

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Randolph Hammock

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Attorneys for Plaintiff,
TAMAR KALOUSTIAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

TAMAR KALOUSTIAN, in the public interest,

Plaintiff,

v.

Rhythm Superfoods, LLC; Whole Foods Market
California, Inc., a California Corporation; and
DOES 1 through 100, inclusive,

Defendants.

Civil Action No.: **20STCV19267**

**COMPLAINT FOR INJUNCTIVE RELIEF AND
CIVIL PENALTIES**

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

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1 Tamar Kaloustian, in the public interest, based on information and belief and investigation
2 of counsel, except for information based on knowledge, hereby makes the following allegations.
3

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to adequately warn
6 individuals in California that they are being exposed to cadmium, a chemical known to the State of
7 California to cause birth defects and other reproductive harm. Such exposures have occurred, and
8 continue to occur, through the manufacture, distribution, sale and consumption of Defendants'
9 Organic Beet Chips (the "Product"). The Product is available to consumers in California through a
10 multitude of retail channels including, without limitation (a) third-party traditional brick-and-mortar
11 retail locations; (b) via the internet through Defendants' website; and (c) via the internet through
12 third-party retail websites. Consumers are exposed to cadmium when they consume the Product.

13 2. Under California's Proposition 65, Health and 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. Defendants introduce a product
17 contaminated with significant quantities of cadmium into the California marketplace, exposing
18 consumers of the Product to cadmium.

19 3. Despite the fact that the Defendants expose consumers to cadmium, Defendants
20 provide no warning, or inadequate warnings about the reproductive hazards associated with
21 cadmium exposure. Defendants' conduct thus violates the warning provision of Proposition 65,
22 Health & Safety Code § 25249.6.
23

24 **PARTIES**

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

27 5. Defendant RHYTHM SUPERFOODS, LLC ("RHYTHM SUPERFOODS") is a
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1 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.
2 RHYTHM SUPERFOODS manufactures, distributes and/or sells the Product for sale and use in
3 California.

4 6. Defendant WHOLE FOODS MARKET CALIFORNIA, INC. ("WHOLE
5 FOODS") is a person in the course of doing business within the meaning of Health & Safety Code §
6 25249.11. WHOLE FOODS manufactures, distributes and/or sells the Product for sale and use in

7 7. The true names of DOES 1 through 100 are unknown to Plaintiff at this time. When
8 their identities are ascertained, the Complaint shall be amended to reflect their true names.
9

10 JURISDICTION AND VENUE

11 8. The Court has jurisdiction over this action pursuant to Health & Safety Code §
12 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
13 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
14 other trial courts.

15 9. This Court has jurisdiction over Defendants as business entities that do sufficient
16 business, have sufficient minimum contacts in California or otherwise intentionally avails itself of the
17 California market through the sale, marketing or use of the Product in California and/or by having
18 such other contacts with California so as to render the exercise of jurisdiction over them by the
19 California courts consistent with traditional notions of fair play and substantial justice.

20 10. Venue is proper in Los Angeles County Superior Court because one or more of the
21 violations arise in the County of Los Angeles.
22

23 BACKGROUND FACTS

24 11. The People of the State of California have declared by initiative under Proposition
25 65 their right "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
26 other reproductive harm." Proposition 65 § 1(b).

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

5
6 No person in the course of doing business shall knowingly and intentionally expose any
7 individual to a chemical known to the state to cause cancer or reproductive toxicity without
8 first giving clear and reasonable warning to such individual...

9 13. The State of California has officially listed cadmium as a chemical known to cause
10 cancer, developmental toxicity and reproductive harm.

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

16 15. Defendants’ Product contains sufficient quantities of cadmium such that consumers,
17 including pregnant women, who consume the Product are exposed to cadmium. The primary route
18 of exposure for the violations is direct ingestion when consumers orally ingest the Product. These
19 exposures occur in homes, workplaces and everywhere in California where the Product is
20 consumed.

21 16. During the relevant one-year period herein, no clear and reasonable warning was
22 provided with the Product regarding the reproductive hazards of cadmium.

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

27 18. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff
28 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General, the
District Attorneys of every county in California, the City Attorneys of every California city with a

1 population greater than 750,000 and to the named Defendants. In compliance with Health & Safety
2 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)
3 the name and address of each violator; (2) the statute violated; (3) the time period during which
4 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure
5 to cadmium from the Product, and (b) the specific type of Product sold and used in violation of
6 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
7 the violations described in each Notice.

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

21 20. None of the public prosecutors with the authority to prosecute violations of
22 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
23 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
24 Plaintiff's Notices.

25 21. Defendants both know and intend that individuals will consume the Product, thus
26 exposing them to cadmium.

27 22. Under Proposition 65, an exposure is "knowing" where the party responsible for
28

such exposure has:

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

23. Defendants have been informed of the cadmium in their Products by the 60-Day Notice of Violation and accompanying Certificate of Merit served on them.

24. Defendants also have constructive knowledge that the Products contain cadmium due to the widespread media coverage concerning the problem of cadmium in consumer products.

25. As entities that manufacture, import, distribute and/or sell the Product for use in the California marketplace, Defendants know or should know that the Product contains cadmium and that individuals who consume the Product will be exposed to cadmium. The cadmium exposures to consumers who consume the Product are a natural and foreseeable consequence of Defendant's placing the Product into the stream of commerce.

26. Nevertheless, Defendants continue to expose consumers to cadmium without prior clear and reasonable warnings regarding the reproductive hazards of cadmium.

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

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

CAUSE OF ACTION

(Violations of the Health & Safety Code 25249.6)

29. Plaintiff realleges and incorporates by reference as if specifically set forth herein Paragraphs 1 through 27, inclusive.

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

31. Cadmium is a chemical listed by the State of California as known to cause birth defects and other reproductive harm.

32. Defendants know that average use of the Product will expose users of the Product to cadmium. Defendants intend that the Product be used in a manner that results in exposures to cadmium from the Products.

33. Defendants have failed, and continue to fail, to provide clear and reasonable warnings regarding the reproductive toxicity of cadmium to users of the Products.

34. By committing the acts alleged above, Defendants have at all times relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to cadmium without first giving clear and reasonable warnings to such individuals regarding the reproductive toxicity of cadmium.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendants as follows:

1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties against the Defendants in the amount of \$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 Defendants from offering the Product for sale in California without either reformulating the Products 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 Defendants to take action to stop ongoing unwarranted exposures to cadmium resulting from use of Product sold, as Plaintiff shall specify in further application to the Court;

1 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
2 applicable theory or doctrine, grant Plaintiff her 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.
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6 Dated: May 20, 2020

KJT LAW GROUP, LLP

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9 By: 

Vache Thomassian
Attorneys for Plaintiff
TAMAR KALOUSTIAN