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ENDORSED  
FILED  
Superior Court of California  
County of San Francisco

FEB 28 2017

CLERK OF THE COURT  
ARLENE RAMOS

Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CGC-17-557320

ERIKA MCCARTNEY, in the public interest,

Plaintiff,

v.

AMAZON.COM, INC., and DOES 1 through  
500, inclusive,

Defendants.

CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES

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

BY FAX

ONE LEGAL LLC

1 Erika McCartney, in the public interest, based on information and belief and investigation of  
2 counsel, except for information based on knowledge, hereby makes the following allegations.  
3

#### 4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendant's 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 distribution, sale and consumption of "Gerbs Cocoa Powder" (the  
9 "Product.") On information and belief, the Product is available to consumers via the internet  
10 through Defendant's website. Consumers are exposed to cadmium when they consume the  
11 Product.  
12

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

20 3. Despite the fact that the Defendant exposes consumers to cadmium, during the  
21 relevant period Defendant provided no warning about the reproductive hazards associated with  
22 cadmium exposure. Defendant's conduct thus violates the warning provision of Proposition 65,  
23 Health & Safety Code § 25249.6.  
24  
25  
26

**PARTIES**

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

5. Defendant AMAZON.COM, INC. ("Defendant") is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. This Defendant distributes and/or sells 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 Defendant as a business entity that does sufficient business, has sufficient minimum contacts in California, or otherwise intentionally avails itself 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, and Defendant has designated no principal office within the State of California.

## **BACKGROUND**

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

13. 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

1 products, the level of exposure is calculated using the reasonably anticipated rate of intake or  
2 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).

3 14. The Product contains sufficient quantities of cadmium such that consumers,  
4 including pregnant women, who consume the Product are exposed to cadmium. The primary route  
5 of exposure for the violations is direct ingestion when consumers orally ingest the Product. These  
6 exposures occur in homes, workplaces and everywhere in California where the Product is  
7 consumed.

8  
9 15. During the relevant one-year period herein, no clear and reasonable warning was  
10 provided with the Product regarding the reproductive hazards of cadmium.

11 16. Any person acting in the public interest has standing to enforce violations of  
12 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid  
13 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action  
14 within such time. Health & Safety Code §25249.7(d).

15  
16 17. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff  
17 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the  
18 District Attorneys of every county in California, the City Attorneys of every California city with a  
19 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety  
20 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)  
21 the name and address of each violator; (2) the statute violated; (3) the time period during which  
22 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure  
23 to cadmium, *inter alia*, from the Product, and (b) the specific type of Product sold and used in  
24 violation of Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is  
25 the subject of the violations described in each Notice.  
26

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

15           19.     None of the public prosecutors with the authority to prosecute violations of  
16    Proposition 65 has commenced and/or is diligently prosecuting a cause of action against Defendant  
17    under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in Plaintiff's Notice.  
18

19           20.     Defendant both knows and intends that individuals will consume the Product, thus  
20    exposing them to cadmium.

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

23                   knowledge of the fact that a[n] ... exposure to a chemical listed pursuant  
24                   to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that  
25                   the ... exposure is unlawful is required.  
26

1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §  
3 12201).

4 22. Defendant has also been informed of the cadmium in the Product by the 60-Day  
5 Notice of Violation and accompanying Certificate of Merit served on it. Following receipt of the  
6 Notice of Violation, Defendant continued to offer the Product for sale to persons in California, and,  
7 in fact, did sell the Product to persons in California, without a clear and reasonable warning.

8 23. Defendant also has constructive knowledge that its Product contains cadmium due to  
9 the widespread media coverage concerning the problem of Cadmium in consumer products in  
10 general, and, in particular, cocoa and chocolate products.

11 24. As an entity that distributes and/or sells the Product for use in the California  
12 marketplace, Defendant knows or should know that the Product contains cadmium and that  
13 individuals who consume the Product will be exposed to cadmium. The cadmium exposures to  
14 consumers who consume the Product are a natural and foreseeable consequence of Defendant's  
15 placing the Product into the stream of commerce.

16 25. Nevertheless, Defendant continues to expose consumers to cadmium without prior  
17 clear and reasonable warnings regarding the reproductive hazards of cadmium.

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

20 27. Any person "violating or threatening to violate" Proposition 65 may be enjoined in  
21 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is  
22 defined to mean "to create a condition in which there is a substantial probability that a violation  
23  
24  
25  
26

1 will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not  
2 to exceed \$2,500 per day for each violation of Proposition 65.

3  
4 **CAUSE OF ACTION**

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

6 28. Plaintiff realleges and incorporates by reference as if specifically set forth herein  
7 Paragraphs 1 through 27, inclusive.

8  
9 29. By placing the Product into the stream of commerce, Defendant is a person in the  
10 course of doing business within the meaning of Health & Safety Code § 25249.11.

11 30. Cadmium is a chemical listed by the State of California as known to cause birth  
12 defects and other reproductive harm.

13 31. Defendant knows that typical use of the Product will expose users of the Product to  
14 cadmium. Defendant intends that the Product be used in a manner that results in exposures to  
15 cadmium from the Products.

16  
17 32. Defendant has failed to provide clear and reasonable warnings regarding the  
18 reproductive toxicity of cadmium to users of the Products.

19 33. By committing the acts alleged above, Defendant has at all times relevant to this  
20 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to  
21 cadmium without first giving clear and reasonable warnings to such individuals regarding the  
22 reproductive toxicity of cadmium.

23 **PRAYER FOR RELIEF**

24  
25 Wherefore, Plaintiff prays for judgment against Defendant as follows:  
26



1           1.       That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil  
2 penalties against the Defendant in the amount of \$2,500 per day for each violation of Proposition  
3 65;

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

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

11           4.       That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable  
12 theory or doctrine, grant Plaintiff her reasonable attorneys' fees and costs of suit; and  
13

14           5.       That the Court grant such other and further relief as may be just and proper.  
15

16 Dated: February 27, 2017.

PACIFIC JUSTICE CENTER

17  
18 By:   
19 Robert B. Hancock  
20 Attorneys for Plaintiff  
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