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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
18 **COUNTY OF SANTA CLARA**

19 AS YOU SOW, a 501(c)(3) non-profit  
20 corporation,

21 Plaintiff,

22 v.

23 NESTLE HEALTHCARE NUTRITION,  
24 INC.; NESTLE HEALTH SCIENCES US  
25 HOLDINGS, INC.; and  
26 DOES 1-10,

27 Defendants.

Case No.: 20CV367043

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 et seq.)

## INTRODUCTION

1. California’s Safe Drinking Water and Toxic Enforcement Act (“Toxic Enforcement Act” or “the Act”), Health & Safety Code § 25249.5 et seq., prohibits any person in the course of doing business from knowingly and intentionally exposing any individual to a chemical known to the State of California to cause cancer or reproductive toxicity, without first giving clear and reasonable warning of such exposure. Health & Safety Code § 25249.6. This prohibition applies with equal force against business entities that produce, distribute, or sell consumer products, where the reasonable intended use of such products would result in an exposure to a known carcinogen or reproductive toxin.

2. On February 27, 1987, the State of California officially listed lead as a chemical known to the State to cause reproductive toxicity.

3. On information and belief, Defendants Nestle HealthCare Nutrition, Inc. and Nestle Health Sciences US Holdings, Inc. (collectively “Nestle” or “Defendants”) manufacture, produce, package, import, supply, market, sell, and/or otherwise distribute in California, including via the internet, food products that are formulated to be consumed or administered enterally, by oral intake or by tube feeding, typically under the direction of a healthcare professional and which contain lead, including but not limited to Nestle COMPLEAT® ORGANIC BLENDS Pediatric Plant-Based Blend (“Covered Product”).

4. Lead is present in the Covered Product. Consumers are exposed to lead when they ingest the Covered Product.

5. Defendants have failed to provide a clear and reasonable warning that ingestion of the Covered Product will result in exposure to lead, a chemical known to the State of California to cause developmental and reproductive toxicity. Accordingly, Plaintiff *As You Sow* seeks an order requiring that Defendants take measures to ensure that California consumers ingesting the Covered Product are not exposed to harmful levels of lead, or provide a clear and reasonable warning as required under the Toxic Enforcement Act that ingestion of the Covered Product will result in exposure to lead.

//

1 **PARTIES**

2 6. Plaintiff AS YOU SOW is a 501(c)(3) non-profit corporation dedicated to, among  
3 other causes, the protection of the environment, toxics reduction, the promotion and  
4 improvement of human health, and the improvement of worker and consumer rights. *As You Sow*  
5 has, since 1992, worked to bring manufacturers and whole industries into compliance with the  
6 Toxic Enforcement Act, as part of its work to ensure safer consumer products, promote corporate  
7 accountability, and create a sustainable marketplace that does not degrade human health or the  
8 planet. *As You Sow* brings this action as a private attorney general in the public interest pursuant  
9 to Health & Safety Code section 25249.7, subdivision (d).

10 7. Defendant NESTLE HEALTHCARE NUTRITION, INC. is, on information and  
11 belief, a business entity with ten or more employees that has manufactured, produced, packaged,  
12 imported, supplied, marketed, sold, and/or otherwise distributed in California, including via the  
13 internet, medical food products containing lead, including but not limited to Nestle  
14 COMPLEAT® ORGANIC BLENDS Pediatric Plant-Based Blend.

15 8. Defendant NESTLE HEALTH SCIENCE US HOLDINGS, INC. is, on  
16 information and belief, a business entity with ten or more employees that has manufactured,  
17 produced, packaged, imported, supplied, marketed, sold, and/or otherwise distributed in  
18 California, including via the internet, medical foods products containing lead, including but not  
19 limited to Nestle COMPLEAT® ORGANIC BLENDS Pediatric Plant-Based Blend. According  
20 to the company's website:

21 "We produce science-based nutritional solutions that are available through retail and  
22 pharmacy outlets (Consumer Care) or by healthcare professionals in institutions (Medical  
23 Nutrition), addressing a spectrum of ages and health conditions from pediatric allergy to  
24 malnutrition amongst the frail elderly."<sup>1</sup>

25 **JURISDICTION AND VENUE**

26 9. This Court has jurisdiction over this action pursuant to Health and Safety Code,  
27 section 25249.7, which allows enforcement of the Toxic Enforcement Act in any court of  
28

<sup>1</sup> <https://www.nestlehealthscience.us/about-us> (accessed May 31, 2020).

1 competent jurisdiction, and pursuant to California Constitution, article VI, section 10, because  
2 this case does not present a cause given by statute to other trial courts.

3 10. This Court has jurisdiction over Defendants because they are business entities that  
4 conduct sufficient business, have sufficient minimum contacts in, or otherwise intentionally avail  
5 themselves of the market in California.

6 11. Venue is proper in the Superior Court of California, County of Santa Clara,  
7 pursuant to Code of Civil Procedure sections 393 and 395, because this court is a court of  
8 competent jurisdiction, because plaintiff seeks civil penalties against defendant, because one or  
9 more instances of wrongful conduct occurred and continue to occur in Santa Clara County,  
10 and/or because defendant conducted and continues to conduct business in this county with  
11 respect to the consumer products at issue in this case.

12 12. Plaintiff has met the statutory requirements for notice to bring this citizen suit  
13 enforcement action under Health and Safety Code section 25249.7 and its implementing  
14 regulations.

### 15 **LEGAL BACKGROUND**

16 13. In 1986, the voters of California overwhelmingly enacted the Safe Drinking  
17 Water and Toxic Enforcement Act.

18 14. The Preamble to the Toxic Enforcement Act ballot measure provides a clear  
19 statement of the purpose of the Act:

20 The people of California find that hazardous chemicals pose a serious potential  
21 threat to their health and well-being, that state government agencies have failed to  
22 provide them with adequate protection, and that these failures have been serious  
23 enough to lead to investigations by federal agencies of the administration of  
California's toxic protection programs. The people therefore declare their rights:

24 (a) To protect themselves and the water they drink against-chemicals that  
cause cancer, birth defects, or other reproductive harm.

25 (b) To be informed about exposures to chemicals that cause cancer, birth  
26 defects, or other reproductive harm.

27 (c) To secure strict enforcement of the laws controlling hazardous  
28 chemicals and deter actions that threaten public health and safety . . . .

1           15.     Among other requirements, the Toxic Enforcement Act provides that “[n]o person  
2 in the course of doing business shall knowingly and intentionally expose any individual to a  
3 chemical known to the State to cause cancer or reproductive toxicity without first giving clear  
4 and reasonable warning to such individual, except as provided in Section 25249.10.” (Health &  
5 Safety Code § 25249.6.)

6           16.     The Toxic Enforcement Act establishes a procedure by which the State develops a  
7 list of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety  
8 Code § 25249.8. No warning is required for a chemical until one year after the State lists the  
9 chemical. (Health & Safety Code § 25249.10(b).)

10          17.     The Office of Environmental Health Hazard Assessment (OEHHA), which is part  
11 of the California Environmental Protection Agency (CalEPA), is the lead agency charged with  
12 implementing the Toxic Enforcement Act. (Health & Safety Code § 25249.12.) OEHHA has  
13 promulgated regulations implementing the Toxic Enforcement Act. (*See* 27 Cal. Code Reg. §  
14 25102 *et seq.*)

15          18.     On February 27, 1987, OEHHA listed lead as a chemical known to the State to  
16 cause developmental toxicity, male reproductive toxicity, and female reproductive toxicity. (27  
17 Cal. Code Reg. § 27001(c).)

18          19.     For many of the chemicals listed under the Act, OEHHA has established “safe  
19 harbor levels,” which include No Significant Risk Levels (NSRLs) for cancer-causing chemicals  
20 and Maximum Allowable Dose Levels (MADLs) for chemicals causing reproductive  
21 toxicity. The established MADL for lead is 0.5 µg/day. (27 Cal. Code Reg. § 25805(b).)

22          20.     According to applicable regulations, a warning for consumer product exposure is  
23 “clear and reasonable” if it is “prominently displayed on a label, labeling, or sign, and ...  
24 displayed with such conspicuousness as compared with other words, statements, designs or  
25 devices on the label, labeling, or sign, as to render the warning likely to be read and understood  
26 by an ordinary individual under customary conditions of purchase or use.” (27 Cal. Code Reg. §  
27 25601(c).)

28           //

1           21.     According to applicable regulations, for internet purchases, a warning “must be  
2 provided by including either the warning or a clearly marked hyperlink using the word  
3 ‘**WARNING**’ on the product display page, or by otherwise prominently displaying the warning  
4 to the purchaser prior to completing the purchase.” (27 Cal. Code Reg. § 25602(b) (bold in  
5 original).) “[A] warning is not prominently displayed if the purchaser must search for it in the  
6 general content of the website.” (*Id.*)

7           22.     According to applicable regulations, a warning for consumer product exposure  
8 meets the regulatory requirements if it includes the following elements:

9           (1) A symbol consisting of a black exclamation point in a yellow equilateral  
10 triangle with a bold black outline. Where the sign, label or labeling for the product  
11 is not printed using the color yellow, the symbol may be printed in black and  
12 white. The symbol shall be placed to the left of the text of the warning, in a size  
13 no smaller than the height of the word “WARNING”.

14          (2) The word “WARNING” in all capital letters and bold print, and:

15          ... (B) For exposures to listed reproductive toxicants, the words, “This product  
16 can expose you to chemicals including [name of one or more chemicals], which is  
17 [are] known to the State of California to cause birth defects or other reproductive  
18 harm. For more information go to [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product).

19          ...

20          (E) Where a warning is being provided for an exposure to a single chemical the  
21 words “chemicals including” may be deleted from the warning content set out in  
22 subsection[] ... (B) ....”

23 (27 Cal. Code Reg. § 25603(a).)

24           23.     A consumer product exposure is “an exposure that results from a person’s  
25 acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer  
26 product, including consumption of a food.” (27 Cal. Code Reg. § 25600.1(e).)

27           //

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24. An exposure is knowing if the person or entity responsible for the exposure had or has “knowledge of the fact that . . . exposure to a chemical listed pursuant to Section 24249.8(a) of the Act is occurring.” (27 Cal. Code Reg. § 25102(n).)

25. This Court has authority to enjoin “[a] person that violates or threatens to violate [Health & Safety Code § 25249.6],” and to impose civil penalties “not to exceed two thousand five hundred dollars (\$2,500) per day for each violation in addition to any other penalty established by law.” (Health & Safety Code § 25249.7.) “Threaten to violate” is defined to mean “to create a condition in which there is a substantial probability that the violation will occur.” (Health and Safety Code § 25249.11((e).))

26. Private parties are entitled to bring an action to enforce the Act under Health & Safety Code § 25249.7(d).

## FACTUAL BACKGROUND

27. The Covered Product is a food product that is formulated to be consumed or administered enterally, by oral intake or by tube feeding, typically under the direction of a healthcare professional.

28. Testing obtained by Plaintiff from an independent laboratory demonstrates that the Covered Product contain lead.

29. Since at least November 1, 2018, Defendants have marketed, manufactured, produced, packaged, imported, sold, and/or otherwise distributed the Covered Product in the State of California.

30. On information and belief, Defendants have had knowledge that the Covered Product contains lead since at least November 1, 2018.

31. The primary route of exposure to lead from Defendants' product is ingestion. This exposure to hazardous lead results from the intended and reasonably foreseeable use of the Covered Product.

32. On November 1, 2019, Plaintiff served Defendants with a written notice of violation stating that Defendants had violated the Toxic Enforcement Act by exposing

1 individuals to lead in the Covered Product without providing a clear and reasonable warning.  
2 True and correct copies of Plaintiff's sixty-day notice are attached as Exhibit 1 to this Complaint.

3 33. On November 1, 2019, Plaintiff provided notice of the violation to the Attorney  
4 General and the district attorneys and city attorneys in whose jurisdiction the violations are  
5 alleged to have occurred.

6 34. Defendants have knowingly and intentionally exposed consumers in California to  
7 lead. The exposure has been knowing and intentional, because they result from Defendants'  
8 marketing, manufacturing, producing, packaging, importing, sale, and/or distribution of the  
9 Covered Product which contain lead, with knowledge that reasonably foreseeable use of the  
10 Covered Product will result in consumers' exposure to lead by way of ingestion.

11 35. In accordance with Health and Safety Code section 25249.7(d), this action is  
12 being commenced more than 60 days from the date that *As You Sow* provided notice of the  
13 violation of Health and Safety Code section 25249.6 alleged herein to the Attorney General and  
14 the district attorneys and city attorneys in whose jurisdiction the violations are alleged to have  
15 occurred, and to Defendants. The notices provided to Defendants included certificates of merit  
16 that complied with the requirements of Health and Safety Code section 25249.7(d)(1). Factual  
17 information sufficient to establish the basis of the certificate of merit was attached to the  
18 certificate of merit served on the Attorney General.

19 36. Neither the Attorney General, nor any district attorney, city attorney, or any other  
20 public prosecutor has commenced and is diligently prosecuting an action against the violations  
21 alleged herein.

22 **FIRST CAUSE OF ACTION**  
23 **(Violation of Health & Safety Code § 25249.6)**

24 37. Plaintiff re-alleges and incorporates by reference all the allegations set forth in the  
25 paragraphs above.

26 38. By committing the acts alleged above, Defendants have, in the course of doing  
27 business, knowingly and intentionally exposed individuals to chemicals known to the State of  
28 California to cause developmental and reproductive toxicity without first giving clear and



1 reasonable warning to such individuals, within the meaning of Health and Safety Code section  
2 25249.6.

3 39. These actions violate Health and Safety Code section 25249.6 and render  
4 Defendants liable for civil penalties up to \$2,500 per day for each violation, as well as other  
5 remedies.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff prays that the Court:

8 A. Grant civil penalties to be paid by Defendants of up to \$2,500 for each violation  
9 of Health & Safety Code § 25249.6;

10 B. Pursuant to Health and Safety Code §25249.7, enter such injunctions or other  
11 orders as are necessary to prevent Defendants from exposing persons within the State of  
12 California to a known developmental and reproductive toxin resulting from the reasonably  
13 foreseeable use of the Covered Product without providing a clear and reasonable warning  
14 calculated to ensure that the warning message is available to individuals prior to exposure;

15 C. Award Plaintiff reasonable attorneys' fees and costs; and,


16 D. Grant such other and further relief as the Court deems just and proper.

17  
18 Respectfully submitted,

19 Dated: June 4, 2020

ALTSHULER BERZON LLP

20  
21 By:

  
\_\_\_\_\_  
Barbara J. Chisholm

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23 *Attorneys for Plaintiff*  
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