

1 James R. Wheaton (State Bar No. 115230)
2 Lowell Chow (State Bar No. 273856)
3 Nathaniel Kane (State Bar No. 279394)
4 ENVIRONMENTAL LAW FOUNDATION
5 1222 Preservation Park Way, Suite 200
6 Oakland, CA 94612
7 Tel: (510) 208-4555
8 nkane@envirolaw.org

9 *Attorneys for Plaintiff Environmental Law Foundation*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

ENVIRONMENTAL LAW FOUNDATION, a
California nonprofit organization, in the public
interest,

Plaintiff,

vs.

PROTEIN SUPPLEMENTS, LLC, a Delaware
limited liability company and DOES 1 through
100, inclusive,

Defendants.

ENDORSED
FILED
ALAMEDA COUNTY
AUG 15 2019
CLERK OF THE SUPERIOR COURT
By AMIRIT KHAN Deputy

Case No.

HG 19031319

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

(Based on Violations of California Health
and Safety Code § 25249.6 *et seq.*)

No trial date set

1 Plaintiff, ENVIRONMENTAL LAW FOUNDATION, by its attorneys, brings this action in the
2 public interest on information and belief, and investigation of counsel, except those allegations
3 which pertain to the named Plaintiff or to its attorneys which are alleged on personal knowledge,
4 and hereby alleges as follows:

5 INTRODUCTION

6 1. This action seeks, among other things, injunctive relief and civil penalties to remedy De-
7 fendants' failure to warn Californians that they are exposed to lead, a chemical known to the State
8 of California to cause cancer and reproductive toxicity when they ingest defendants' products.
9 Defendants manufacture and/or distribute products that contain lead. Defendants' products that
10 contain lead are Protein Supplement Products (the "Products"). The Products are available to con-
11 sumers in California through retail channels including, without limitation, via the Internet through
12 the Defendants' website. Consumers are exposed to lead when they ingest the Products.

13 2. Proposition 65 is a right-to-know law. It requires businesses to warn California consumers
14 before exposing them to chemicals that cause birth defects or cancer. (The Safe Drinking Water
15 and Toxic Enforcement Act, California Health and Safety Code § 25249.5 *et seq.*, hereinafter re-
16 ferred to as "Proposition 65.") In 1987, Governor Deukmejian declared lead to be a reproductive
17 toxicant subject to Proposition 65's warning requirements. In 1992, Governor Wilson declared
18 lead and lead compounds to be carcinogens subject to Proposition 65's warning requirements.
19 Defendants' Products cause exposure to lead when ingested. Therefore, under Proposition 65, De-
20 fendants are required to provide a clear and reasonable warning that ingestion of their Products
21 causes exposure to lead, a chemical known to the State of California to cause cancer and birth
22 defects. Defendants have failed to provide the required warnings.

23 3. By exposing California consumers to lead without providing any warning, Defendants
24 have violated and will continue to violate Proposition 65. Plaintiff is therefore entitled to civil
25 penalties. Additionally, by committing the acts set forth herein, defendants have violated Propo-
26 sition 65 and will continue to do so unless enjoined. Therefore, Plaintiff is entitled to injunctive
27 and other equitable relief to compel defendants to comply with the requirements of Proposition
28 65 in their manufacturing and/or distribution and/or sale of Products that contain lead. Plaintiff,

1 through this action, seeks to enjoin defendants from exposing Californians to lead by ingesting
2 Defendants' Products without being provided a clear and reasonable warning regarding the risks
3 of cancer and reproductive toxicity. Plaintiff also seeks the assessment of civil penalties.

4 **PARTIES**

5 4. Plaintiff ENVIRONMENTAL LAW FOUNDATION ("ELF") is a California nonprofit or-
6 ganization founded on Earth Day in 1991. ELF has been committed to the enforcement of envi-
7 ronmental, toxics, and community right-to-know laws for more than 25 years. ELF is dedicated
8 to reducing health hazards to the public posed by lead, and particularly to protect those with the
9 least choice and greatest vulnerability to toxic risks: children, inner city dwellers, and workers.
10 ELF brings this action pursuant to California Health and Safety Code section 25249.7(d) in the
11 public interest.

12 5. 6. Defendant PROTEIN SUPPLEMENTS, LLC, a Delaware limited liability com-
13 pany with its principal place of business located at 2010 Crow Canyon Place, Suite 100, San
14 Ramon, California 94583, is a person in the course of doing business within the meaning of Health
15 and Safety Code section 25249.11. PROTEIN SUPPLEMENTS, LLC manufactures and/or dis-
16 tributes Products for sale and use in California.

17 6. DOES 1 through 100, inclusive are persons in the course of doing business within the
18 meaning of Health and Safety Code section 25249.11. DOES 1 through 100 manufacture and/or
19 distribute Products for sale and use in California. Plaintiff is presently unaware of their true names
20 and capacities and, therefore, Plaintiff sues Defendant DOES 1 through 100 by such fictitious
21 names, pursuant to California Code of Civil Procedure section 474. Plaintiff will amend this Com-
22 plaint and include these Doe Defendants' true names and capacities when they are ascertained.

23 7. Each of the Defendants herein has employed ten (10) or more persons at all times relevant
24 to this action.

25 **JURISDICTION AND VENUE**

26 8. The Court has jurisdiction over this action pursuant to Health and Safety Code section
27 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to Cali-
28 fornia Constitution Article VI, Section 10, because this case is a cause not given by statute to other

1 trial courts.

2 9. This Court has jurisdiction over Defendants named herein because Defendants either are
3 located in this State or are foreign corporations authorized to do business in California and regis-
4 tered with the California Secretary of State; or who do sufficient business in California, have
5 sufficient minimum contacts with California, or otherwise intentionally avail themselves of the
6 markets within California through the manufacturing, distribution, sale, promotion, and/or mar-
7 keting of their products in California to render the exercise of jurisdiction by the California courts
8 permissible under traditional notions of fair play and substantial justice.

9 10. Venue is proper in the County of Alameda because one or more of the violations arise in
10 Alameda County and because PROTEIN SUPPLEMENTS, LLC's principal place of business is
11 in San Ramon, in Alameda County.

12 11. ELF is a non-profit organization acting as a private attorney general, as authorized by
13 Health and Safety Code section 25249.7.

14 12. On May 30, 2019, ELF served 60-Day Notices of Proposition 65 violations to the requisite
15 public enforcement agencies and to Defendants. These notices were issued pursuant to, and in
16 compliance with, the requirements of Health and Safety Code section 25249.7(d) and the statute's
17 implementing regulations regarding the notice of the violations to be given to certain public en-
18 forcement agencies and to the violator. The notices given included, *inter alia*, the following infor-
19 mation: the name, address, and telephone number of the noticing individual; the name of the
20 alleged violator; the statute violated; the approximate time period during which violations oc-
21 curred; and descriptions of the violations, including the chemical involved, the routes of toxic
22 exposure, and the specific products and type of products causing the violations. Each Notice iden-
23 tified a non-exclusive exemplar of the Product as "Protein Supplements LLC, Gold 50 Shake."
24 The named Defendants and the California Attorney General were provided copies of the 60-Day
25 Notice by mail. Additionally, the named Defendants were each provided with a copy of a docu-
26 ment entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
27 Summary," which is also known as Appendix A to Title 27 of California Code of Regulations,
28 section 25903.

1 13. Each 60-Day Notice of Violation included a certificate of merit executed by Plaintiffs'
2 attorneys stating that the person executing the certificate had consulted with one or more persons
3 with relevant and appropriate experience or expertise who has reviewed the facts, studies or other
4 data regarding exposure to the listed chemical that is the subject of the notice, and that, based on
5 that information, the person executing the certificate believes there is a reasonable and meritorious
6 case for this private action. Factual information sufficient to establish the basis of the certificate
7 of merit was attached to the certificate of merit served on the California Attorney General.

8 14. None of these public prosecutors has commenced and is diligently prosecuting an action
9 against the violations at issue herein, although the notice period provided in § 25249.7 has elapsed.

10 **STATUTORY AND REGULATORY BACKGROUND**

11 15. Proposition 65 was passed by voter initiative in 1986, in which the People of California
12 declared their right to be “informed about exposures to chemicals that cause cancer, birth defects,
13 or other reproductive harm.” Proposition 65, § 1(b).

14 16. Under Proposition 65:

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

18 (Health & Saf. Code § 25249.6.)

19 17. Under Proposition 65, an exposure is “knowing” where the party responsible for such ex-
20 posure has:

21 knowledge of the fact that a discharge of, release of, or exposure to a chemical
22 listed pursuant to Section 25249.8(a) of the Act is occurring. No knowledge
that the discharge, release or exposure is unlawful is required.

23 (Cal. Code Regs., tit 27, § 25102(n).) This knowledge may be actual or constructive. (See, e.g.,
24 Final Statement of Reasons Revised (November 4, 1988) for former Cal. Code Regs., tit. 22, §
25 12201.)

26 18. An exposure to a chemical in a consumer product is one “which results from a person’s
27 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer
28 good, or any exposure that results from receiving a consumer service.” (Cal. Code Regs., tit 27, §

1 25601(b).)

2 19. Proposition 65 establishes a procedure by which the Governor lists chemicals known to
3 the state to cause reproductive toxicity and/or cancer. (Health & Saf. Code § 25249.8.)

4 20. On February 27, 1987, California Governor George Deukmejian declared lead a reproduc-
5 tive toxin subject to Proposition 65. Proposition 65 requires that consumers must be warned before
6 they are exposed to chemicals, including metals, that cause birth defects and/or reproductive harm.
7 Lead became subject to the warning requirement one year later on February 27, 1988. (Cal. Code
8 Regs., tit. 27, § 25000, *et seq.*; Health & Saf. Code § 25249.10(b).)

9 21. Lead is specifically identified as a reproductive toxicant under three subcategories: “de-
10 velopmental reproductive toxicity,” which means harm to the developing fetus; “female reproduc-
11 tive toxicity,” which means harm to the female reproductive system; and “male reproductive
12 toxicity,” which means harm to the male reproductive system. (Cal. Code Regs., tit. 27, §
13 27001(c).)

14 22. On October 1, 1992, California Governor Pete Wilson declared “lead and lead compounds”
15 a carcinogen subject to Proposition 65. Lead and lead compounds became subject to the warning
16 requirement one year later on October 1, 1993 (Cal. Code Regs., tit. 27, § 25000, *et seq.*; Health
17 & Saf. Code § 25249.10(b).)

18 **FACTS**

19 23. Defendants manufacture and/or distribute the Products, which are labeled, marketed and
20 intended for immediate human consumption. The Products are manufactured, distributed and/or
21 sold in California for the purpose of distribution, retail sale and consumption in California.

22 24. Scientists agree that there is no safe level of exposure to lead. The American Academy of
23 Pediatrics has stated that there is no “safe level” of lead for children.
24 (www.aap.org/advocacy/washing/News-Release_Press-Statements/01-05-08-EPA-Lead.pdf.)

25 25. The Products at issue in this Complaint contain lead which results in exposure to the lead
26 upon consumption of the Products.

27 26. Under Proposition 65, an exposure is “knowing” where the party responsible for such ex-
28 posure has:

1 knowledge of the fact that a discharge of, release of, or exposure to a chemical
2 listed pursuant to Section 25249.8(a) of the Act is occurring. No knowledge
that the discharge, release or exposure is unlawful is required.

3 (Cal. Code Regs. tit. 27, § 25102(n).) The knowledge may be actual or constructive. (Final State-
4 ment of Reasons Revised (November 4, 1988) for former Cal. Code Regs., tit. 22, § 12201.)

5 27. Plaintiff is informed and believes and thereon alleges that the Defendants knew and in-
6 tended that the foreseeable use of their Products results in exposure to lead, and that the levels of
7 lead exceed the lead exposure levels which trigger warning requirements under Proposition 65.

8 28. Defendants know and intend that individuals will consume their Products, thus exposing
9 them to lead.

10 29. Nevertheless, and in violation of § 25249.6 *et seq.*, Defendants have not provided clear
11 and reasonable warnings to inform the public that their Products expose consumers to lead, a
12 chemical known to the State of California to cause cancer and reproductive toxicity.

13 30. Defendants have, in the course of doing business, knowingly and intentionally exposed
14 individuals to a chemical known to the State of California to cause cancer and reproductive tox-
15 icity without first providing a clear and reasonable warning as required by Health and Safety Code
16 sections 25249.6 and 25249.11, subd. (f). As a direct result of Defendants' acts and omissions, the
17 general public in California is being regularly, unlawfully, and involuntarily exposed to lead, a
18 known reproductive toxin and carcinogen.

19 31. The Products continue to be offered for sale in California without a clear and reasonable
20 warning.

21 **CAUSE OF ACTION**

22 **(Violations of California Health and Safety Code section 25249.6 et seq.)**

23 **(Against All Defendants)**

24 32. Plaintiff incorporates by reference paragraphs 1 through 31 as if fully set forth herein.

25 33. The People of the State of California have declared in Proposition 65 their right "[t]o be
26 informed about exposures to chemicals that cause cancer, birth defects and other reproductive
27 harm." Proposition 65, Section 1(b) of the Initiative Measure.

28 34. To carry out those statutory purposes, Proposition 65 requires that a clear and reasonable

1 warning be given by persons who, in the course of doing business, knowingly and intentionally
2 expose any individual to a chemical known to the State of California to cause cancer and repro-
3 ductive harm.

4 35. Proposition 65 provides that any person “violating or threatening to violate” the statute
5 may be enjoined in any court of competent jurisdiction. (Health & Saf. Code § 25249.7.) “Threaten
6 to violate” is defined to mean “to create a condition in which there is a substantial probability that
7 a violation will occur.” (Health & Saf. Code § 25249.11(e).)

8 36. Violators of Proposition 65 are liable for civil penalties of up to \$2,500.00 per day per
9 violation, recoverable in a civil action. (Health & Saf. Code § 25249.7(b).)

10 37. Defendants have engaged and continue to engage in conduct which violates section
11 25249.6. This conduct includes the manufacturing and/or distributing of Products the foreseeable
12 use of which results in exposing the public to lead, known to the State of California to cause
13 reproductive toxicity and cancer, without first providing a clear and reasonable warning pursuant
14 to sections 25249.6 and 25249.11, subd. (f). Defendants have, therefore, in the course of doing
15 business, knowingly and intentionally exposed individuals to a chemical known to the State of
16 California to cause reproductive toxicity and cancer without first providing a clear and reasonable
17 warning.

18 38. Some unknown number of the Products sold by Defendants and their agents since the No-
19 tice of Violation was sent to Defendants remain unopened and uneaten and have not yet exposed
20 a person to lead but will when consumed. Such Products require a “clear and reasonable warning”
21 prior to exposure.

22 39. By the above-described acts, Defendants are liable, pursuant to § 25249.7(b), for a civil
23 penalty of up to \$2,500 per day per individual exposure to lead through Defendants’ Products.

24 40. An action for injunctive relief under Proposition 65 is specifically authorized by §
25 25249.7(a).

26 41. Continuing commission by Defendants of the acts alleged above will irreparably harm the
27 citizens of the State of California, for which harm they have no plain, speedy, or adequate remedy
28 at law.

42. By committing the acts alleged herein, the Defendants have caused irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence of equitable relief, the general public will continue to be involuntarily exposed to the lead contained in Defendants' Products, creating a substantial risk of irreparable injury by continuing to cause consumers to be exposed to lead through the ingestion of the Products.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

1. A preliminary and permanent injunction, pursuant to Health and Safety Code section 25249.7, subd. (b), enjoining Defendants, their agents, employees, assigns and all persons acting in concert or participating with Defendants from importing, manufacturing and/or distributing Products that contain lead in California without first providing a clear and reasonable warning that the consumers of the Products are exposed, within the meaning of Proposition 65, to lead;

2. An assessment of civil penalties, pursuant to Health and Safety Code section 25249.7, subd. (b), against each Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

3. That the Court, pursuant to Health and Safety Code section 25249.7, subd. (a), order Defendants to take any other action this Court may deem necessary and proper;

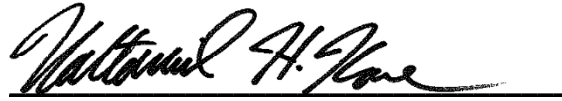
4. An award to Plaintiff of its reasonable attorneys' fees and costs of suit pursuant to Code of Civil Procedure section 1021.5 as Plaintiff shall specify in further application to the Court; and,

5. Such other and further relief as may be just and proper.

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2 Dated: August 14, 2019
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Respectfully submitted,

ENVIRONMENTAL LAW FOUNDATION

A handwritten signature in black ink, appearing to read "Nathaniel H. Kane", is written over a horizontal line.

5 By: Nathaniel Kane

6 Attorneys for Petitioners Carmen Zamora
7 and Environmental Law Foundation
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