

1 ELLISON FOLK (State Bar No. 149232)
2 LAURA D. BEATON (State Bar No. 294466)
3 SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
4 Facsimile: (415) 552-5816
Folk@smwlaw.com
5 Beaton@smwlaw.com

6 Attorneys for Plaintiff
AS YOU SOW

ENDORSED
FILED
Superior Court of California
County of San Francisco

NOV 03 2015

CLERK OF THE COURT
By: ARLENE RAMOS
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

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

11 Plaintiff,

12 v.

13 TRADER JOE'S, INC., and DOES 1
14 through 10, inclusive,

15 Defendants.

Case No. CGC-15-548791

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

1 Plaintiff AS YOU SOW alleges as follows:

2 **I. INTRODUCTION**

3 1. This Complaint seeks an injunction and civil penalties to remedy the continuing
4 failure of Trader Joe's, Inc. ("Defendant") to give clear and reasonable warnings to residents of
5 California prior to exposing those residents to products containing lead and cadmium. The State
6 of California has listed lead as a chemical known to cause cancer and reproductive harm and has
7 listed cadmium as a chemical known to cause reproductive harm. Under the Safe Drinking
8 Water and Toxic Enforcement Act of 1986 – also known as "Proposition 65" – businesses must
9 provide persons with a "clear and reasonable warning" before exposing them to potentially
10 harmful chemicals like lead or cadmium. Health & Saf. Code § 25249.6.

11 **II. PARTIES**

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

18 3. Defendant Trader Joe's, Inc. is a business entity that manufactures, distributes,
19 markets, and/or sells products that contain lead and cadmium to consumers within the State of
20 California.

21 4. The true names and capacities of Defendants sued herein as Does 1 through 10 are
22 unknown to Plaintiff, who therefore sues them by fictitious names. Plaintiff will amend this
23 Complaint to allege the true names and capacities of these Defendants when they have been
24 determined. Each of the fictitiously named Defendants is responsible for the manufacture,
25 distribution, marketing, and/or sale of products containing lead and cadmium to consumers in
26 California.

27 5. Wherever reference is made to "Defendant" in this Complaint, such reference
28 includes the Defendant named in Paragraph 3 and Does 1 through 10, inclusive.

1 **III. JURISDICTION AND VENUE**

2 6. This Court has jurisdiction pursuant to California Constitution Article VI, Section
3 10, because this case is a cause not given by statute to other trial courts.

4 7. This Court has jurisdiction over Defendant named above because Defendant does
5 sufficient business in California, has sufficient minimum contacts in California, or otherwise
6 intentionally avails itself of the California market, through the manufacture, distribution, sale,
7 marketing, and/or use of its products in California, rendering the exercise of jurisdiction over
8 Defendant by the California courts consistent with traditional notions of fair play and substantial
9 justice.

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

15 9. On November 3, 2014, Plaintiff provided a Notice of Violation of Proposition 65
16 to the California Attorney General, the District Attorney of each county in California, the City
17 Attorney of each California city with a population over 750,000 persons, and Defendant,
18 pursuant to Health and Safety Code section 25249.7(d). This Notice of Violation involved the
19 following products manufactured, distributed, marketed, and/or sold by Defendant:

- 20 • Trader Joe's Dark Chocolate Bar – Toffee with Walnuts and Pecans (70% Cacao) [lead]
21 • Trader Joe's Dark Chocolate Lover's Bar (85% Cacao) [lead and cadmium]
22 • Trader Joe's Organic Dark Chocolate 73% Cacao Super Dark (Bar) [lead and cadmium]
23 • Trader Joe's Pound Plus Dark Chocolate (Bar) [lead]
24 • Trader Joe's Pound Plus Dark Chocolate (Bar) (72% Cacao) [lead]
25 • Trader Joe's Swiss Dark Chocolate (72% Cacao) (Bar) [lead]

26 10. The Notice of Violation included a Certificate of Merit that Plaintiff's attorneys
27 had consulted with one or more persons with relevant and appropriate experience or expertise
28 who has reviewed facts, studies, or other data regarding exposure to lead and cadmium from the

1 products manufactured, distributed, marketed, and/or sold by Defendant. The Certificate of
2 Merit confirms that, based on that information, Plaintiff's attorneys believe that there is a
3 reasonable and meritorious case for this private action. The Notice of Violation also included a
4 Certificate of Service. The Notice of Violation mailed to Defendant included a document
5 entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986: A Summary." In
6 compliance with Health and Safety Code section 25249.7(d) and title 11, section 3102 of the
7 California Code of Regulations, Plaintiff served the Attorney General with a Notice of Violation
8 and Certificate of Merit that included confidential factual information sufficient to establish the
9 basis of the Certificate of Merit, including the identity of individual(s) with whom Plaintiff
10 consulted and the facts, studies, or other data that was reviewed by such person(s).

11 11. None of the public prosecutors that received the Notice of Violation has
12 commenced and is diligently prosecuting an action against the named Defendant for the
13 violations alleged in this Complaint, although the notice period established in Health and Safety
14 Code section 25249.7(d) has elapsed since the Notice of Violation was served by mail.

15 12. Because Plaintiff has fully complied with the requirements of Health and Safety
16 Code section 25249.7(d), and neither the Attorney General nor any District Attorney, City
17 Attorney, or prosecutor has commenced and is diligently pursuing an action against the
18 violations alleged herein, Plaintiff has standing to bring this Complaint.

19 IV. STATUTORY BACKGROUND

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

22 14. The warning requirement of Proposition 65 is contained in Health and Safety Code
23 section 25249.6, which provides:

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

27 15. Regulations promulgated to implement Proposition 65 provide that the warning
28 method "must be reasonably calculated, considering the alternative methods available under the

1 circumstances, to make the warning message available to the individual prior to exposure.” 27
2 Cal. Code Regs. § 25601.

3 16. Proposition 65 also establishes a procedure by which the state is to develop a list
4 of chemicals “known to the state to cause cancer or reproductive toxicity.” Health & Saf. Code
5 § 25249.8. No warning need be given concerning a listed chemical until one year after the
6 chemical first appears on the list.

7 17. Proposition 65 provides that any person “violat[ing] or threaten[ing] to violate”
8 the statute may be enjoined in any court of competent jurisdiction. Health & Saf. Code
9 § 25249.7(a). The statute defines “threaten to violate” as “creat[ing] a condition in which there
10 is a substantial probability that a violation will occur.” Health & Saf. Code § 25249.11(e). In
11 addition, violators are liable for civil penalties of up to \$2,500 per day for each violation,
12 recoverable in a civil action. Health & Saf. Code § 25249.7(b).

13 18. Private actions to enforce Proposition 65 “may be brought by a person in the
14 public interest” if the action is commenced more than sixty days from the date that the person
15 has given notice of an alleged violation of Health and Safety Code section 25249.5 or 25249.6 to
16 the Attorney General; to the District Attorney, City Attorney, or prosecutor in whose jurisdiction
17 the violation occurred; and to the alleged violator. Health & Saf. Code § 25249.7(d). A
18 Certificate of Merit shall be included with the notification to the Attorney General, District
19 Attorney, City Attorney, or prosecutor in each jurisdiction where the violation occurred. *Id.* If
20 no public prosecutors commence enforcement within sixty days, then the person giving notice
21 may sue. *Id.*

22 V. FACTS

23 19. Lead is listed under Proposition 65 as a chemical known to the State of California
24 to cause cancer and reproductive harm. Cadmium is listed under Proposition 65 as a chemical
25 known to the State of California to cause reproductive harm.

26 20. Defendant manufactures, distributes, markets, and/or sells products for sale or use
27 in the State of California that contain lead and cadmium. Specifically, Defendant sold to
28 consumers in the State of California the following products containing lead and cadmium:

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

7 21. Use of the products identified in Paragraph 21 results in human exposure to lead
8 and cadmium when consumers use the products as directed on the labels.

9 22. Defendant knew or reasonably should have known that the products that it
10 manufactured, distributed, marketed, and/or sold contained lead and cadmium. Defendant has
11 intended and knows that individuals use the products that Defendant has manufactured,
12 distributed, marketed, and/or sold. Defendant has therefore knowingly and intentionally
13 exposed individuals to lead and cadmium through its deliberate act(s) of manufacturing,
14 distributing, marketing, and/or selling these products.

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

19 24. Defendant has failed to provide clear and reasonable warnings that the use of the
20 products described above results in exposure to chemicals known to the State of California to
21 cause cancer and reproductive harm, and no such warning was provided to consumers using
22 those products.

23 VI. FIRST CAUSE OF ACTION

24 25. Paragraphs 1 through 24 are re-alleged as if fully set forth herein.

25 26. Plaintiff is informed and believes, and based on such information and belief,
26 alleges that Defendant employs ten or more persons.

27 27. By committing the acts alleged above, Defendant has, within the previous twelve
28 months and in the course of doing business, knowingly and intentionally exposed individuals in

1 the State of California to lead, a chemical known to the State of California to cause cancer and
2 reproductive harm, and to cadmium, a chemical known to the State of California to cause
3 reproductive harm, without first giving clear and reasonable warning to such individuals within
4 the meaning of Health and Safety Code section 25249.6.

5 28. Said violations render Defendant liable for civil penalties of up to \$2,500 per day
6 for each violation, as well as other remedies.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff prays that the Court:

9 1. Pursuant to the First Cause of Action, assess civil penalties against Defendant in
10 the amount of up to \$2,500 per day for each violation of Proposition 65;

11 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary
12 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting
13 Defendant from exposing persons within the State of California to lead and cadmium by use of
14 their products without providing clear and reasonable warnings, as Plaintiff shall specify in
15 further application to the Court;

16 3. Award Plaintiff its costs of suit;

17 4. Pursuant to Code of Civil Procedure section 1021.5 and any other applicable
18 provision of law, order Defendant to pay Plaintiff such attorneys' fees and costs as Plaintiff
19 incurs in bringing this enforcement action; and

20 5. Grant such other and further relief as the court deems just and proper.

21 DATED: November 3, 2015

SHUTE, MIHALY & WEINBERGER LLP

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24 By: 

ELLISON FOLK
LAURA D. BEATON

Attorneys for Plaintiff
AS YOU SOW

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