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**ELECTRONICALLY
FILED**
*Superior Court of California,
County of San Francisco*
11/05/2015
Clerk of the Court
BY: CAROL BALISTRERI
Deputy Clerk

8
9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11 ERIKA MCCARTNEY, in the public interest,)
12 Plaintiff,)
13 v.)
14 ARTISAN CONFECTIONS COMPANY, a)
15 Delaware corporation; THE HERSHEY)
16 COMPANY, a Delaware corporation; and DOES)
17 1 through 500, inclusive,)
18 Defendants.)

CIVIL ACTION NO. CGC-544497
**FIRST AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF AND CIVIL
PENALTIES**
[Cal. Health and Safety Code
Sec. 25249.6, *et seq.*]

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.
3

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.
13

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.
20

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.
25
26

PARTIES

1
2 4. Plaintiff brings this enforcement action in the public interest pursuant to Health &
3 Safety Code § 25249.7(d).

4 5. Defendant ARTISAN CONFECTIONS COMPANY ("ARTISAN
5 CONFECTIONS") is a Delaware corporation with its principal place of business at 100 Crystal A
6 Drive, Hershey, Pennsylvania. This Defendant is a person in the course of doing business within
7 the meaning of Health & Safety Code § 25249.11. ARTISAN CONFECTIONS, distributes and/or
8 sells the Product for sale and use in California, or, by virtue of its holding out as a "distributor" of
9 the Product, is deemed to be so.
10

11 6. Defendant THE HERSHEY COMPANY ("HERSHEY") is a Delaware corporation
12 with its principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania. This Defendant
13 is a person in the course of doing business within the meaning of Health & Safety Code §
14 25249.11. HERSHEY manufactures, distributes and/or sells the Product for sale and use in
15 California.
16

17 7. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When
18 their identities are ascertained, the Complaint shall be amended to reflect their true names.
19

JURISDICTION AND VENUE

20
21 8. The Court has jurisdiction over this action pursuant to Health & Safety Code §
22 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
23 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
24 other trial courts.
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1 under two subcategories: "developmental reproductive toxicity," which means harm to the
2 developing fetus, and "male reproductive toxicity," which means harm to the male reproductive
3 system. 27 California Code of Regulations ("C.C.R.") § 27001(c). On May 1, 1998, one year
4 after it was listed as a chemical known to cause reproductive toxicity, cadmium became subject to
5 the clear and reasonable warning requirement regarding reproductive toxicants under Proposition
6 65.

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

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

17
18 16. During the relevant one-year period herein, no clear and reasonable warning was
19 provided with the Product regarding the reproductive hazards of cadmium.

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

24
25 18. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff
26 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the

1 District Attorneys of every county in California, the City Attorneys of every California city with a
2 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety
3 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)
4 the name and address of each violator; (2) the statute violated; (3) the time period during which
5 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure
6 to cadmium from the Product, and (b) the specific type of Product sold and used in violation of
7 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
8 the violations described in each Notice.
9

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

25 20. None of the public prosecutors with the authority to prosecute violations of
26 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against

1 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
2 Plaintiff's Notices.

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

5 22. 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 23. Defendants have further been informed of the cadmium in the Product by the 60-
14 Day Notices of Violation and accompanying Certificates of Merit served on them.

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

18 25. As entities that manufacture, import, distributes and/or sell the Product for use in the
19 California marketplace, Defendants know or should know that the Product contains cadmium and
20 that individuals who consume the Product will be exposed to cadmium. The cadmium exposures to
21 consumers who consume the Product are a natural and foreseeable consequence of Defendants
22 placing the Product into the stream of commerce.
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1 26. Nevertheless, on information and belief, Defendants continue to expose consumers
2 to cadmium without prior clear and reasonable warnings regarding the reproductive hazards of
3 cadmium.

4 27. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior
5 to filing this Complaint by way of her 60-day Notice, to which no response was received.

6 28. Any person "violating or threatening to violate" Proposition 65 may be enjoined in
7 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is
8 defined to mean "to create a condition in which there is a substantial probability that a violation
9 will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not
10 to exceed \$2,500 per day for each violation of Proposition 65.
11

12 **CAUSE OF ACTION**

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

14 29. Plaintiff restates and realleges paragraphs 1 through 28, inclusive, as though fully set
15 forth herein.
16

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

19 31. Cadmium is a chemical listed by the State of California as known to cause birth
20 defects and other reproductive harm.

21 32. Defendants know that use of the Product will expose users of the Product to
22 cadmium. Defendants intend that the Product be used in a manner that results in exposures to
23 cadmium from the Product.
24

25 33. On information and belief, Defendants have failed to provide clear and reasonable
26 warnings regarding the reproductive toxicity of cadmium to users of the Products.

1 34. By committing the acts alleged above, Defendants have at times relevant to this
2 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
3 cadmium without first giving clear and reasonable warnings to such individuals regarding the
4 reproductive toxicity of cadmium.

5 **PRAYER FOR RELIEF**

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

7 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil
8 penalties against each Defendant in the amount of up to \$2,500 per day for each violation of
9 Proposition 65;

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

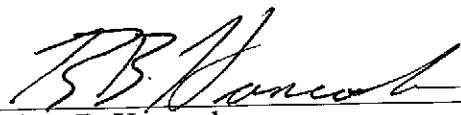
14 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order each
15 Defendant to take action to stop ongoing unwarranted exposures to cadmium resulting from use of
16 Product sold, as Plaintiff shall specify in further application to the Court;

17 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable
18 theory or doctrine, grant Plaintiff her 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: November 4, 2015

PACIFIC JUSTICE CENTER

21 By: 
22 Robert B. Hancock
23 Attorneys for Plaintiff
24
25
26

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:

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(BY ONE LEGAL) On the date hereof a true and correct copy of the above document(s) was electronically served on counsel of record for the above-referenced case by transmission to One Legal.

(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.

I declare under penalty of perjury under the laws of the November 4, 2015.



Robert B. Hancock