Wood Dust to users of the Product.
24

25 32. By committing the acts alleged above, Defendant has at all times relevant to this
26 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;

8 2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and
9 permanently enjoin Defendant from offering the Product for sale in California without either
10 reformulating the Product such that no Proposition 65 warnings is required or providing prior clear
11 and reasonable warnings, as Plaintiff shall specify in further application to the Court;

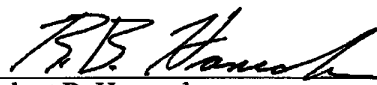
12 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendant to
13 take action to stop ongoing unwarranted exposures to Wood Dust resulting from use of the Product
14 sold by Defendant, as Plaintiff shall specify in further application to the Court;

15 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable
16 statute, theory, rule or doctrine, grant Plaintiff its reasonable attorneys' fees and costs of suit; and

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

18 Dated: December 26, 2014

PACIFIC JUSTICE CENTER

19 By: 
20 Robert B. Hancock
21 Attorneys for Plaintiff