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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

AS YOU SOW, a California Non-Profit
Public Benefit Corporation,

Plaintiff,

v.

TRADER JOE'S COMPANY; BARRY
CALLEBAUT U.S.A., LLC; BLOMMER
CHOCOLATE CO.; GUITTARD
CHOCOLATE CO.; THE HERSHEY
COMPANY; LINDT & SPRÜNGLI
(NORTH AMERICA) INC.; CARGILL,
INC., on behalf of itself, its affiliates, and
subsidiaries; MARS, INC.; MONDELEZ
GLOBAL, LLC, as the United States
operating company for MONDELEZ
INTERNATIONAL, INC.; NESTLE USA,
INC., and DOES 1 through 150, inclusive,

Defendants.

Case No. CGC-15-548791

**SECOND AMENDED COMPLAINT
FOR INJUNCTIVE RELIEF AND
CIVIL PENALTIES**

Dept: 504
Judge: Hon. Suzanne R. Bolanos
Action Filed: November 3, 2015

ELECTRONICALLY
FILED

Superior Court of California,
County of San Francisco

01/25/2018
Clerk of the Court

BY: EDNALEEN ALEGRE

Deputy Clerk

1 Plaintiff AS YOU SOW alleges as follows:

2 **I. INTRODUCTION**

3 1. This Second Amended Complaint seeks an injunction and civil penalties to
4 remedy the continuing failure of Trader Joe’s Company; Barry Callebaut U.S.A., LLC;
5 Blommer Chocolate Co.; Guittard Chocolate Co.; The Hershey Company; Lindt & Sprüngli
6 (North America) Inc.; Cargill, Inc., on behalf of itself, its affiliates, and subsidiaries; Mars, Inc.;
7 Mondelez Global, LLC, as the United States operating company for Mondelez International,
8 Inc.; and Nestle USA, Inc. (“Defendants”) to give clear and reasonable warnings to residents of
9 California prior to exposing those residents to products containing lead and cadmium. The State
10 of California has listed lead as a chemical known to cause cancer and reproductive harm and has
11 listed cadmium as a chemical known to cause reproductive harm. Under the Safe Drinking
12 Water and Toxic Enforcement Act of 1986 – also known as “Proposition 65” – businesses must
13 provide persons with a “clear and reasonable warning” before exposing them to potentially
14 harmful chemicals like lead or cadmium. Health & Saf. Code § 25249.6.

15 **II. PARTIES**

16 2. Plaintiff As You Sow is a 501(c)(3) nonprofit organization based in Oakland,
17 California, and incorporated under the laws of the State of California. As You Sow is dedicated
18 to, among other causes, the protection of the environment, the promotion of human health, the
19 improvement of worker and consumer safety, and environmental education. As You Sow is a
20 “person” pursuant to Health and Safety Code section 25249.11(a). As You Sow brings this
21 action in the interest of the general public pursuant to Health and Safety Code section 25249.7.

22 3. Defendant Trader Joe’s Company is a business entity that manufactures,
23 distributes, markets, and/or sells products that contain lead and cadmium to consumers within
24 the State of California.

25 4. Defendant Barry Callebaut U.S.A., LLC is a business entity that manufactures,
26 distributes, markets, and/or sells products that contain lead to consumers within the State of
27 California.

28 5. Blommer Chocolate Co. is a business entity that manufactures, distributes,

1 markets, and/or sells products that contain lead and cadmium to consumers within the State of
2 California.

3 6. Guittard Chocolate Co. is a business entity that manufactures, distributes, markets,
4 and/or sells products that contain lead and cadmium to consumers within the State of California.

5 7. The Hershey Company is a business entity that manufactures, distributes, markets,
6 and/or sells products that contain lead and cadmium to consumers within the State of California.

7 8. Lindt & Sprüngli (North America) Inc. is a business entity that manufactures,
8 distributes, markets, and/or sells products that contain lead and cadmium to consumers within
9 the State of California. Its subsidiaries include Lindt & Sprüngli (USA), Inc.; the Ghirardelli
10 Chocolate Company; and Russell Stover Chocolates, LLC.

11 9. Cargill, Inc. is a business entity that manufactures, distributes, markets, and/or
12 sells products that contain lead and cadmium to consumers within the State of California.

13 10. Mars, Inc. is a business entity that manufactures, distributes, markets, and/or sells
14 products that contain lead and cadmium to consumers within the State of California.

15 11. Mondelez Global, LLC is the United States operating company for Mondelez
16 International, Inc., and is a business entity that manufactures, distributes, markets, and/or sells
17 products that contain lead and cadmium to consumers within the State of California.

18 12. Nestle USA, Inc. is a business entity that manufactures, distributes, markets,
19 and/or sells products that contain lead and cadmium to consumers within the State of California.

20 13. The true names and capacities of Defendants sued herein as Does 1 through 150
21 are unknown to Plaintiff, who therefore sues them by fictitious names. Plaintiff will amend this
22 Complaint to allege the true names and capacities of these Defendants when they have been
23 determined. Each of the fictitiously named Defendants is responsible for the manufacture,
24 distribution, marketing, and/or sale of products containing lead and cadmium to consumers in
25 California.

26 14. Wherever reference is made to "Defendants" in this Complaint, such reference
27 includes the Defendants named in Paragraphs 3 through 12 and Does 1 through 150, inclusive.
28

III. JURISDICTION AND VENUE

15. This Court has jurisdiction pursuant to California Constitution Article VI, Section 10, because this case is a cause not given by statute to other trial courts.

16. This Court has jurisdiction over Defendants named above because Defendants do sufficient business in California, have sufficient minimum contacts in California, or otherwise intentionally avail themselves of the California market, through the manufacture, distribution, sale, marketing, and/or use of their products in California, rendering the exercise of jurisdiction over Defendants by the California courts consistent with traditional notions of fair play and substantial justice.

17. Venue is proper in this Court because Defendants' manufacturing, distributing, marketing, and/or sales of products containing lead and cadmium have occurred in the County of San Francisco, and/or Defendants sold the products containing lead and cadmium to people who live in the County of San Francisco, which causes people to be exposed to lead and cadmium while they are physically present in the County of San Francisco.

18. On July 18, 2014, Plaintiff provided a Notice of Violation of Proposition 65 to the California Attorney General, the District Attorney of each county in California, the City Attorney of each California city with a population over 750,000 persons, and Mondelez International, Inc., of which defendant Mondelez Global, LLC, is the United States operating company, pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation involved the following products manufactured, distributed, marketed, and/or sold by Mondelez International, Inc.:

- Green & Black's Organic 85% Cacao Bar [cadmium]

19. On November 4, 2014, Plaintiff provided a Notice of Violation of Proposition 65 to the California Attorney General, the District Attorney of each county in California, the City Attorney of each California city with a population over 750,000 persons, and defendants The Hershey Company and Trader Joe's Company, pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation involved the following products manufactured, distributed, marketed, and/or sold by defendants:

- 1 • The Hershey Company's Dagoba Chocolate New Moon Rich Dark Chocolate (Bar)
- 2 [cadmium and lead]
- 3 • Trader Joe's Dark Chocolate Bar – Toffee with Walnuts and Pecans (70% Cacao) [lead]
- 4 • Trader Joe's Dark Chocolate Lover's Bar (85% Cacao) [lead and cadmium]
- 5 • Trader Joe's Organic Dark Chocolate 73% Cacao Super Dark (Bar) [lead and cadmium]
- 6 • Trader Joe's Pound Plus Dark Chocolate (Bar) [lead]
- 7 • Trader Joe's Pound Plus Dark Chocolate (Bar) (72% Cacao) [lead]
- 8 • Trader Joe's Swiss Dark Chocolate (72% Cacao) (Bar) [lead]

9 20. On February 11, 2015, Plaintiff provided a Notice of Violation of Proposition 65
 10 to the California Attorney General, the District Attorney of each county in California, the City
 11 Attorney of each California city with a population over 750,000 persons, and defendants The
 12 Hershey Company and Mars, Inc., pursuant to Health and Safety Code section 25249.7(d). This
 13 Notice of Violation involved the following products manufactured, distributed, marketed, and/or
 14 sold by defendants:

- 15 • The Hershey Company's Scharffen Berger Semisweet Fine Artisan Dark Chocolate (Bar)
- 16 (62% Cacao) [cadmium]
- 17 • The Hershey Company's Scharffen Berger Extra Dark Fine Artisan Dark Chocolate (Bar)
- 18 (82% Cacao) [cadmium]
- 19 • Mars, Inc.'s Dove Silky Smooth Dark Chocolate (Bar) [cadmium]

20 21. On February 5, 2016, Plaintiff provided a second Notice of Violation of
 21 Proposition 65 to the California Attorney General, the District Attorney of each county in
 22 California, the City Attorney of each California city with a population over 750,000 persons,
 23 and defendant Trader Joe's Company, pursuant to Health and Safety Code section 25249.7(d).
 24 This Notice of Violation involved the following products manufactured, distributed, marketed,
 25 and/or sold by Trader Joe's Company:

- 26 • Trader Joe's Single Origin Chocolate Passport 73% Cacao Bar (Tanzania) [lead and
- 27 cadmium]
- 28 • Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Sao Tome) [lead]

- 1 • Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Papua New Guinea) [lead
2 and cadmium]
- 3 • Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Dominican Republic)
4 [lead and cadmium]
- 5 • Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Ghana) [lead]
- 6 • Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Venezuela) [lead and
7 cadmium]
- 8 • Trader Joe's Single Origin Chocolate Passport 66% Cacao Bar (Ecuador) [lead and
9 cadmium]
- 10 • Trader Joe's Single Origin Chocolate Passport 60% Cacao Bar (Peru) [lead and
11 cadmium]

12 22. On March 24, 2016, Plaintiff provided a Notice of Violation of Proposition 65 to
13 the California Attorney General, the District Attorney of each county in California, the City
14 Attorney of each California city with a population over 750,000 persons, and defendants The
15 Hershey Company and Mars, Inc., pursuant to Health and Safety Code section 25249.7(d). This
16 Notice of Violation involved the following products manufactured, distributed, marketed, and/or
17 sold by defendants:

- 18 • The Hershey Company's Hershey's Special Dark Mildly Sweet Chocolate Bar [lead]
- 19 • The Hershey Company's Dagoba Organic Chocolate Eclipse Extra Strong Dark
20 Chocolate [lead and cadmium]
- 21 • The Hershey Company's Cadbury Mini Eggs Royal Dark Chocolate With A Crisp Sugar
22 Shell [lead]
- 23 • The Hershey Company's Cadbury Royal Dark Chocolate Indulgent Semi-Sweet [lead]
- 24 • Mars, Inc.'s Dove Eggs Dark Chocolate Silky Smooth [lead and cadmium]

25 23. On April 6, 2016, Plaintiff provided a Notice of Violation of Proposition 65 to the
26 California Attorney General, the District Attorney of each county in California, the City
27 Attorney of each California city with a population over 750,000 persons, and Mondelez
28 International, Inc., of which defendant Mondelez Global, LLC, is the United States operating
company, pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation

1 involved the following products manufactured, distributed, marketed, and/or sold by Mondelez
2 International, Inc.:

- 3 • Cote D'Or 86% Noir Brut Belgian Dark Chocolate Confection (Bar) [lead and cadmium]

4 24. On August 11, 2017, Plaintiff provided a Notice of Violation of Proposition 65 to
5 the California Attorney General, the District Attorney of each county in California, the City
6 Attorney of each California city with a population over 750,000 persons, and defendants Barry
7 Callebaut U.S.A., Inc.; Guittard Chocolate Co.; Mars, Inc.; and Mondelez International, Inc., of
8 which defendant Mondelez Global, LLC, is the United States operating company, pursuant to
9 Health and Safety Code section 25249.7(d). This Notice of Violation involved any chocolate,
10 cocoa, or cacao products, including chocolate pieces, callets, bars, nibs, liquors, and confections
11 that contain lead and/or cadmium and are, at any time, manufactured, distributed, or sold by the
12 noticed defendants, including but not limited to the following:

- 13 • Barry Callebaut U.S.A., Inc.'s Dark Chocolate Extra Bitter Callets, 70.4% Cacao [lead]
- 14 • Barry Callebaut U.S.A., Inc.'s Kumabo 80.1% Cocoa Callets [lead]
- 15 • Barry Callebaut U.S.A., Inc.'s 80% Kumabo Dark Chocolate, Unsweetened [lead]
- 16 • Guittard Chocolate Co.'s Clair De Lune Bittersweet Chocolate [lead and cadmium]
- 17 • Mars, Inc.'s Dark Chocolate M&Ms [lead]
- 18 • Mondelez's Toblerone of Switzerland Dark Chocolate with Honey and Almond Nougat
19 [lead]
- 20 • Mondelez's Enjoy Life Eat Freely boomCHOCOboom Bar [lead]

21 25. On October 24, 2017, Plaintiff provided a Notice of Violation of Proposition 65 to
22 the California Attorney General, the District Attorney of each county in California, the City
23 Attorney of each California city with a population over 750,000 persons, and defendants The
24 Hershey Company; Blommer Chocolate Co.; Lindt & Sprüngli (North America) Inc.; and
25 Cargill, Inc., pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation
26 involved any chocolate, cocoa, or cacao products, including chocolate pieces, callets, bars, nibs,
27 liquors, and confections that contain lead and/or cadmium and are, at any time, manufactured,
28 distributed, or sold by the noticed defendants, including but not limited to the following:

- 1 • The Hershey Company's and Blommer Chocolate Co.'s Hershey's Cocoa 100% Cacao
2 Natural Unsweetened [cadmium]
- 3 • The Hershey Company's and Blommer Chocolate Co.'s Dagoba Organic Chocolate New
4 Moon Rich Dark Chocolate Bar [lead and cadmium]
- 5 • The Hershey Company's and Blommer Chocolate Co.'s Hershey's Special Dark Mildly
6 Sweet Chocolate Bar [lead]
- 7 • The Hershey Company's and Blommer Chocolate Co.'s Dagoba Organic Chocolate
8 Eclipse Extra Strong Dark Chocolate [lead and cadmium]
- 9 • Lindt & Sprüngli (North America) Inc.'s Lindt Excellence 85% Cocoa Extra Dark
10 Chocolate Bar [lead and cadmium]
- 11 • Lindt & Sprüngli (North America) Inc.'s Ghirardelli 100% Cacao Unsweetened
12 Chocolate Baking Bar [cadmium]
- 13 • Lindt & Sprüngli (North America) Inc.'s Ghirardelli Chocolate Intense Dark Twilight
14 Delight (72% Cacao) (Bar) [lead and cadmium]
- 15 • Cargill, Inc.'s Trader Joe's Single Origin Chocolate Passport 73% Cacao Bar (Tanzania)
16 [lead and cadmium]
- 17 • Cargill, Inc.'s Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Sao Tome)
18 [lead]
- 19 • Cargill, Inc.'s Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Papua
20 New Guinea) [lead and cadmium]
- 21 • Cargill, Inc.'s Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar (Dominican
22 Republic) [lead and cadmium]
- 23 • Cargill, Inc.'s Trader Joe's Single Origin Chocolate Passport 70% Cacao Bar
24 (Venezuela) [lead and cadmium]
- 25 • Cargill, Inc.'s Trader Joe's Single Origin Chocolate Passport 66% Cacao Bar (Ecuador)
26 [lead and cadmium]
- 27 • Cargill, Inc.'s Trader Joe's Single Origin Chocolate Passport 60% Cacao Bar (Peru) [lead
28 and cadmium]

1 26. On November 10, 2017, Plaintiff provided a Notice of Violation of Proposition 65
2 to the California Attorney General, the District Attorney of each county in California, the City
3 Attorney of each California city with a population over 750,000 persons, and defendants Nestle
4 USA, Inc., pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation
5 involved any chocolate, cocoa, or cacao products, including chocolate pieces, callets, bars, nibs,
6 liquors, and confections that contain lead and/or cadmium and are, at any time, manufactured,
7 distributed, or sold by Nestle USA, Inc., including but not limited to the following:

- 8 • Nestle Toll House Cocoa (Powder) [lead and cadmium]
- 9 • Nestle Toll House Dark Chocolate Chips [lead and cadmium]

10 27. The Notices of Violation included Certificates of Merit that Plaintiff's attorneys
11 had consulted with one or more persons with relevant and appropriate experience or expertise
12 who has reviewed facts, studies, or other data regarding exposure to lead and cadmium from the
13 products manufactured, distributed, marketed, and/or sold by Defendants. The Certificates of
14 Merit confirm that, based on that information, Plaintiff's attorneys believe that there is a
15 reasonable and meritorious case for this private action. The Notices of Violation also included
16 Certificates of Service. The Notices of Violation mailed to Defendants all included a document
17 entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986: A Summary." In
18 compliance with Health and Safety Code section 25249.7(d) and title 11, section 3102 of the
19 California Code of Regulations, Plaintiff served the Attorney General with Notices of Violation
20 and Certificates of Merit that included confidential factual information sufficient to establish the
21 basis of the Certificates of Merit, including the identity of individual(s) with whom Plaintiff
22 consulted and the facts, studies, or other data that was reviewed by such person(s).

23 28. None of the public prosecutors that received the Notices of Violation has
24 commenced and is diligently prosecuting an action against the named Defendants for the
25 violations alleged in this Complaint, although the notice period established in Health and Safety
26 Code section 25249.7(d) has elapsed since the Notices of Violation were served by mail.

27 29. Because Plaintiff has fully complied with the requirements of Health and Safety
28 Code section 25249.7(d), and neither the Attorney General nor any District Attorney, City

1 Attorney, or prosecutor has commenced and is diligently pursuing an action against the
2 violations alleged herein, Plaintiff has standing to bring this Complaint.

3 IV. STATUTORY BACKGROUND

4 30. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative
5 statute passed as "Proposition 65" by a vote of the people in November of 1986.

6 31. The warning requirement of Proposition 65 is contained in Health and Safety Code
7 section 25249.6, which provides:

8 No person in the course of doing business shall knowingly and intentionally
9 expose any individual to a chemical known to the state to cause cancer or
10 reproductive toxicity without first giving clear and reasonable warning to such
individual, except as provided in Health and Safety Code section 25249.10.

11 32. Regulations promulgated to implement Proposition 65 provide that the warning
12 method "must be reasonably calculated, considering the alternative methods available under the
13 circumstances, to make the warning message available to the individual prior to exposure." 27
14 Cal. Code Regs. § 25601.

15 33. Proposition 65 also establishes a procedure by which the state is to develop a list
16 of chemicals "known to the state to cause cancer or reproductive toxicity." Health & Saf. Code
17 § 25249.8. No warning need be given concerning a listed chemical until one year after the
18 chemical first appears on the list.

19 34. Proposition 65 provides that any person "violat[ing] or threaten[ing] to violate"
20 the statute may be enjoined in any court of competent jurisdiction. Health & Saf. Code
21 § 25249.7(a). The statute defines "threaten to violate" as "creat[ing] a condition in which there
22 is a substantial probability that a violation will occur." Health & Saf. Code § 25249.11(e). In
23 addition, violators are liable for civil penalties of up to \$2,500 per day for each violation,
24 recoverable in a civil action. Health & Saf. Code § 25249.7(b).

25 35. Private actions to enforce Proposition 65 "may be brought by a person in the
26 public interest" if the action is commenced more than sixty days from the date that the person
27 has given notice of an alleged violation of Health and Safety Code section 25249.5 or 25249.6 to
28 the Attorney General; to the District Attorney, City Attorney, or prosecutor in whose jurisdiction

1 the violation occurred; and to the alleged violator. Health & Saf. Code § 25249.7(d). A
2 Certificate of Merit shall be included with the notification to the Attorney General, District
3 Attorney, City Attorney, or prosecutor in each jurisdiction where the violation occurred. *Id.* If
4 no public prosecutors commence enforcement within sixty days, then the person giving notice
5 may sue. *Id.*

6 V. FACTS

7 36. Lead is listed under Proposition 65 as a chemical known to the State of California
8 to cause cancer and reproductive harm. Cadmium is listed under Proposition 65 as a chemical
9 known to the State of California to cause reproductive harm.

10 37. Defendants manufacture, distribute, market, and/or sell products for sale or use in
11 the State of California that contain lead and cadmium. Specifically, Defendants sold to
12 consumers in the State of California the products containing lead and cadmium listed in
13 Paragraphs 18 through 26, above.

14 38. Use of the products identified in Paragraphs 18 through 26 results in human
15 exposure to lead and cadmium when consumers use the products as directed on the labels.

16 39. Defendants knew or reasonably should have known that the products that they
17 manufactured, distributed, marketed, and/or sold contained lead and cadmium. Defendants have
18 intended and know that individuals use the products that Defendants have manufactured,
19 distributed, marketed, and/or sold. Defendants have therefore knowingly and intentionally
20 exposed individuals to lead and cadmium through their deliberate act(s) of manufacturing,
21 distributing, marketing, and/or selling these products.

22 40. The products described in this Complaint were tested in a certified laboratory and
23 were found to contain sufficiently high levels of lead, cadmium, or both lead and cadmium to
24 necessitate clear and reasonable warnings under Proposition 65 that use of the products results in
25 exposure to chemicals known to the State of California to cause cancer and reproductive harm.

26 41. Defendants have failed to provide clear and reasonable warnings that the use of
27 the products described above results in exposure to chemicals known to the State of California
28 to cause cancer and reproductive harm, and no such warning was provided to consumers using

1 those products.

2 **VI. FIRST CAUSE OF ACTION**

3 42. Paragraphs 1 through 41 are re-alleged as if fully set forth herein.

4 43. Plaintiff is informed and believes, and based on such information and belief,
5 alleges that Defendants each employ ten or more persons.

6 44. By committing the acts alleged above, Defendants have, within the previous
7 twelve months and in the course of doing business, knowingly and intentionally exposed
8 individuals in the State of California to lead, a chemical known to the State of California to
9 cause cancer and reproductive harm, and/or to cadmium, a chemical known to the State of
10 California to cause reproductive harm, without first giving clear and reasonable warning to such
11 individuals within the meaning of Health and Safety Code section 25249.6.

12 45. Said violations render Defendants liable for civil penalties of up to \$2,500 per day
13 for each violation, as well as other remedies.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff prays that the Court:

- 16 1. Pursuant to the First Cause of Action, assess civil penalties against Defendants in
17 the amount of up to \$2,500 per day for each violation of Proposition 65;
- 18 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary
19 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting
20 Defendants from exposing persons within the State of California to lead and cadmium by use of
21 their products without providing clear and reasonable warnings, as Plaintiff shall specify in
22 further application to the Court;
- 23 3. Award Plaintiff its costs of suit;
- 24 4. Pursuant to Code of Civil Procedure section 1021.5 and any other applicable
25 provision of law, order Defendants to pay Plaintiff such attorneys' fees and costs as Plaintiff
26 incurs in bringing this enforcement action; and
- 27 5. Grant such other and further relief as the court deems just and proper.
- 28

1 DATED: January 19, 2018

SHUTE, MIHALY & WEINBERGER LLP

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By: 

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