

1 Reuben Yeroushalmi (SBN 193981)
2 Ben Yeroushalmi (SBN 232540)
3 Peter T. Sato (SBN 238486)
4 **YEROUSHALMI & YEROUSHALMI**
5 An Association of Independent Law Corporations
6 9100 Wilshire Boulevard, Suite 240W
7 Beverly Hills, California 90212
8 Telephone: 310.623.1926
9 Facsimile: 310.623.1930

10 Attorneys for Plaintiff,
11 Consumer Advocacy Group, Inc.

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

NOV 03 2016

Sherri R. Carter, Executive Officer/Clerk
By: Judi Lara, Deputy

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF LOS ANGELES**

14 CONSUMER ADVOCACY GROUP, INC.,
15 in the public interest,

16 Plaintiff,

17 v.

18 BRISTOL FARMS, a California
19 Corporation; ENDEAVOUR CAPITAL, a
20 business entity form unknown; THE
21 NAPOLEON CO., a Washington
22 Corporation; and DOES 1-20;

23 Defendants.

CASE NO. **BC 6 3 9 5 1 9**

COMPLAINT FOR PENALTY AND
INJUNCTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

24 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
25 Defendants BRISTOL FARMS, ENDEAVOUR CAPITAL, THE NAPOLEON CO., and DOES
26 1-20 as follows:

27 **THE PARTIES**

- 28 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
organization qualified to do business in the State of California. CAG is a person within
the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting

1 as a private attorney general, brings this action in the public interest as defined under
2 Health and Safety Code section 25249.7, subdivision (d).

3 2. Defendant BRISTOL FARMS ("BRISTOL") is a California Corporation, doing business
4 in the State of California at all relevant times herein.

5 3. Defendant ENDEAVOUR CAPITAL ("ENDEAVOUR") is a business entity form
6 unknown, doing business in the State of California at all relevant times herein.

7 4. Defendant THE NAPOLEON CO. ("NAPOLEON") is a Washington Corporation,
8 doing business in the State of California at all relevant times herein.

9 5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-
10 20, and therefore sues these defendants by such fictitious names. Plaintiff will amend
11 this complaint to allege their true names and capacities when ascertained. Plaintiff is
12 informed, believes, and thereon alleges that each fictitiously named defendant is
13 responsible in some manner for the occurrences herein alleged and the damages caused
14 thereby.

15 6. At all times mentioned herein, the term "Defendants" includes BRISTOL,
16 ENDEAVOUR, NAPOLEON, and DOES 1-20.

17 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
18 times mentioned herein have conducted business within the State of California.

19 8. Upon information and belief, at all times relevant to this action, each of the Defendants,
20 including DOES 1-20, was an agent, servant, or employee of each of the other
21 Defendants. In conducting the activities alleged in this Complaint, each of the
22 Defendants was acting within the course and scope of this agency, service, or
23 employment, and was acting with the consent, permission, and authorization of each of
24 the other Defendants. All actions of each of the Defendants alleged in this Complaint
25 were ratified and approved by every other Defendant or their officers or managing
26 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated
27 the alleged wrongful conduct of each of the other Defendants.

28

1 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
2 Defendants was a person doing business within the meaning of Health and Safety Code
3 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
4 employees at all relevant times.

5 **JURISDICTION**

6 10. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
7 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
8 those given by statute to other trial courts. This Court has jurisdiction over this action
9 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
10 violations of Proposition 65 in any Court of competent jurisdiction.

11 11. This Court has jurisdiction over Defendants named herein because Defendants either
12 reside or are located in this State or are foreign corporations authorized to do business in
13 California, are registered with the California Secretary of State, or who do sufficient
14 business in California, have sufficient minimum contacts with California, or otherwise
15 intentionally avail themselves of the markets within California through their
16 manufacture, distribution, promotion, marketing, or sale of their products within
17 California to render the exercise of jurisdiction by the California courts permissible
18 under traditional notions of fair play and substantial justice.

19 12. Venue is proper in the County of Los Angeles because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
21 because Defendants conducted, and continue to conduct, business in the County of Los
22 Angeles with respect to the consumer product that is the subject of this action.

23 **BACKGROUND AND PRELIMINARY FACTS**

24 13. In 1986, California voters approved an initiative to address growing concerns about
25 exposure to toxic chemicals and declared their right "[t]o be informed about exposures
26 to chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
27 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
28 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections

1 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
2 from contamination, to allow consumers to make informed choices about the products
3 they buy, and to enable persons to protect themselves from toxic chemicals as they see
4 fit.

5 14. Proposition 65 requires the Governor of California to publish a list of chemicals known
6 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
7 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains
8 over 700 chemicals and chemical families. Proposition 65 imposes warning
9 requirements and other controls that apply to Proposition 65-listed chemicals.

10 15. All businesses with ten (10) or more employees that operate or sell products in
11 California must comply with Proposition 65. Under Proposition 65, businesses are: (1)
12 prohibited from knowingly discharging Proposition 65-listed chemicals into sources of
13 drinking water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
14 reasonable" warnings before exposing a person, knowingly and intentionally, to a
15 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

16 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
17 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
18 25249.7. "Threaten to violate" means "to create a condition in which there is a
19 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
20 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
21 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

22 17. Plaintiff identified certain practices of manufacturers and distributors of products
23 bearing Lead and Lead Compounds ("LEAD") and Cadmium and Cadmium Compounds
24 ("CADMIUM") of exposing, knowingly and intentionally, persons in California to the
25 Proposition 65-listed chemicals of such products without first providing clear and
26 reasonable warnings of such to the exposed persons prior to the time of exposure.
27 Plaintiff later discerned that Defendants engaged in such practice.

28

- 1 18. On February 27, 1987, the Governor of California added lead to the list of chemicals
2 known to the State to cause reproductive toxicity (Cal. Code Regs. tit. 27, § 27001(c)).
3 Lead is known to the State to cause developmental, female, and male reproductive
4 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
5 months after addition of lead to the list of chemicals known to the State to cause
6 reproductive toxicity, lead became fully subject to Proposition 65 warning requirements
7 and discharge prohibitions.
- 8 19. On October 1, 1992, the Governor of California added lead and lead compounds to the
9 list of chemicals known to the State to cause cancer (Cal. Code Regs. tit. 27, § 27001(b)).
10 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
11 after addition of lead and lead compounds to the list of chemicals known to the State to
12 cause cancer, lead and lead compounds became fully subject to Proposition 65 warning
13 requirements and discharge prohibitions.
- 14 20. On October 1, 1987, the Governor of California added Cadmium and Cadmium
15 Compounds to the list of chemicals known to the State to cause cancer (*Cal. Code Regs.*
16 *tit. 27, § 27001(b)*). Cadmium is known to the State to cause cancer and developmental,
17 male reproductive toxicity. Pursuant to Health and Safety Code sections 25249.9 and
18 25249.10, twenty (20) months after addition of Cadmium to the list of chemicals known
19 to the State to cause cancer, Cadmium became fully subject to Proposition 65 warning
20 requirements and discharge prohibitions.
- 21 21. On May 1, 1997, the Governor of California added Cadmium to the list of chemicals
22 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).
23 Cadmium is known to the State to cause developmental, male reproductive toxicity.
24 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
25 after addition of Cadmium to the list of chemicals known to the State to cause
26 reproductive toxicity, Cadmium became fully subject to Proposition 65 warning
27 requirements and discharge prohibitions.

28 **SATISFACTION OF PRIOR NOTICE**

1 22. On or about June 7, 2016, Plaintiff gave notice of alleged violations of Health and
2 Safety Code section 25249.6, concerning consumer products exposures, subject to a
3 private action to BRISTOL, ENDEAVOUR, NAPOLEON, and to the California
4 Attorney General, County District Attorneys, and City Attorneys for each city
5 containing a population of at least 750,000 people in whose jurisdictions the violations
6 allegedly occurred, concerning the product Smoked Mussels containing LEAD and
7 CADMIUM.

8 23. On or about June 16, 2016, Plaintiff gave notice of alleged violations of Health and
9 Safety Code section 25249.6, concerning consumer products exposures, subject to a
10 private action to BRISTOL, ENDEAVOUR, and to the California Attorney General,
11 County District Attorneys, and City Attorneys for each city containing a population of at
12 least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning
13 the product Minced Clams containing LEAD.

14 24. Before sending the notice of alleged violations, Plaintiff investigated the consumer
15 products involved, the likelihood that such products would cause users to suffer
16 significant exposures to LEAD and CADMIUM, and the corporate structure of each of
17 the Defendants.

18 25. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
19 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney
20 for Plaintiff who executed the certificate had consulted with at least one person with
21 relevant and appropriate expertise who reviewed data regarding the exposures to LEAD
22 and CADMIUM, the subject Proposition 65-listed chemicals of this action. Based on
23 that information, the attorney for Plaintiff who executed the Certificate of Merit believed
24 there was a reasonable and meritorious case for this private action. The attorney for
25 Plaintiff attached to the Certificate of Merit served on the Attorney General the
26 confidential factual information sufficient to establish the basis of the Certificate of
27 Merit.

28

1 26. Plaintiff's notices of alleged violations also included a Certificate of Service and a
2 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
3 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

4 27. Plaintiff is commencing this action more than sixty (60) days from the dates that
5 Plaintiff gave notices of the alleged violation to BRISTOL, ENDEAVOUR,
6 NAPOLEON, and the public prosecutors referenced in Paragraphs 22 and 23.

7 28. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
8 any applicable district attorney or city attorney has commenced and is diligently
9 prosecuting an action against the Defendants.

10 **FIRST CAUSE OF ACTION**

11 **(By CONSUMER ADVOCACY GROUP, INC. and against BRISTOL, ENDEAVOUR,
12 NAPOLEON, and DOES 1-10 for Violations of Proposition 65, The Safe Drinking Water
13 and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

14 **Smoked Mussels**

15 29. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
16 reference paragraphs 1 through 28 of this complaint as though fully set forth herein.
17 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
18 distributor, promoter, or retailer of Smoked Mussels, which includes but is not limited
19 to, "'Napoleon®"; "Fancy Smoked Mussels"; "Classic Taste" NET WT. 3.66 OZ
20 (106g); "Family Owned in the Northwest Since 1903"; "Best Before: April 2018";
21 "Imported by The Napoleon Co. Seattle, WA 98134"; "Product of China from Managed
22 Fisheries"; UPC: 0 41253 00341 7" ("MUSSELS").

23 30. MUSSELS contain LEAD and CADMIUM.

24 31. Defendants knew or should have known that LEAD and CADMIUM have been
25 identified by the State of California as a chemical known to cause cancer and
26 reproductive toxicity and therefore was subject to Proposition 65 warning requirements.
27 Defendants were also informed of the presence of LEAD and CADMIUM in MUSSELS
28 within Plaintiff's notice of alleged violations further discussed above at Paragraph 22.

1 32. Plaintiff's allegations regarding MUSSELS concerns "[c]onsumer products
2 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
3 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
4 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
5 *25602(b)*. MUSSELS are consumer products, and, as mentioned herein, exposures to
6 LEAD and CADMIUM took place as a result of such normal and foreseeable use.

7 33. Plaintiff is informed, believes, and thereon alleges that between June 7, 2013 and the
8 present, each of the Defendants knowingly and intentionally exposed California
9 consumers and users of MUSSELS, which Defendants manufactured, distributed, or
10 sold as mentioned above, to LEAD and CADMIUM, without first providing any type of
11 clear and reasonable warning of such to the exposed persons before the time of
12 exposure. Defendants have distributed and sold MUSSELS in California. Defendants
13 know and intend that California consumers will use MUSSELS, thereby exposing them
14 to LEAD and CADMIUM. Defendants thereby violated Proposition 65.

15 34. The principal routes of exposure are through ingestion, dermal contact, and inhalation.
16 Persons sustain exposures by eating and consuming MUSSELS, handling MUSSELS
17 without wearing gloves or any other personal protective equipment, or by touching bare
18 skin or mucous membranes with gloves after handling MUSSELS, as well as through
19 direct and indirect hand to mouth contact, hand to mucous membrane, or breathing in
20 particulate matter dispersed from MUSSELS.

21 35. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
22 Proposition 65 as to MUSSELS have been ongoing and continuous to the date of the
23 signing of this complaint, as Defendants engaged and continue to engage in conduct
24 which violates Health and Safety Code section 25249.6, including the manufacture,
25 distribution, promotion, and sale of MUSSELS, so that a separate and distinct violation
26 of Proposition 65 occurred each and every time a person was exposed to LEAD and
27 CADMIUM by MUSSELS as mentioned herein.

1 36. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
3 violations alleged herein will continue to occur into the future.

4 37. Based on the allegations herein, Defendants are liable for civil penalties of up to
5 \$2,500.00 per day per individual exposure to LEAD and CADMIUM from MUSSELS,
6 pursuant to Health and Safety Code section 25249.7(b).

7 38. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
8 filing this Complaint.

9
10 **SECOND CAUSE OF ACTION**

11 **(By CONSUMER ADVOCACY GROUP, INC. and against BRISTOL, ENDEAVOUR,
12 and DOES 11-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic
13 Enforcement Act of 1986 (Health & Safety Code, §§ 25249.5, et seq.))**

14 **Minced Clams**

15 39. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
16 reference paragraphs 1 through 38 of this complaint as though fully set forth herein.
17 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
18 distributor, promoter, or retailer of Minced Clams, which includes but is not limited to,
19 “Cento® Minced Clams”; NET WT. 6.5 OZ (184 g); “TENDER HAND SELECTED
20 PREMIUM CLAMS”; Cento; “Trust your family with our family®”; “Distributed by:
21 Cento Fine Foods, Inc. P.O. Box 565 Thorofare, N.J. 08086 www.cento.com” UPC: 0
22 70796 80605 6” (“CLAMS”).

23 40. CLAMS contain LEAD.

24 41. Defendants knew or should have known that LEAD has been identified by the State of
25 California as a chemical known to cause cancer and reproductive toxicity and therefore
26 was subject to Proposition 65 warning requirements. Defendants were also informed of
27 the presence of LEAD in CLAMS within Plaintiff's notice of alleged violations further
28 discussed above at Paragraph 23.

1 42. Plaintiff's allegations regarding CLAMS concerns "[c]onsumer products exposure[s],"
2 which "is an exposure that results from a person's acquisition, purchase, storage,
3 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
4 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
5 CLAMS are consumer products, and, as mentioned herein, exposures to LEAD took
6 place as a result of such normal and foreseeable use.

7 43. Plaintiff is informed, believes, and thereon alleges that between June 16, 2013 and the
8 present, each of the Defendants knowingly and intentionally exposed California
9 consumers and users of CLAMS, which Defendants manufactured, distributed, or sold
10 as mentioned above, to LEAD, without first providing any type of clear and reasonable
11 warning of such to the exposed persons before the time of exposure. Defendants have
12 distributed and sold CLAMS in California. Defendants know and intend that California
13 consumers will use CLAMS, thereby exposing them to LEAD. Defendants thereby
14 violated Proposition 65.

15 44. The principal routes of exposure are through ingestion, dermal contact, and inhalation.
16 Persons sustain exposures by eating and consuming CLAMS, handling CLAMS without
17 wearing gloves or any other personal protective equipment, or by touching bare skin or
18 mucous membranes with gloves after handling CLAMS, as well as through direct and
19 indirect hand to mouth contact, hand to mucous membrane, or breathing in particulate
20 matter dispersed from CLAMS.

21 45. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
22 Proposition 65 as to CLAMS have been ongoing and continuous to the date of the
23 signing of this complaint, as Defendants engaged and continue to engage in conduct
24 which violates Health and Safety Code section 25249.6, including the manufacture,
25 distribution, promotion, and sale of CLAMS, so that a separate and distinct violation of
26 Proposition 65 occurred each and every time a person was exposed to LEAD by
27 CLAMS as mentioned herein.
28

1 46. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
3 violations alleged herein will continue to occur into the future.

4 47. Based on the allegations herein, Defendants are liable for civil penalties of up to
5 \$2,500.00 per day per individual exposure to LEAD from CLAMS, pursuant to Health
6 and Safety Code section 25249.7(b).

7 48. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
8 filing this Complaint.

9 **PRAYER FOR RELIEF**

10 Plaintiff demands against each of the Defendants as follows:

- 11 1. A permanent injunction mandating Proposition 65-compliant warnings;
- 12 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
- 13 3. Costs of suit;
- 14 4. Reasonable attorney fees and costs; and
- 15 5. Any further relief that the court may deem just and equitable.

16
17
18 Dated: November 2, 2016

YEROUSHALMI & YEROUSHALMI

19
20
21 BY: 

22 Reuben Yeroushalmi
23 Attorneys for Plaintiff,
24 Consumer Advocacy Group, Inc.
25
26
27
28