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ENDORSED
FILED
Superior Court of California
County of San Francisco

OCT 28 2016

CLERK OF THE COURT
BY: VALENE APOLONIO
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ERIKA MCCARTNEY, in the public interest, Plaintiff, v. WHOLE FOODS MARKET CALIFORNIA, INC; MRS. GOOCH'S NATURAL FOOD MARKETS, INC.; and DOES 1 through 500, inclusive, Defendants.	CIVIL ACTION NO. CGC-16-555096 **COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES** [Cal. Health and Safety Code Sec. 25249.6, *et seq.*]

BY FAX

Erika McCartney, in the public interest, based on information and belief and investigation of counsel, except for information based on knowledge, hereby makes the following allegations.

INTRODUCTION

1. This Complaint seeks to remedy Defendants' failure to adequately warn individuals in California that they are being exposed to lead, a chemical known to the State of California to cause cancer, birth defects and other reproductive harm (hereinafter "Lead"). Such exposures have occurred, and continue to occur, through the manufacture, distribution, sale and consumption of Himalayan Bulk Goji Berries (the "Product"). The Product is available to consumers in California through Defendants' brick-and-mortar retail locations. Consumers are exposed to Lead when they consume the Product.

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

3. Despite the fact that the Defendants expose consumers to Lead, during the relevant period Defendants provided no warning about the reproductive hazards associated with Lead exposure. Defendants' conduct thus violates the warning provision of Proposition 65, Health & Safety Code § 25249.6.

PARTIES

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

5. Defendants WHOLE FOODS MARKET CALIFORNIA, INC. and MRS. GOOCH'S NATURAL FOOD MARKETS, INC. are persons in the course of doing business within the meaning of Health & Safety Code § 25249.11. Defendanta manufacture, distribute and/or sell 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 Defendanta business entities that do sufficient business, have sufficient minimum contacts in California or otherwise intentionally avails themselves of the California market through the sale, marketing or use of the Product 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 the County of San Francisco.

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).

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

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

12. On February 27, 1987, the State of California officially listed Lead as a chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive toxicant under three subcategories: "developmental reproductive toxicity," which means harms to the developing fetus, "female reproductive toxicity," which means harm to the female reproductive system, and "male reproductive toxicity," which means harm to the male reproductive system. 27 California Code of Regulations ("C.C.R.") § 27001(c). On February 27, 1988, one year after it was listed as a chemical known to cause reproductive toxicity, Lead became subject to the clear and reasonable warning requirement regarding reproductive toxicants under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

13. On October 1, 1992, the State of California officially listed Lead and Lead compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were

listed as chemicals known to cause cancer, Lead and Lead compounds became subject to the clear and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R. 27001(c); Health & Safety Code § 25249.10(b).

14. There is no safe level of exposure to Lead and even minute amounts of Lead have been proven harmful to children and adults. *See* Report of the Advisory Committee on Childhood Lead Poisoning Prevention of the Centers For Disease Control and Prevention, "Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention," January 2, 2012. A study performed by the California Office of Environment Health Hazard Assessment determined that exposures to Lead even at levels previously considered safe have now been shown to cause adverse health effects including reduced cognitive ability and significant diminution of intellectual potential. Carlisle, *et al.*, "A Blood Lead Benchmark for Assessing Risks from Childhood Lead Exposure," *Journal of Environmental Science and Health*, 44, 2009. This conclusion is based on a meta study of 1,333 children who participated in seven international studies. Lanphear, *et al.*, "Low-Level Environmental Lead Exposure and Children's Intellectual Function: An International Pooled Analysis," *Environmental Health Perspectives*, 113:7, 2005.

15. Lead exposures for pregnant women are also of particular concern in light of evidence that even short-term Lead exposures *in utero* may have long-term harmful effects. Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental Development," Environmental Health Perspectives 114:11,2 006; Schnaas, Lourdes, *et al.*, "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental Health Perspectives* 114:5, 2006. Increased Lead exposure during pregnancy has also been shown to cause increased risk of premature birth and increased blood pressure in both the mother during pregnancy and the child after birth. Vigeh, *et al.*, "Blood Lead at Currently Acceptable Levels May

Cause Preterm Labour," *Occupational Environmental Medicine*, 68:231-234, 2010; Zhang, *et al.*, "Association Between Prenatal Lead Exposure and Blood Pressure in Children," *Environmental Health Perspectives*, 120:3, 2012; Wells, *et al.*, "Low-Level Lead Exposure and Elevations in Blood Pressure During Pregnancy," 119:5, 2011.

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

17. Defendants' Product contains sufficient quantities of Lead such that consumers, including pregnant women, who consume the Product are exposed to Lead. The primary route of exposure for the violations is direct ingestion when consumers orally ingest the Product. These exposures occur everywhere in California where the Product is consumed.

18. During the relevant period herein, no clear and reasonable warning was provided with the Product regarding the reproductive hazards of Lead.

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

20. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000 and to the named Defendants. In compliance with Health & Safety

Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1) the name and address of each violator; (2) the statute violated; (3) the time period during which violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure to Lead from the Product, and (b) the specific type of Product sold and used in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of the violations described in each Notice.

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

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

23. Defendants both know and intend that individuals will consume the Product, thus exposing them to Lead.

24. Under Proposition 65, an exposure is "knowing" where the party responsible for such exposure has:

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

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

25. Defendants have further been informed of the Lead in the Product by the 60-Day Notice of Violation and accompanying Certificate of Merit served on them.

26. Defendants also have constructive knowledge that the Product contains Lead due to the widespread media coverage concerning the problem of Lead in consumer products in general.

27. As an entities that manufacture, import, distribute and/or sell the Product for use in the California marketplace, Defendants knows or should know that the Product contains Lead and that individuals who consume the Product will be exposed to Lead. The Lead exposures to consumers who consume the Product are a natural and foreseeable consequence of Defendants' placing the Product into the stream of commerce.

28. Nevertheless, on information and belief, Defendants continue to expose consumers to Lead without prior clear and reasonable warnings regarding the reproductive hazards of Lead.

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

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

CAUSE OF ACTION

(Violations of the Health & Safety Code 25249.6)

31. Plaintiff restates and realleges paragraphs 1 through 30 as though fully set forth herein.

32. By placing the Product into the stream of commerce, Defendants are persons in the course of doing business within the meaning of Health & Safety Code § 25249.11.

33. Lead is a chemical listed by the State of California as known to cause cancer, birth defects and other reproductive harm.

34. Defendants know that average use of the Product will expose users of the Product to Lead. Defendants intend that the Product be used in a manner that results in exposures to Lead from the Products.

35. Defendants have failed to provide clear and reasonable warnings regarding the reproductive toxicity of Lead to users of the Products.

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

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendants as follows:

1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties against the Defendant of up to $2,500 per day for each violation of Proposition 65 occurring on or after the statutory period;

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

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

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

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

Dated: October 28, 2016.

PACIFIC JUSTICE CENTER

By: _____
Robert B. Hancock
Attorneys for Plaintiff