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ENDORSED
FILED
San Francisco County Superior Court

FEB 03 2017

CLERK OF THE COURT
BY: KALENE APOLONIO
Deputy Clerk

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SAN FRANCISCO

CGC-17-556912

12 ERIKA MCCARTNEY, in the public interest,)

13 Plaintiff,)

14 v.)

15 PACIFIC WEST INGREDIENTS LLC;)
16 ORGANIC MERCHANTS CO; WAL-MART)
17 STORES, INC.; JET.COM, INC. and DOES 1)
through 500, inclusive,)

18 Defendants.)

CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

19 BY FAX
20 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 Defendants' failure to adequately warn individuals
6 in California that they are being exposed to cadmium, a chemical known to the State of California
7 to cause birth defects and other reproductive harm. Such exposures have occurred, and continue to
8 occur, through the manufacture, distribution, sale and consumption of "Organic Merchants Co.
9 Cacao Nibs" (the "Product.") On information and belief, the Product is available to consumers in
10 California through a multitude of retail channels including, without limitation: (a) via the internet
11 through the primary distributor's website; and (c) via the internet through third-party retail
12 websites. Consumers are exposed to cadmium when they consume the Product.
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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 significant quantities of cadmium into the California
19 marketplace, exposing consumers of the Product to cadmium.
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21 3. Despite the fact that Defendants expose consumers to cadmium, during the relevant
22 period Defendants provided no warning about the reproductive hazards associated with cadmium
23 exposure. Defendants' conduct thus violates the warning provision of Proposition 65, Health &
24 Safety Code § 25249.6.
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PARTIES

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

5. Defendants PACIFIC WEST INGREDIENTS, LLC; ORGANIC MERCHANTS CO.; WAL-MART STORES, INC.; and JET.COM, INC. (“Defendants”) are persons in the course of doing business within the meaning of Health & Safety Code § 25249.11. Each Defendant manufactures, 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.

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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 Defendants as 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 distribution of the Product in and/or to 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.

1 9. Venue is proper in San Francisco County Superior Court because one or more of the
2 violations arise in the County of San Francisco, and at least one Defendant has designated no
3 principal office within the State of California.
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5 **BACKGROUND**

6 10. The People of the State of California have declared by initiative under Proposition
7 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
8 other reproductive harm.” Proposition 65 § 1(b).
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10 11. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed
11 by the State of California as known to cause cancer, birth defects or other reproductive harm above
12 certain levels without a “clear and reasonable warning” unless the business responsible for the
13 exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
14 states, in pertinent part:
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16 No person in the course of doing business shall knowingly and intentionally
17 expose any individual to a chemical known to the state to cause cancer or
18 reproductive toxicity without first giving clear and reasonable warning to such
19 individual

20 12. On May 1, 1997, the State of California officially listed cadmium as a chemical
21 known to cause reproductive toxicity. Cadmium is specifically identified as a reproductive toxicant
22 under two subcategories: “developmental reproductive toxicity,” which means harm to the
23 developing fetus, and “male reproductive toxicity,” which means harm to the male reproductive
24 system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On May 1, 1998, one year
25 after it was listed as a chemical known to cause reproductive toxicity, cadmium became subject to
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1 the clear and reasonable warning requirement regarding reproductive toxicants under Proposition
2 65.

3 13. The level of exposure to a chemical causing reproductive toxicity under Proposition
4 65 is determined by multiplying the level in question times the reasonably anticipated rate of
5 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer
6 products, the level of exposure is calculated using the reasonably anticipated rate of intake or
7 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).
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9 14. The Product contains sufficient quantities of cadmium such that consumers,
10 including pregnant women, who consume the Product are exposed to cadmium. The primary route
11 of exposure for the violations is direct ingestion when consumers orally ingest the Product. These
12 exposures occur in homes, workplaces and everywhere in California where the Product is
13 consumed.
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15 15. During the relevant one-year period herein, no clear and reasonable warning was
16 provided with the Product regarding the reproductive hazards of cadmium.

17 16. Any person acting in the public interest has standing to enforce violations of
18 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
19 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
20 within such time. Health & Safety Code §25249.7(d).
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22 17. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff
23 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the
24 District Attorneys of every county in California, the City Attorneys of every California city with a
25 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety
26 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)

1 the name and address of each violator; (2) the statute violated; (3) the time period during which
2 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure
3 to cadmium, *inter alia*, from the Product, and (b) the specific type of Product sold and used in
4 violation of Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is
5 the subject of the violations described in each Notice.

6 18. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
7 General, the District Attorneys of every county in California, the City Attorneys of every California
8 city with a population greater than 750,000 and to the named Defendant. In compliance with
9 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's
10 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or
11 expertise who reviewed facts, studies or other data regarding the exposures to Cadmium alleged in
12 each Notice; and (2) based on the information obtained through such consultations, believes that
13 there is a reasonable and meritorious case for a citizen enforcement action based on the facts
14 alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. §
15 3102, each Certificate served on the Attorney General included factual information - provided on a
16 confidential basis – sufficient to establish the basis for the Certificate, including the identity of the
17 person(s) consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such
18 persons.
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21 19. None of the public prosecutors with the authority to prosecute violations of
22 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against Defendant
23 under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in Plaintiff's Notice.

24 20. Defendants both know and intends that individuals will consume the Product, thus
25 exposing them to cadmium.
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1 21. Under Proposition 65, an exposure is “knowing” where the party responsible for
2 such exposure has:

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

6 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
7 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
8 12201).

9 22. Defendants have also been informed of the cadmium in the Product by the 60-Day
10 Notice of Violation and accompanying Certificate of Merit served on them.

11 23. Defendants also have constructive knowledge that its Product contains cadmium due
12 to the widespread media coverage concerning the problem of cadmium in consumer products in
13 general, and, in particular, cocoa and chocolate products.

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

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

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

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4 **CAUSE OF ACTION**

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

6 27. Plaintiff realleges and incorporates by reference as if specifically set forth herein
7 Paragraphs 1 through 26, inclusive.

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

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

13 30. Defendants know that typical use of the Product will expose users of the Product to
14 cadmium. Defendants intend that the Product be used in a manner that results in exposures to
15 cadmium from the Products.

16
17 31. Defendants have failed to provide clear and reasonable warnings regarding the
18 reproductive toxicity of cadmium to users of the Products.

19 32. By committing the acts alleged above, Defendants have 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.
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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 in the amount of \$2,500 per day for each violation of Proposition 65;

2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin Defendant 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 Defendant to take action to stop ongoing unwarranted exposures to cadmium 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: February 2, 2017.

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff