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BARBARA J. CHISHOLM (SBN 224656)  
TONY LOPRESTI (SBN 289269)  
Altshuler Berzon LLP  
177 Post Street, Suite 300  
San Francisco, California 94108  
Telephone: (415) 421-7151  
Facsimile: (415) 362-8064  
E-mail: bchisholm@altshulerberzon.com  
tlopresti@altshulerberzon.com

**ENDORSED  
FILED  
ALAMEDA COUNTY**  
**JUL 08 2016**  
CLERK OF THE SUPERIOR COURT  
By *Jamie Thomas*  
JAMIE THOMAS, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

AS YOU SOW,

Plaintiff,

vs.

ABBOTT LABORATORIES INC. d/b/a  
ABBOTT SALES, MARKETING &  
DISTRIBUTION, and DOES 1-10,

Defendants.

Case No.: RG16822576

**COMPLAINT**

Unlimited Civil Case

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## INTRODUCTION

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

2. On February 27, 1987, the State of California officially listed lead as a chemical known to the State to cause reproductive toxicity.

3. On information and belief, Defendant Abbott Laboratories Inc. d/b/a Abbott Sales, Marketing & Distribution (hereinafter "Abbott" or "Defendant") produces, distributes, and/or sells ZonePerfect Nutrition Bar Double Dark Chocolate (the "Covered Product"), in California.

4. Lead is present in the Covered Product. Consumers are exposed to this chemical when they ingest the Covered Product.

5. Defendant has failed to provide a clear and reasonable warning that ingestion of the Covered Product will result in exposure to lead, a chemical known to the State of California to cause reproductive toxicity. Accordingly, Plaintiff As You Sow seeks an order requiring that Defendant take measures to ensure that California consumers ingesting the Covered Product are not exposed to harmful levels of lead, or provide a clear and reasonable warning that ingestion of the Covered Product will result in exposure to a chemical, namely lead, known to the State of California to cause reproductive toxicity.

## PARTIES

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 and improvement of human health, the improvement of worker and consumer

1 rights, environmental education, and corporate accountability. As You Sow brings this action on  
2 its own behalf and in the public interest pursuant to Health and Safety Code §25249.7(d).

3 7. Defendant ABBOTT LABORATORIES INC. d/b/a ABBOTT SALES,  
4 MARKETING & DISTRIBUTION is, on information and belief, a business entity with ten or  
5 more employees that has produced, distributed, and/or sold in California a product called  
6 ZonePerfect Nutrition Bar Double Dark Chocolate, which contains lead.

### 7 JURISDICTION AND VENUE

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

10 9. This Court has jurisdiction over Defendant because it is a business entity that  
11 conducts sufficient business, has sufficient minimum contacts in, or otherwise intentionally  
12 avails itself of the market in California through the manufacture, sale, distribution, and/or use of  
13 products in California.

14 10. Venue is proper in this Court because the obligation or liability arises, at least in  
15 part, in the County of Alameda.

### 16 LEGAL BACKGROUND

17 11. In 1986, the voters of California overwhelmingly enacted Proposition 65.

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

23 13. Proposition 65 establishes a procedure by which the State is to develop a list of  
24 chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code  
25 §25249.8. No warning is required for a chemical until one year after the State lists the chemical.  
26 Health & Safety Code §25249.10(b).

27 14. “Whenever a clear and reasonable warning is required under Section 25249.6 of  
28 the Act, the method employed to transmit the warning must be reasonably calculated,

1 considering the alternative methods available under the circumstances, to make the warning  
2 message available to the individual prior to exposure.” Code Regs., tit. 27, §25601. The  
3 warning that is provided “must clearly communicate that the chemical in question is known to  
4 the State to cause cancer, or birth defects or other reproductive harm.” *Id.*

5 15. The warning must be provided “to any person to whom the product is sold or  
6 transferred unless the product is packaged or labeled with a clear and reasonable warning.” Code  
7 Regs., tit. 27, §25603(c).

8 16. According to the applicable regulations, a clear and reasonable warning may be  
9 provided through warnings on a product, or through shelf warnings or signs, but such warnings  
10 must be “prominently placed . . . with such conspicuousness, as compared with other words,  
11 statements, designs, or devices in the label, labeling or display as to render it likely to be read  
12 and understood by an ordinary individual under customary conditions of purchase or use.” Code  
13 Regs., tit. 27, §25603.1(a)-(d); *see also Dowhal v. SmithKline Beecham Consumer Healthcare*,  
14 32 Cal.4th 910, 918 (2004) (“The warning may be communicated through product labeling,  
15 point-of-sale signs, or public advertising.”).

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

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

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

27 20. Private parties are entitled to bring an action to enforce the Act under Health &  
28 Safety Code §25249.7(d).

1 **FACTUAL BACKGROUND**

2 21. On February 27, 1987, lead was placed on the California Office of Environmental  
3 Health Hazard Assessment's list of chemicals known to the State to cause reproductive toxicity.

4 22. Plaintiff's testing at an independent laboratory demonstrates that the Zone Perfect  
5 product contains lead.

6 23. Since at least September 25, 2014, Defendant has produced, distributed, and/or  
7 sold the Covered Product in the State of California. The Covered Product is described on the  
8 product website as both a "nutrition bar" and an "energy bar." The product website states, "We  
9 took the dark, rich, irresistible chocolate flavor you love and doubled it to make this unbelievable  
10 energy bar." ZonePerfect website, <<http://zoneperfect.com/products#double-dark-chocolate>>.

11 24. On information and belief, Defendant intends that consumers ingest the Covered  
12 Product frequently and in large quantities. The Frequently Asked Question page of the website  
13 for the Covered Product states that "the recommended usage for ZonePerfect bars is 2-3 bars per  
14 day." The page also notes that "there is nothing harmful" about consuming even more than 2-3  
15 bars per day. The page explains that ZonePerfect bars can serve as a "meal" or as a "nutritious  
16 snack." ZonePerfect website, <<http://zoneperfect.com/about/faq>>.

17 25. Defendant has had knowledge that the Covered Product it produces, distributes,  
18 and/or sells in California contains lead.

19 26. The primary route of exposure to lead from Defendant's product is ingestion.  
20 This exposure to hazardous lead results from the reasonably foreseeable use of the Covered  
21 Product.

22 27. Defendant has produced, distributed, and/or sold the Covered Product within the  
23 State of California without providing a clear and reasonable warning that the intended and  
24 reasonably foreseeable use of the Covered Product will result in consumers' exposure to a  
25 chemical known to the State of California to cause reproductive toxicity and birth defects  
26 ("Proposition 65 warning").  
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1           28.    On information and belief, Defendant has produced, distributed, and/or sold the  
2 Covered Product within the State of California, without providing an adequate and reasonable  
3 warning as required by Proposition 65 since at least September 25, 2014.

4           29.    On September 25, 2015, Plaintiff served Defendant with a written notice of  
5 violation stating that Defendant had violated Proposition 65 by exposing individuals to lead in  
6 the Covered Product without providing a clear and reasonable warning.

7           30.    Also on September 25, 2015, Plaintiff provided notice of the violation to the  
8 Attorney General and the district attorneys and city attorneys in whose jurisdiction the violations  
9 are alleged to have occurred.

10          31.    Defendant has knowingly and intentionally exposed consumers to lead. The  
11 exposure has been knowing and intentional in part because it results from Defendant's  
12 production, distribution and/or sale of the Covered Product that contains lead, with knowledge  
13 that reasonably foreseeable use of the Covered Product will result in consumers' exposure to a  
14 chemical, namely lead, known to the State of California to cause birth defects or other  
15 reproductive harm.

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

24          33.    Neither the Attorney General, any district attorney, any city attorney, nor any  
25 other public prosecutor has commenced and is diligently prosecuting an action against the  
26 violations alleged herein.

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1 **FIRST CAUSE OF ACTION**

2 34. Plaintiff re-alleges and incorporates by reference all the allegations set forth in  
3 this Complaint.

4 35. By committing the acts alleged above, Defendant has, in the course of doing  
5 business, knowingly and intentionally exposed individuals to a chemical known to the State of  
6 California to cause reproductive toxicity without first giving clear and reasonable warning to  
7 such individuals, within the meaning of Health & Safety Code §25249.6.

8 36. These actions violate Health & Safety Code §25249.6 and render Defendant liable  
9 for civil penalties up to \$2,500 per day for each violation, as well as other remedies.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays that the Court:

12 A. Grant civil penalties to be paid by Defendant for each violation of Health &  
13 Safety Code §25249.6;

14 B. Pursuant to Health and Safety Code §25249.7, enter such injunctions or other  
15 orders as are necessary to prevent Defendant from exposing persons within the State of  
16 California to known reproductive toxins resulting from the reasonably foreseeable use of  
17 Defendant's product without providing a clear and reasonable warning calculated to ensure that  
18 the warning message is available to individuals prior to exposure;

19 C. Award Plaintiff reasonable attorneys' fees and costs; and,

20 D. Grant such other and further relief as the Court deems just and proper.

21 Respectfully submitted,

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24 BARBARA J. CHISHOLM  
25 TONY LOPRESTI  
26 Altshuler Berzon LLP  
27 Attorneys for Plaintiff As You Sow  
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Dated: July 7, 2016