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FILED
San Francisco County Superior Court

OCT 15 2018

CLERK OF THE COURT

BY:  Deputy Clerk

12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO

14 ERIKA MCCARTNEY, in the public interest,
15 Plaintiff,
16 v.
17 CHAMPLAIN CHOCOLATE COMPANY a
18 Vermont company, and DOES 1 through 500,
19 inclusive,
20 Defendants.

CIVIL ACTION NO:
CGC-18-570587
COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

BY FAX

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 **INTRODUCTION**

4 1. This Complaint seeks to remedy Defendant's failures to warn individuals in California
5 that they are being exposed to cadmium, a substance known to the State of California to cause cancer.
6 Such exposures have occurred, and continue to occur, through manufacture, distribution, sale and use
7 of Defendant's (a) Lake Champlain Organic Cocoa Powder; (b) Lake Champlain 80% Dark Organic
8 Chocolates; (c) Lake Champlain 72% Dark Organic Chocolates; (d) Lake Champlain 57% Dark
9 Organic Chocolates; and 54% Dark Chocolates (hereinafter, "the Products").

10 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
11 unlawful for business to knowingly and intentionally expose individuals in California to substances
12 known to the State to cause cancer, birth defects or other reproductive harm without providing clear
13 and reasonable warnings to individuals prior to exposures. Defendant introduces the Products
14 contaminated with significant quantities of cadmium and lead into the California marketplaces,
15 exposing consumers to cadmium and lead.

16 3. Despite the fact that Defendant exposes consumers to cadmium and lead, Defendant has,
17 during the operative period, provided no warnings about the reproductive toxicity associated with
18 cadmium exposures. Defendant's conduct thus violated the warning provision of Proposition 65,
19 Health and Safety Code § 25249.6.

20 **PARTIES**

21 4. Plaintiff brings this enforcement action in the public interest pursuant to Health and
22 Safety Code § 2549.7(d).

23 5. Defendant, CHAMPLAIN CHOCOLATE COMPANY ("Defendant") is a Person in the
24 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
25 manufactures, distributes, and/or sells the Products for sale and use in California.

26 6. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When
27 their identities are ascertained, the Complaint shall be amended to reflect their true names.
28

1 **JURISDICTION AND VENUE**

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

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

10 10. Venue is proper in San Francisco County Superior Court because one or more of the
11 violations arise in San Francisco County, and/or because Defendant has not designated any principal
12 place of business within the state of California.

13 **BACKGROUND**

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

17 12. To effectuate this goal, Proposition 65 prohibits exposing people to substances listed by
18 the State of California as known to cause cancer, birth defects or other reproductive harm without a
19 “clear and reasonable warning” unless the business responsible for the exposure can prove that it fits
20 within a statutory exemption. Health & Safety Code § 25249.6 states, in pertinent part:

21 No Person in the course of doing business shall knowingly and intentionally expose any
22 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
23 giving clear and reasonable warning to such individual.

24 13. On May 1, 1997, the State of California officially listed cadmium as a chemical known
25 to cause reproductive toxicity. Cadmium is specifically identified as a reproductive toxicant under two
26 subcategories: “developmental reproductive toxicity,” which means harm to the developing fetus, and
27 “male reproductive toxicity,” which means harm to the male reproductive system. 27 California Code
28 of Regulations (“C.C.R.”) § 27001(c). On May 1, 1998, one year after it was listed as a chemical

1 known to cause reproductive toxicity, cadmium became subject to the clear and reasonable warning
2 requirement regarding reproductive toxicants under Proposition 65.

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

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

16 16. The Products contain sufficient quantities of cadmium and lead such that consumers
17 who consume the Products are exposed to cadmium and lead. The primary route of exposure for the
18 violation is direct ingestion when consumers orally ingest the Products. The exposure occurs in homes,
19 workplaces, and everywhere in California where the Products is consumed.

20 17. During the relevant one-year period herein, no clear and reasonable warning was
21 provided with the Products regarding the reproductive hazards of cadmium or lead.

22 18. Any person acting in the public interest has standing to enforce violations of Proposition
23 65 provided that such person has supplied the requisite public enforcers with a valid 60-Day Notice of
24 Violation and such public enforcers are not diligently prosecuting the action within such time. Health
25 & Safety Code § 25249.7(d).

26 19. More than sixty days prior to naming the Defendant therein, Plaintiff provided a 60-Day
27 “Notice of Violation of Proposition 65” to the California Attorney General, the District Attorneys of
28 every California city with a population greater than 750,000, and to Defendant. In compliance with

1 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following
2 information: (1) the name and address of each violator; (2) the statute violated; (3) the time period
3 during which violations occurred; (4) specific descriptions of the violations, including (a) the routes of
4 exposure to the cadmium and lead from the Products, and (b) the specific type of Products sold and
5 used in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed substances
6 that are the subject of the violations described in the Notice.

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

19 21. None of the public prosecutors with the authority to prosecute violations of Proposition
20 65 has commenced and/or is diligently prosecuting a cause of action against Defendant under Health
21 & Safety Code § 2529.5 *et seq.*, based on the claims asserted in Plaintiff's Notice.

22 22. Defendant knows and intends that individuals in California will use the Product, thus
23 exposing them to cadmium and lead.

24 23. Under Proposition 65, an exposure is “knowing” where the party responsible for such
25 exposure has:

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

1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final Statement
2 of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, § 12201).

3 24. Defendant has been informed of the cadmium and lead in the Products by the 60-Day
4 Notice of Violation and accompanying Certificate of Merit served on them.

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

8 26. As an entity that manufactures, distributes and/or sells the Products for use in the
9 California marketplace, each Defendant knew or should have known that the Products contain cadmium
10 and lead and that individuals who use the Products will be exposed to cadmium and lead. The exposures
11 to consumers who use the Products are a natural and foreseeable consequence of Defendant's actions
12 of placing the Products into the stream of commerce.

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

16 28. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior to
17 filing this Complaint.

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

23 **CAUSE OF ACTION**

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

25 30. Plaintiff realleges and incorporates by reference as if specifically set forth herein
26 Paragraphs 1 through 26, inclusive.

27 31. By placing the Products into the stream of commerce, Defendant is a Person in the
28 course of doing business within the meaning of Health & Safety Code § 25249.11.

1 32. Cadmium and lead are chemicals listed by the State of California as known to cause
 2 birth defects and other reproductive harm.

3 33. Defendant knows that the use of the Products will expose users of the Products to
 4 cadmium and lead. Defendant intends that the Products be used in a manner that results in exposure to
 5 cadmium and lead from the Products.

6 34. On information and belief, Defendant has failed to provide clear and reasonable
 7 warnings regarding the toxicity of cadmium and lead to users of the Products.

8 35. By committing the acts alleged above, Defendant has at all times relevant to this
 9 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to cadmium
 10 without first giving clear and reasonable warnings to such individuals regarding the reproductive
 11 toxicity of cadmium and lead.

12 **PRAYER FOR RELIEF**

13 Wherefore, Plaintiff prays for judgment against Defendant as follows:

14 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties
 15 against each Defendant in an amount up to \$2,500 per day for each violation of Proposition 65;

16 2. That the Court, pursuant to Health & Safety Code § 25249.7(a), permanently enjoin
 17 Defendant from offering the Products for sale in California without either reformulating the Products
 18 such that no Proposition 65 warnings are required or providing prior clear and reasonable warnings, as
 19 Plaintiff shall specify in further application to the Court;

20 3. That the Court pursuant to Health & Safety Code § 25249.7(a), order Defendant to take
 21 action to stop ongoing unwarranted exposures to cadmium resulting from use of the Products sold by
 22 Defendant, as Plaintiff shall specify in further application to the Court;

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1 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable
2 statute, theory, rule or doctrine, grant Plaintiff reasonable attorneys' fees and costs of suit; and

3 5. That the Court grant such other and further relief as may be just and proper.
4

5 Dated: October 15, 2018

PACIFIC JUSTICE CENTER

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8 By:


Robert B. Hancock
Attorneys for Plaintiff