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ENDORSED
FILED
San Francisco County Superior Court

APR 25 2017

CLERK OF THE COURT
BY: DENNIS TOYAMA
Deputy Clerk

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8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

10 ERIKA MCCARTNEY, in the public interest,)

11 Plaintiff,)

12 v.)

13 TREE OF LIFE, LLC; KEHE DISTRIBUTORS,)
14 LLC; KEHE ENTERPRISES, LLC; KEHE)
15 DISTRIBUTORS, INC.; and DOES 1 through)
16 500, inclusive,)

17 Defendants.)

CGC-17-558379
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 Defendants' failure to adequately warn individuals
6 in California that they are being exposed to lead, a chemical known to the State of California to
7 cause cancer, birth defects and other reproductive harm (hereinafter "Lead.") Such exposures have
8 occurred, and continue to occur, through the manufacture, distribution, sale and consumption of
9 Defendants' Tree of Life Goji Berries (the "Product"). The Product is available to consumers in
10 California through a multitude of retail channels which may include, without limitation: (a) third-
11 party traditional brick-and-mortar retail locations; (b) via the internet through Defendant's website;
12 and (c) via the internet through third-party retail websites. Consumers are exposed to Lead when
13 they consume the Product.
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15 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
16 unlawful for businesses to knowingly and intentionally expose individuals in California to
17 chemicals known to the State to cause cancer, birth defects or other reproductive harm without
18 providing clear and reasonable warnings to individuals prior to their exposure. Defendant
19 introduces a product contaminated with significant quantities of Lead into the California
20 marketplace, exposing consumers of the Product to Lead.
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22 3. Despite the fact that the Defendants expose consumers to Lead, during the relevant
23 period Defendants provided no warning about the reproductive hazards associated with Lead
24 exposure. Defendants' conduct thus violates the warning provision of Proposition 65, Health &
25 Safety Code § 25249.6.
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PARTIES

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

5. Defendants (1) TREE OF LIFE, LLC; (2) KEHE DISTRIBUTORS, LLC; (3) KEHE ENTERPRISES, LLC; and (4) KEHE DISTRIBUTORS, INC. are persons in the course of doing business within the meaning of Health & Safety Code § 25249.11. Defendants manufacture, distribute and/or sell the Product for sale and use in California.

6. There is unity of interest and ownership among Defendants such that the separate personalities of the two entities do not exist, and to treat them as separate would sanction a fraud or promote injustice to uphold the separateness of the entities. Accordingly, Defendants are the alter ego of one another.

7. Each Defendant sued herein was the principal, agent, or employee of the other, and was acting within the scope of such agency or employment. Each Defendant sued herein was the co-conspirator of the other and was acting within the course and scope of a conspiracy formed amongst each of them. Each Defendant sued here aided and abetted the other with the intent that each would be successful in their mutual endeavors. Each Defendant sued herein received money or property as a result of the conduct described herein without consideration therefore and/or with knowledge that the money or property was obtained as a result of the wrongful conduct described herein. Each entity Defendant sued herein is a shell organization, and is actually the alter ego of the other Defendants sued herein.

8. 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

9. 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.

10. This Court has jurisdiction over Defendants as business entities that do sufficient business, have sufficient minimum contacts in California or otherwise intentionally avail themselves of the California market through the sale, marketing or use of the Products in California and/or by having such other contacts with California so as to render the exercise of jurisdiction over them by the California courts consistent with traditional notions of fair play and substantial justice.

11. Venue is proper in San Francisco County Superior Court because one or more of the violations arise in the County of San Francisco.

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BACKGROUND

12. 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).

13. 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:

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

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

14 15. On October 1, 1992, the State of California officially listed Lead and Lead
15 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
16 listed as chemicals known to cause cancer, Lead and Lead compounds became subject to the clear
17 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
18 27001(c); Health & Safety Code § 25249.10(b).

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

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8 17. Lead exposures for pregnant women are also of particular concern in light of
9 evidence that even short-term Lead exposures *in utero* may have long-term harmful effects. Hu,
10 H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
11 Development," *Environmental Health Perspectives* 114:11,2 006; Schnaas, Lourdes, *et al.*,
12 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
13 *Health Perspectives* 114:5, 2006. Increased Lead exposure during pregnancy has also been shown
14 to cause increased risk of premature birth and increased blood pressure in both the mother during
15 pregnancy and the child after birth. Vigeh, *et al.*, "Blood Lead at Currently Acceptable Levels May
16 Cause Preterm Labour," *Occupational Environmental Medicine*, 68:231-234, 2010; Zhang, *et al.*,
17 "Association Between Prenatal Lead Exposure and Blood Pressure in Children," *Environmental*
18 *Health Perspectives*, 120:3, 2012; Wells, *et al.*, "Low-Level Lead Exposure and Elevations in
19 Blood Pressure During Pregnancy," 119:5, 2011.

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21 18. The level of exposure to a chemical causing reproductive toxicity under Proposition
22 65 is determined by multiplying the level in question times the reasonably anticipated rate of
23 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer
24 products, the level of exposure is calculated using the reasonably anticipated rate of intake or
25 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).
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1 19. Defendants' Product contains sufficient quantities of Lead such that consumers,
2 including pregnant women, who consume the Product are exposed to Lead. The primary route of
3 exposure for the violations is direct ingestion when consumers orally ingest the Product. These
4 exposures occur everywhere in California where the Product is consumed.

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

7 21. Any person acting in the public interest has standing to enforce violations of
8 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
9 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
10 within such time. Health & Safety Code § 25249.7(d).

11 22. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff
12 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the
13 District Attorneys of every county in California, the City Attorneys of every California city with a
14 population greater than 750,000 and to the named Defendants. In compliance with Health & Safety
15 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)
16 the name and address of each violator; (2) the statute violated; (3) the time period during which
17 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure
18 to Lead from the Product, and (b) the specific type of Product sold and used in violation of
19 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
20 the violations described in each Notice.
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22 23. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
23 General, the District Attorneys of every county in California, the City Attorneys of every California
24 city with a population greater than 750,000 and to the named Defendants. In compliance with
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1 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's
2 counsel: (1) have consulted with one or more persons with relevant and appropriate experience or
3 expertise who reviewed facts, studies or other data regarding the exposures to Lead alleged in the
4 Notice; and (2) based on the information obtained through such consultations, believes that there is
5 a reasonable and meritorious case for a citizen enforcement action based on the facts alleged in
6 each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each
7 Certificate served on the Attorney General included factual information - provided on a confidential
8 basis – sufficient to establish the basis for the Certificate, including the identity of the person(s)
9 consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such persons.
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11 24. None of the public prosecutors with the authority to prosecute violations of
12 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
13 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
14 Plaintiff's Notices.
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16 25. Defendants both know and intend that individuals will consume the Product, thus
17 exposing them to Lead.

18 26. Under Proposition 65, an exposure is “knowing” where the party responsible for
19 such exposure has:

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

23 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
24 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
25 12201).
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1 27. Defendants have further been informed of the Lead in the Product by the 60-Day
2 Notice of Violation and accompanying Certificate of Merit served on them.

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

5 29. As entities that manufacture, import, distribute and/or sell the Product for use in the
6 California marketplace, Defendants know or should know that the Product contains Lead and that
7 individuals who consume the Product will be exposed to Lead. The Lead exposures to consumers
8 who consume the Product are a natural and foreseeable consequence of Defendants' placing the
9 Product into the stream of commerce.
10

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

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

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

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

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24 33. Plaintiff restates and realleges paragraphs 1 through 32 as though fully set forth
25 herein.
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1 34. By placing the Product into the stream of commerce, Defendants are persons in the
2 course of doing business within the meaning of Health & Safety Code § 25249.11.

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

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

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

10 38. By committing the acts alleged above, Defendants have at times relevant to this
11 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to Lead
12 without first giving clear and reasonable warnings to such individuals regarding the reproductive
13 toxicity of Lead.
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17 **PRAYER FOR RELIEF**

18 Wherefore, Plaintiff prays for judgment against Defendants as follows:

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

22 2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and
23 permanently enjoin Defendants from offering the Product for sale in California without either
24 reformulating the Products such that no Proposition 65 warnings are required or providing prior
25 clear and reasonable warnings, as Plaintiff shall specify in further application to the Court;
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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: April 24, 2017.

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff