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ENDORSED
FILED
Superior Court of California
County of San Francisco

MAR 03 2015

CLERK OF THE COURT

BY: MARY ALMOBAN
Deputy Clerk

8
9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC - 15 - 544497

11 ERIKA MCCARTNEY, in the public interest,)

12 Plaintiff,)

13 v.)

14 ARTISAN CONFECTIONS COMPANY, a)
15 Delaware corporation; DAGOBA ORGANIC)
16 CHOCOLATES, LLC, an Oregon limited)
17 liability company; and DOES 1 through 500,)
inclusive,)

18 Defendants.)

CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

19 BY FAX
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1 Erika McCartney, in the public interest, based on information and belief, except for
2 information pertaining directly to Plaintiff, hereby makes the following allegations.

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4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to adequately warn
6 individuals in California that they are being exposed to cadmium, a chemical known to the State of
7 California to cause birth defects and other reproductive harm. Such exposures have occurred, and
8 continue to occur, through the manufacture, distribution, sale and consumption of "Dagoba Organic
9 Chocolate Cacao Powder" (the "Product"). The Product is available through a multitude of retail
10 channels including, without limitation: (a) third-party traditional brick-and-mortar retail locations;
11 (b) via the internet through third-party retail websites; and (c) directly at Defendants' online store.
12 Consumers are exposed to cadmium when they consume the Product.

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14 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
15 unlawful for businesses to knowingly and intentionally expose individuals in California to
16 chemicals known to the State to cause cancer, birth defects or other reproductive harm without
17 providing clear and reasonable warnings to individuals prior to their exposure. Defendants
18 introduce a product contaminated with cadmium into the California marketplace, exposing
19 consumers of the Product to cadmium.

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21 3. Despite the fact that the Defendants expose consumers to cadmium, during the
22 relevant period Defendants provided no warning about the reproductive hazards associated with
23 cadmium exposure. Defendants' conduct thus violates the warning provision of Proposition 65,
24 Health & Safety Code § 25249.6.
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1 themselves of the California market through the sale, marketing or use of the Product in California
2 and/or by having such other contacts with California so as to render the exercise of jurisdiction over
3 them by the California courts consistent with traditional notions of fair play and substantial justice.

4 10. Venue is proper in San Francisco County Superior Court because one or more of the
5 violations arise in the County of San Francisco, and no defendant has designated a principal office
6 in California.

7 8 BACKGROUND FACTS

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10 11. The People of the State of California have declared by initiative under Proposition
11 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
12 other reproductive harm.” Proposition 65 § 1(b).

13 12. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed
14 by the State of California as known to cause cancer, birth defects or other reproductive harm above
15 certain levels without a “clear and reasonable warning” unless the business responsible for the
16 exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
17 states, in pertinent part:
18

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

22 13. On May 1, 1997, the State of California officially listed cadmium as a chemical
23 known to cause reproductive toxicity. Cadmium is specifically identified as a reproductive toxicant
24 under two subcategories: “developmental reproductive toxicity,” which means harm to the
25 developing fetus, and “male reproductive toxicity,” which means harm to the male reproductive
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1 system. 27 California Code of Regulations ("C.C.R.") § 27001(c). On May 1, 1998, one year
2 after it was listed as a chemical known to cause reproductive toxicity, cadmium became subject to
3 the clear and reasonable warning requirement regarding reproductive toxicants under Proposition
4 65.

5 14. The level of exposure to a chemical causing reproductive toxicity under Proposition
6 65 is determined by multiplying the level in question times the reasonably anticipated rate of
7 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer
8 products, the level of exposure is calculated using the reasonably anticipated rate of intake or
9 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).

10 15. The Product contains sufficient quantities of cadmium such that consumers who
11 consume the Product are exposed to cadmium. The primary route of exposure for the violations is
12 direct ingestion when consumers orally ingest the Product. These exposures occur in homes,
13 workplaces and everywhere in California where the Product is consumed.

14 16. During the relevant one-year period herein, no clear and reasonable warning was
15 provided with the Product regarding the reproductive hazards of cadmium.

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

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

7
8 19. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
9 General, the District Attorneys of every county in California, the City Attorneys of every California
10 city with a population greater than 750,000 and to the named Defendant. In compliance with
11 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's
12 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or
13 expertise who reviewed facts, studies or other data regarding the exposures to Cadmium alleged in
14 each Notice; and (2) based on the information obtained through such consultations, believes that
15 there is a reasonable and meritorious case for a citizen enforcement action based on the facts
16 alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. §
17 3102, each Certificate served on the Attorney General included factual information - provided on a
18 confidential basis – sufficient to establish the basis for the Certificate, including the identity of the
19 person(s) consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such
20 persons.
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23 20. None of the public prosecutors with the authority to prosecute violations of
24 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
25 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
26 Plaintiff's Notices.

1 21. Defendants know and intend that individuals will consume the Product, thus
2 exposing them to cadmium.

3 22. Under Proposition 65, an exposure is “knowing” where the party responsible for
4 such exposure has:

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

8 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
9 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
10 12201).

11 23. Defendants have further been informed of the cadmium in the Product by the 60-
12 Day Notice of Violation and accompanying Certificate of Merit served on them.

13 24. Defendants also have constructive knowledge that the Product contains cadmium
14 due to the widespread media coverage concerning the problem of cadmium in consumer products in
15 general, and, in particular, cacao products.

16 25. As entities that manufacture, import, distributes and/or sell the Product for use in the
17 California marketplace, Defendants know or should know that the Product contains cadmium and
18 that individuals who consume the Product will be exposed to cadmium. The cadmium exposures to
19 consumers who consume the Product are a natural and foreseeable consequence of Defendants
20 placing the Product into the stream of commerce.

21 26. Nevertheless, on information and belief, Defendants continue to expose consumers
22 to cadmium without prior clear and reasonable warnings regarding the reproductive hazards of
23 cadmium.
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1 cadmium without first giving clear and reasonable warnings to such individuals regarding the
2 reproductive toxicity of cadmium.

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 Defendant in the amount of 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 each Defendant from offering the Product for sale in California without either
10 reformulating the Product such that no Proposition 65 warnings are required or providing prior
11 clear 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 each
13 Defendant to take action to stop ongoing unwarranted exposures to cadmium resulting from use of
14 Product sold, 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 theory or doctrine, grant Plaintiff her 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: March 3, 2015

PACIFIC JUSTICE CENTER

19 By: 

20 Robert B. Hancock
21 Attorneys for Plaintiff