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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY
DEC 20 2019
CLERK OF THE SUPERIOR COURT
By JERRIE MOYER
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

RG19047748

CENTER FOR ENVIRONMENTAL HEALTH,
a non-profit corporation,

Plaintiff,

v.

GT'S LIVING FOODS, LLC; MILLENNIUM
PRODUCTS, INC.; ALBERTSON'S LLC; O
ORGANICS LLC; LUCERNE FOODS INC.;
SAFEWAY INC.; HUMM KOMBUCHA, LLC;
INC.; and DOES 1 through 100, inclusive,

Defendants.

Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code § 25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on information and
2 belief and investigation of counsel, except for information based on knowledge, hereby makes the
3 following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to ethyl alcohol in alcoholic beverages and
7 alcoholic beverages (collectively, "Alcohol") which are known to the State of California to cancer
8 and birth defects and other reproductive harm. Such exposures have occurred, and continue to
9 occur, through Defendants' manufacture, distribution, sale and consumption of kombucha
10 (hereinafter, the "Kombucha"). Because Defendants' Kombucha contains more than 0.5%
11 Alcohol by volume, the Kombucha qualifies as "alcoholic beverages" under California law. *See*
12 *Bus. & Prof. Code § 23004*. Individuals in California are exposed to Alcohol in amounts greater
13 than 0.5% by volume when they drink Defendants' Kombucha.

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 such individuals. Defendants introduce Kombucha
18 containing more than 0.5% Alcohol by volume into the California marketplace, thereby exposing
19 consumers of the Kombucha to Alcohol.

20 3. Despite the fact that Defendants expose pregnant women and other individuals to
21 Alcohol, Defendants provide no clear and reasonable warnings about the carcinogenic or
22 reproductive hazards associated with Alcohol exposure. Defendants' conduct thus violates the
23 warning provision of Proposition 65, Health & Safety Code § 25249.6.

24 **PARTIES**

25 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a non-profit
26 corporation dedicated to protecting the public from environmental health hazards and toxic
27 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of
28 California. CEH is a "person" within the meaning of Health & Safety Code § 25249.11(a) and

1 brings this enforcement action in the public interest pursuant to Health & Safety Code §
2 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has
3 prosecuted a large number of Proposition 65 cases in the public interest. These cases have
4 resulted in significant public benefit, including the reformulation of thousands of consumer
5 products to remove toxic chemicals and to make them safer. CEH also provides information to
6 Californians about the health risks associated with exposure to hazardous substances, where
7 manufacturers and other responsible parties fail to do so.

8 5. Defendant GT'S LIVING FOODS, LLC is a person in the course of doing
9 business within the meaning of Health & Safety Code § 25249.11. Defendant GT'S LIVING
10 FOODS, LLC manufactures, distributes and/or sells Kombucha for sale and consumption in
11 California.

12 6. Defendant MILLENNIUM PRODUCTS, INC. is a person in the course of doing
13 business within the meaning of Health & Safety Code § 25249.11. Defendant MILLENNIUM
14 PRODUCTS, INC. manufactures, distributes and/or sells Kombucha for sale and consumption in
15 California.

16 7. Defendant ALBERTSON'S LLC is a person in the course of doing business within
17 the meaning of Health & Safety Code § 25249.11. Defendant ALBERTSON'S LLC sells
18 Kombucha that is sold and consumed in California. Defendant ALBERTSON'S LLC's
19 Kombucha is sold under a brand or trademark that is owned or licensed by ALBERTSON'S LLC
20 or an affiliated entity.

21 8. Defendant O ORGANICS LLC is a person in the course of doing business within
22 the meaning of Health & Safety Code § 25249.11. Defendant O ORGANICS LLC sells
23 Kombucha that is sold and consumed in California. Defendant O ORGANICS LLC's Kombucha
24 is sold under a brand or trademark that is owned or licensed by O ORGANICS LLC or an
25 affiliated entity.

26 9. Defendant LUCERNE FOODS INC. is a person in the course of doing business
27 within the meaning of Health & Safety Code § 25249.11. Defendant LUCERNE FOODS INC.
28 sells Kombucha that is sold and consumed in California. Defendant LUCERNE FOODS INC.'s

1 Kombucha is sold under a brand or trademark that is owned or licensed by LUCERNE FOODS
2 INC. or an affiliated entity.

3 10. Defendant SAFEWAY INC. is a person in the course of doing business within the
4 meaning of Health & Safety Code § 25249.11. Defendant SAFEWAY INC. sells Kombucha that
5 is sold and consumed in California. Defendant SAFEWAY INC.'s Kombucha is sold under a
6 brand or trademark that is owned or licensed by SAFEWAY INC. or an affiliated entity.

7 11. Defendant HUMM KOMBUCHA, LLC is a person in the course of doing business
8 within the meaning of Health & Safety Code § 25249.11. Defendant HUMM KOMBUCHA,
9 LLC manufactures, distributes and/or sells Kombucha for sale and consumption in California.

10 12. DOES 1 through 100 are each a person in the course of doing business within the
11 meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture, distribute
12 and/or sell the Kombucha for sale and use in California. The Defendants identified in Paragraphs
13 5 through 13 and DOES 1 through 100 are collectively referred to herein as "Defendants."

14 13. The true names of DOES 1 through 100 are either unknown to CEH at this time or
15 the applicable time period before which CEH may file a Proposition 65 action has not run. When
16 their identities are ascertained or the applicable time period before which CEH may file a
17 Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

18 **JURISDICTION AND VENUE**

19 14. The Court has jurisdiction over this action pursuant to Health & Safety Code §
20 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
21 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
22 other trial courts.

23 15. This Court has jurisdiction over Defendants because each is a business entity that
24 does sufficient business, has sufficient minimum contacts in California, or otherwise intentionally
25 avails itself of the California market through the sale, marketing, or consumption of Kombucha in
26 California and/or by having such other contacts with California so as to render the exercise of
27 jurisdiction over it by the California courts consistent with traditional notions of fair play and
28 substantial justice.

1 industry, which has become increasingly popular due to the health consciousness of consumers.¹
2 Kombucha is marketed as a healthy alternative to traditional non-alcoholic beverages such as
3 sodas. During the fermentation process used to make the Kombucha, sugar is broken down into
4 alcohol and carbon dioxide. The alcohol remains in the Kombucha and can increase in volume
5 even after the Kombucha is bottled and sold to consumers.

6 22. The failure to provide warnings regarding Alcohol in amounts greater than 0.5%
7 by volume in Kombucha is of particular concern in light of evidence that consumption of Alcohol
8 causes cancer and reproductive harm. Specifically, Alcohol consumption is known to cause
9 female breast cancer, as well as cancers of the colon, larynx, liver, esophagus, oral cavity and
10 pharynx.² The reproductive toxicity of Alcohol consumption is similarly well documented. For
11 example, there is no safe level of Alcohol consumption during pregnancy, and such consumption
12 can cause miscarriage, stillbirth, and a range of lifelong physical, behavioral, and intellectual
13 disabilities in children.³

14 23. Defendants' Kombucha contains Alcohol in amounts greater than 0.5% by volume
15 such that individuals who drink the Kombucha are exposed to Alcohol. The route of exposure for
16 the violations is ingestion by individuals when they drink Defendants' Kombucha. These
17 exposures occur through the ordinary consumption of Kombucha. The exposures occur in homes,
18 schools, workplaces, and everywhere else throughout California where the Kombucha is
19 consumed.

20 24. No clear and reasonable warning is provided with Defendants' Kombucha
21 regarding the carcinogenic or reproductive hazards of Alcohol.

24 ¹ Adroit Market Research Press Release (April 10, 2019), *available at*
25 <https://www.globenewswire.com/news-release/2019/04/10/1801849/0/en/Kombucha-Market-to-Grow-at-13-CAGR-to-Hit-3-5-Billion-by-2025-Adroit-Market-Research.html> (last visited
December 20, 2019).

26 ² World Health Organization, IARC Monographs on the Evaluation of Carcinogenic Risks
27 (2012), Volume 100E, at pp. 383, 386, 378-379, 470.

28 ³ United States Centers for Disease Control & Prevention, Alcohol Use During Pregnancy,
available at <https://www.cdc.gov/ncbddd/fasd/alcohol-use.html> (last visited December 20, 2019).

1 25. Any person acting in the public interest has standing to enforce violations of
2 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
3 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
4 within such time. Health & Safety Code § 25249.7(d).

5 26. More than sixty days prior to naming each Defendant in this lawsuit, CEH
6 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General, to
7 the District Attorneys of every county in California, to the City Attorneys of every California city
8 with a population greater than 750,000, and to each of the named Defendants. In compliance with
9 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
10 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
11 time period during which violations occurred; (4) specific descriptions of the violations, including
12 (a) the routes of exposure to Alcohol from the Kombucha, and (b) the specific type of product
13 sold in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed
14 chemical that is the subject of the violations described in each Notice.

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

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1 28. None of the public prosecutors with the authority to prosecute violations of
2 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
3 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each
4 of CEH's Notices.

5 29. Defendants both know and intend that individuals will ingest the Kombucha, thus
6 exposing them to Alcohol.

7 30. Under Proposition 65, an exposure is "knowing" where the party responsible for
8 such exposure has:

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

12 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
13 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
14 § 12601).

15 31. The Alcohol in Defendants' Kombucha is a well known by-product of the
16 fermentation process. As companies that manufacture, import, distribute, and/or sell the
17 Kombucha for use in the California marketplace, Defendants know or should know that the
18 Kombucha contains Alcohol in amounts greater than 0.5% by volume and that individuals who
19 drink the Kombucha will be exposed to Alcohol. The problem of Kombucha containing more
20 than 0.5% Alcohol by volume has been thoroughly documented for over a decade in studies by
21 government entities, industry groups and concerned citizens, and the issue has been widely
22 discussed in media news articles and reports.

23 32. The Alcohol exposures to individuals who ingest the Kombucha are a natural and
24 foreseeable consequence of Defendants' placing the Kombucha into the stream of commerce.

25 33. Defendants have also been informed of the Alcohol exposures caused by their
26 Kombucha pursuant to the 60-Day Notice of Violation and accompanying Certificate of Merit
27 served on them by CEH.

28 34. Nevertheless, Defendants continue to expose individuals to Alcohol without prior
clear and reasonable warnings regarding the carcinogenic and reproductive hazards of Alcohol.

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1. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin Defendants from offering Kombucha for sale in California without providing prior clear and reasonable warnings, as CEH shall specify in further application to the Court;

2. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendants to take action to stop ongoing unwarned exposures to Alcohol resulting from consumption of Kombucha sold by Defendants, as CEH shall specify in further application to the Court;

3. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties against each of the Defendants in the amount of \$2,500 per day for each violation of Proposition 65 according to proof;

4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable theory, grant CEH its 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: December 19, 2019

Respectfully submitted,

LEXINGTON LAW GROUP



Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH