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ENDORSED
FILED
San Francisco County Superior Court
MAR 15 2018
CLERK OF THE COURT
BY: ROSSALY DE LA VEGA
Deputy Clerk

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SAN FRANCISCO

12 ERIKA MCCARTNEY, in the public interest,)
13 Plaintiff,)
14 v.)
15 AMAZON.COM, INC., a Washington)
16 corporation; and DOES 1 through 500, inclusive,)
17 Defendants.)

CGC-18-565030
CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

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 failure to adequately warn individuals
6 in California that they are being exposed to cadmium and lead, a chemical known to the State of
7 California to cause birth defects and other reproductive harm. Such exposures have occurred with
8 respect to cadmium through the sale and consumption of "OMG! Raw Cacao Nibs." Such exposures
9 have occurred with respect to lead through the sale and consumption of "OMG! Organic Spirulina
10 Powder" (the "Products.") The Products are available through Defendant's online retail store.
11 Consumers are exposed to cadmium and lead when they consume the Product.
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13 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
14 unlawful for businesses to knowingly and intentionally expose individuals in California to chemicals
15 known to the State to cause cancer, birth defects or other reproductive harm without providing clear
16 and reasonable warnings to individuals prior to their exposure. Defendant introduce products
17 contaminated with cadmium and lead into the California marketplace, exposing consumers of the
18 Product to cadmium and lead.
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20 3. Despite the fact that the Defendant exposes consumers to cadmium and lead, during
21 the relevant period, Defendant provided no clear and reasonable warning about the reproductive
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1 hazards associated with cadmium and lead exposure. Defendant's conduct thus violates the warning
2 provision of Proposition 65, Health & Safety Code § 25249.6.

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4 **PARTIES**

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

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8 5. Defendant AMAZON.COM, INC. is a person in the course of doing business within
9 the meaning of Health & Safety Code § 25249.11. Defendant sells the Products to or in California.

10 6. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When
11 their identities are ascertained, the Complaint shall be amended to reflect their true names.

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13 **JURISDICTION AND VENUE**

14 7. The Court has jurisdiction over this action pursuant to Health & Safety Code §
15 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to California
16 Constitution Article VI, Section 10, because this case is a cause not given by statute to other trial
17 courts.

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19 8. This Court has jurisdiction over Defendant as a business entity that does sufficient
20 business, has sufficient minimum contacts in California or otherwise intentionally avails itself of the
21 California market through the sale, marketing or use of the Products in California and/or by having
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1 such other contacts with California so as to render the exercise of jurisdiction over them by the
2 California courts consistent with traditional notions of fair play and substantial justice.

3 9. Venue is proper in San Francisco County Superior Court because one or more of the
4 violations arise in the County of San Francisco, and Defendant has not designated a principal office
5 in California.

6 **BACKGROUND FACTS**

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8 10. The People of the State of California have declared by initiative under Proposition 65
9 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
10 reproductive harm.” Proposition 65 § 1(b).

11 11. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed
12 by the State of California as known to cause cancer, birth defects or other reproductive harm above
13 certain levels without a “clear and reasonable warning” unless the business responsible for the
14 exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6 states,
15 in pertinent part:
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17 No person in the course of doing business shall knowingly and intentionally expose
18 any individual to a chemical known to the state to cause cancer or reproductive
19 toxicity without first giving clear and reasonable warning to such individual

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

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

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14 14. The level of exposure to a chemical causing reproductive toxicity under Proposition
15 65 is determined by multiplying the level in question times the reasonably anticipated rate of
16 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer
17 products, the level of exposure is calculated using the reasonably anticipated rate of intake or
18 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).

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20 15. The Products contain sufficient quantities of cadmium and lead such that consumers
21 who consume the Products are exposed to cadmium and lead. The primary route of exposure for the
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1 violations is direct ingestion when consumers orally ingest the Products. These exposures occur in
2 homes, workplaces and everywhere in California where the Products are consumed.

3 16. During the relevant one-year period herein, no clear and reasonable warning was
4 provided with the Products regarding the reproductive hazards of cadmium and lead.

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

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

19 22. Under Proposition 65, an exposure is "knowing" where the party responsible for such
20 exposure has:

21 knowledge of the fact that a[n] ... exposure to a chemical listed pursuant
22 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that
23 the ... exposure is unlawful is required.
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1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
3 12201).

4 23. Defendant has further been informed of the cadmium and lead in the Products by the
5 60-Day Notice of Violation and accompanying Certificate of Merit served on it.

6 24. Defendant also has constructive knowledge that the Products contain cadmium and
7 lead due to the widespread media coverage concerning the problem of cadmium and lead in consumer
8 products in general, and, in particular, cocoa and cacao products.

9 25. As an entity that distributes and/or sells the Products for use in the California
10 marketplace, Defendant knows or should know that the Products contain cadmium and lead, and that
11 individuals who consume the Products will be exposed to cadmium and lead. The cadmium and lead
12 exposures to consumers who consume the Products are a natural and foreseeable consequence of
13 Defendant placing the Products into the stream of commerce.

14 26. Nevertheless, on information and belief, Defendant continues to expose consumers to
15 cadmium and lead without prior clear and reasonable warnings regarding the reproductive hazards of
16 cadmium and lead.

17 27. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior to
18 filing this Complaint by way of her 60-day Notice.

19 28. Any person “violating or threatening to violate” Proposition 65 may be enjoined in
20 any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to violate” is
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1 defined to mean “to create a condition in which there is a substantial probability that a violation will
2 occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not to
3 exceed \$2,500 per day for each violation of Proposition 65.

4 **CAUSE OF ACTION**

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

6 29. Plaintiff restates and realleges paragraphs 1 through 28, inclusive, as though fully set
7 forth herein.

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

11 31. Cadmium and lead are chemicals listed by the State of California as known to cause
12 birth defects and other reproductive harm.

13 32. Defendant knows that use of the Products will expose users of the Products to
14 cadmium and lead. Defendant intends that the Products be used in a manner that results in exposures
15 to cadmium and lead from the Products.

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17 33. On information and belief, Defendant has failed to provide clear and reasonable
18 warnings regarding the reproductive toxicity of cadmium to users of the Products.

19 34. By committing the acts alleged above, Defendant has at times relevant to this
20 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to cadmium
21 and lead without first giving clear and reasonable warnings to such individuals regarding the
22 reproductive toxicity of cadmium and lead.
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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 Products for sale in California without either ensuring the Products have been reformulated 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 Products 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: March 14, 2018.

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff