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ENDORSED
FILED
Superior Court of California
County of San Francisco

NOV 15 2017

CLERK OF THE COURT
BY: ROSSALY DELAVEGA
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CGC-17-562527

ERIKA MCCARTNEY, in the public interest,)
Plaintiff,)
v.)
SAVORY SPICE SHOP, INC., a Colorado)
corporation; 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
08/15/2017

1 Erika McCartney, in the public interest, based on information and belief, except for
2 information pertaining directly to Plaintiff, 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 manufacture, distribution, sale and consumption of "Savory Spice
9 Shop Organic Raw Cacao Nibs" (the "Product.") The Product is available through a multitude of
10 retail channels including, without limitation: (a) via the internet through third-party retail websites;
11 and (b) directly at Defendant's online store. Consumers are exposed to cadmium when they
12 consume the Product.
13

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. Defendant
18 introduces a product contaminated with cadmium into the California marketplace, exposing
19 consumers of the Product to cadmium.
20

21 3. Despite the fact that the Defendant exposes consumers to cadmium, during the
22 relevant period, Defendant provides no warning about the reproductive hazards associated with
23 cadmium exposure. Defendant's conduct thus violates the warning provision of Proposition 65,
24 Health & 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. Defendant SAVORY SPICE SHOP, INC. is a Colorado corporation with its principal place of business located at 1805 East 58th Avenue, Unit C, Denver, Colorado. This Defendant is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. This 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.

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.

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).
8

9 14. The Product contains sufficient quantities of cadmium such that consumers who
10 consume the Product are exposed to cadmium. The primary route of exposure for the violations is
11 direct ingestion when consumers orally ingest the Product. These exposures occur in homes,
12 workplaces and everywhere in California where the Product is consumed.

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

16 16. Any person acting in the public interest has standing to enforce violations of
17 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
18 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
19 within such time. Health & Safety Code § 25249.7(d).

20 17. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff
21 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the
22 District Attorneys of every county in California, the City Attorneys of every California city with a
23 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety
24 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)
25 the name and address of each violator; (2) the statute violated; (3) the time period during which
26

1 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure
2 to cadmium from the Product, and (b) the specific type of Product sold and used in violation of
3 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
4 the violations described in each Notice.

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

19
20 19. None of the public prosecutors with the authority to prosecute violations of
21 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against Defendant
22 under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of Plaintiff's
23 Notices.
24

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

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. Defendant has further been informed of the cadmium in the Product by the 60-Day
10 Notice of Violation and accompanying Certificate of Merit served on it.

11 23. Defendant also has constructive knowledge that the 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 cacao products.

14 24. As entities that manufacture, import, distribute and/or sell the Product for use in the
15 California marketplace, Defendant knows or should know that the Product contains cadmium and
16 that individuals who consume the Product will be exposed to cadmium. The cadmium exposures to
17 consumers who consume the Product are a natural and foreseeable consequence of Defendant
18 placing the Product into the stream of commerce.

19 25. Nevertheless, on information and belief, Defendant continues to expose consumers
20 to cadmium without prior clear and reasonable warnings regarding the reproductive hazards of
21 cadmium.
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23 26. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior
24 to filing this Complaint by way of her 60-day Notice, to which no response was received.
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PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendant as follows:

1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties against Defendant in the amount of up to \$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 Product 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: November 15, 2017.

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff