

1 DANIELLE R. FUGERE (State Bar No. 160873)
2 CHELSEA J. LINSLEY (State Bar No. 315327)
3 AS YOU SOW
2150 Kittredge Street, Suite 450
Berkeley, California 94704
Telephone: (510) 735-8156
4 Fax: (510) 735-8143
5 Dfugere@asyousow.org
Clinsley@asyousow.org

6 *Attorneys for Plaintiff*

7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF ALAMEDA**

9
10 AS YOU SOW, a 501(c)(3) non-profit
corporation,

11 Plaintiff,

12 v.

13 MEDLINE INDUSTRIES, INC.,

14 Defendants.
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**ENDORSED
FILED
ALAMEDA COUNTY**

APR 29 2021

CLERK OF THE SUPERIOR COURT
By ANDREL GOSPEL
Deputy

Case No.: **RG21097747**

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 et seq.)

1 INTRODUCTION

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

10 2. The State of California has officially listed lead and cadmium as chemicals known
11 to the State to cause cancer, developmental toxicity, and reproductive harm.

12 3. On information and belief, Defendant MEDLINE INDUSTRIES, INC.
13 manufactures, produces, packages, imports, supplies, markets, sells, and/or otherwise distributes
14 California blenderized feeding tube meals, including Kitchen Blends® Feeding Tube Meals –
15 Mixed Vegetables, which contain lead and cadmium (“Covered Products”).

16 4. Lead and cadmium are present in the Covered Products. Consumers are exposed
17 to lead and cadmium when they ingest the Covered Products.

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

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2 **PARTIES**

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

11 7. Defendant MEDLINE INDUSTRIES, INC. is, on information and belief, a
12 business entity with ten or more employees that has manufactured, produced, packaged,
13 imported, supplied, marketed, sold, and/or otherwise distributed in California, including via the
14 internet, blenderized feeding tube meals, which contain lead and cadmium. According to the
15 company's website: "We offer a comprehensive clinical nutrition product portfolio and
16 supporting nutrition education to promote optimal patient health for superior patient outcomes."¹

17 **JURISDICTION AND VENUE**

18 8. This Court has jurisdiction over this action pursuant to Health and Safety Code,
19 section 25249.7, which allows enforcement of the Toxic Enforcement Act in any court of
20 competent jurisdiction, and pursuant to California Constitution, Article VI, Section 10, because
21 this case does not present a cause given by statute to other trial courts.

22 9. This Court has jurisdiction over Defendant because it is a business entity that
23 conducts sufficient business, has sufficient minimum contacts in, or otherwise intentionally
24 avails itself of the market in California.

25 10. Venue is proper in the Superior Court of California, Alameda County, pursuant to
26 Code of Civil Procedure sections 393 and 395, because this court is a court of competent
27 jurisdiction, because Plaintiff seeks civil penalties against Defendant, because one or more
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¹ <https://punchout.medline.com/category/Nutrition/cat1470145> (accessed February 9, 2021).

1 instances of wrongful conduct occurred and continues to occur in Alameda County, and/or
2 because defendant conducted and continues to conduct business in this county with respect to the
3 consumer products at issue in this case.

4 11. Plaintiff has met the statutory requirements for notice to bring this citizen suit
5 enforcement action under Health and Safety Code section 25249.7 and its implementing
6 regulations.

7 **LEGAL BACKGROUND**

8 12. In 1986, the voters of California overwhelmingly enacted the Safe Drinking
9 Water and Toxic Enforcement Act.

10 13. The Preamble to the Toxic Enforcement Act ballot measure provides a clear
11 statement of the purpose of the Act:

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

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

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

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

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

26 15. The Toxic Enforcement Act establishes a procedure by which the State develops a
27 list of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety
28

1 Code § 25249.8. No warning is required for a chemical until one year after the State lists the
2 chemical. (Health & Safety Code § 25249.10(b).)

3 16. The Office of Environmental Health Hazard Assessment (OEHHA), which is part
4 of the California Environmental Protection Agency (CalEPA), is the lead agency charged with
5 implementing the Toxic Enforcement Act. (Health & Safety Code § 25249.12.) OEHHA has
6 promulgated regulations implementing the Toxic Enforcement Act. (*See 27 CCR § 25102 et*
7 *seq.*)

8 17. On February 27, 1987, OEHHA listed lead as a chemical known to the State to
9 cause developmental toxicity, male reproductive toxicity, and female reproductive toxicity. (27
10 CCR § 27001(b).)

11 18. On May 1, 1997, OEHHA listed cadmium as a chemical known to the State to
12 cause developmental toxicity and male reproductive toxicity. (27 Cal. Code Reg. § 27001(b).)

13 19. For many of the chemicals listed under the Act, OEHHA has established “safe
14 harbor levels,” which include No Significant Risk Levels (NSRLs) for cancer-causing chemicals
15 and Maximum Allowable Dose Levels (MADLs) for chemicals causing reproductive toxicity.
16 The established MADL for lead is 0.5 µg/day. (27 CCR § 25805.) The established MADL for
17 cadmium is 4.1 µg/day (oral). (27 Cal. Code Reg. § 25805(b).)

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

23 21. According to applicable regulations, for internet purchases, a warning “must be
24 provided by including either the warning or a clearly marked hyperlink using the word
25 ‘**WARNING**’ on the product display page, or by otherwise prominently displaying the warning
26 to the purchaser prior to completing the purchase.” (27 CCR § 25602(b) (bold in original).)

27 22. According to applicable regulations, a warning for consumer product exposure
28 must include the following elements:

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

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

7 ... (B) For exposures to listed reproductive toxicants, the words, “This
8 product can expose you to [name of one or more chemicals], a chemical [or
9 chemicals] known to the State of California to cause birth defects or other
10 reproductive harm. For more information go to
11 www.P65Warnings.ca.gov/product.”²

12 23. A consumer product exposure is “an exposure that results from a person’s
13 acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer
14 product, including consumption of a food.” (27 CCR § 25600.1(d).)

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

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

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

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² 27 CCR 25603(a).

1 **FACTUAL BACKGROUND**

2 27. The Covered Products are blenderized meals manufactured, distributed, and/or
3 sold by Defendant designed for use for individuals who tube feed.

4 28. Testing obtained by Plaintiff from an independent laboratory demonstrates that
5 the Covered Products contain lead and cadmium.

6 29. Since at least July 15, 2019, Defendants have marketed, manufactured, produced,
7 packaged, imported, sold, and/or otherwise distributed the Covered Products in the State of
8 California.

9 30. On information and belief, Defendants have had knowledge that the Covered
10 Products contain lead and cadmium since at least July 15, 2019.

11 31. The primary route of exposure to lead and cadmium from Defendants' products is
12 ingestion. This exposure to hazardous lead and cadmium results from the intended and
13 reasonably foreseeable use of the Covered Products.

14 32. On July 15, 2020, Plaintiff served Defendants with a written notice of violation
15 stating that Defendants had violated the Toxic Enforcement Act by exposing individuals to lead
16 and cadmium in the Covered Products without providing a clear and reasonable warning. True
17 and correct copies of Plaintiff's sixty-day notice are attached as Exhibit 1 to this Complaint.

18 33. On July 15, 2020, Plaintiff provided notice of the violation to the Attorney
19 General and the district attorneys and city attorneys in whose jurisdiction the violations are
20 alleged to have occurred.

21 34. Defendants have knowingly and intentionally exposed consumers in California to
22 lead and cadmium. The exposure has been knowing and intentional, because they result from
23 Defendants' marketing, manufacturing, producing, packaging, importing, sale, and/or
24 distribution of the Covered Products, which contain lead and cadmium, with knowledge that
25 reasonably foreseeable use of the Covered Products will result in consumers' exposure to lead
26 and cadmium by way of ingestion.

27 35. In accordance with Health and Safety Code section 25249.7(d), this action is
28 being commenced more than 60 days from the date that *As You Sow* provided notice of the

1 violation of Health and Safety Code section 25249.6 alleged herein to the Attorney General and
2 the district attorneys and city attorneys in whose jurisdiction the violations are alleged to have
3 occurred, and to Defendants. The notices provided to Defendants included certificates of merit
4 that comply with the requirements of Health and Safety Code section 25249.7(d)(1). Factual
5 information sufficient to establish the basis of the certificate of merit was attached to the
6 certificate of merit served on the Attorney General.

7 36. Neither the Attorney General, nor any district attorney, city attorney, or any other
8 public prosecutor has commenced and is diligently prosecuting an action based on the violations
9 alleged herein.

10
11 **FIRST CAUSE OF ACTION**
12 **(Violation of Health & Safety Code § 25249.6)**

13 37. Plaintiff re-alleges and incorporates by reference all the allegations set forth in
14 this Complaint.

15 38. By committing the acts alleged above, Defendants have, in the course of doing
16 business, knowingly and intentionally exposed individuals to chemicals known to the State of
17 California to cause developmental and reproductive toxicity without first giving clear and
18 reasonable warning to such individuals, within the meaning of Health and Safety Code section
19 25249.6.

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

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff prays that the Court:

25 A. Grant civil penalties to be paid by Defendants for the violations of Health &
26 Safety Code § 25249.6;

27 B. Pursuant to Health and Safety Code §25249.7, enter such injunctions or other
28 orders as are necessary to prevent Defendants from exposing persons within the State of

1 California to known developmental and reproductive toxins resulting from the reasonably
2 foreseeable use of the Covered Products without providing a clear and reasonable warning;

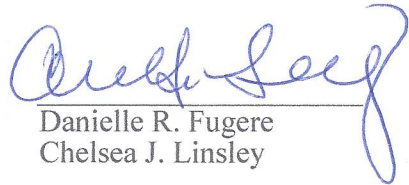
3 C. Award Plaintiff reasonable attorneys' fees and costs; and,

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

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6 Respectfully submitted,

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8 Dated: April 29, 2021

By:



Danielle R. Fugere
Chelsea J. Linsley

Attorneys for Plaintiff
As You Sow

EXHIBIT 1



July 15, 2020

Charles N. Mills, CEO
Medline Industries, Inc.
3 Lakes Dr.
Northfield, Illinois, 60093-2753

Medline Industries, Inc.
c/o Corporation Service Company
2710 Gateway Oaks Dr., Suite 150N
Sacramento, CA 95833

Re: NOTICE OF VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE
SECTION 25249.5 ET SEQ.

Dear Mr. Mills:

As You Sow ("AYS") is a 501(c)(3) non-profit corporation dedicated to, among other causes, toxics reduction, the promotion of and improvement of human health, the improvement of worker and consumer rights, environmental education and the protection of the environment, and corporate accountability. AYS is based in Berkeley, California, and was incorporated in 1992 under the laws of the State of California.

AYS has documented violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), Cal. Health & Safety Code §25249.5 et seq., by Medline Industries, Inc. (the "Company"). This letter constitutes notice by AYS to the Company of these violations. Specifically, the Company has violated and is violating Section 25249.6, which provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first providing a clear and reasonable warning to such individual ..." Pursuant to section 25249.7(d) of the statute, AYS intends to bring an enforcement action sixty days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

A summary of the statute and its implementing regulations, which was prepared by the lead agency designated under the statute, is enclosed with the notices served upon the violator(s). The specific details of the violations that are the subject of this notice are provided below.

Alleged violators. The names of the violators covered by this notice are:

- Medline Industries, Inc.

Chemical(s). These violations involve exposures to lead and cadmium from the products listed below. The State of California has officially listed lead and cadmium as chemicals known to cause cancer and reproductive harm.

Consumer products. The products that are the subject of this notice are feeding tube meals that contain lead and cadmium and are, at any time, manufactured, distributed, or sold by the alleged violator, including but not limited to the following:

- Kitchen Blends® Feeding Tube Meals - Mixed Vegetables

Route of exposure. Use of the products identified in this notice result in human exposures to lead and cadmium. The route of exposure is ingestion. No clear and reasonable warning is provided with the products regarding the reproductive hazards of lead and cadmium.

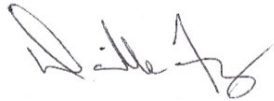
Duration of violation. These ongoing violations have occurred on every day since at least July 15, 2019, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are removed from the products.

Pursuant to Title 11, Cal. Code Regs. section 3100, a certificate of merit is attached hereto.

In keeping with its public interest mission and to expeditiously rectify this ongoing violation of California law, *As You Sow* is interested in seeking a constructive resolution of this matter without engaging in costly and protracted litigation. You may communicate directly with *As You Sow* to discuss an early resolution of this matter by contacting:

Danielle Fugere
President
As You Sow
2150 Kittredge St. Suite 450
Berkeley, CA 94704
Tel: (510) 735-8141
Email: dfugere@asyousow.org

Sincerely,



Danielle Fugere

CERTIFICATE OF MERIT

(for *As You Sow*'s Notice of Proposition 65 Violation on Medline Industries, Inc.)

I, Chelsea Linsley, declare:

This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged that the parties in the notice have violated section 25249.6 of the Health and Safety Code by failing to provide clear and reasonable warnings.

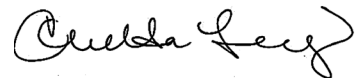
I am in-house counsel and Staff Attorney of the noticing party.

I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding exposure to the listed chemicals that are the subject of the action.

Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

The copy of this Certificate of Merit served on the Attorney General has attached to it to it factual information sufficient to establish the basis for this certificate, including the information identified in section 25249.7(h)(2) of the Health and Safety Code, i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: July 15, 2020



Chelsea Linsley

Enclosure (For Attorney General Copy only)

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States and over the age of 18 years. My business address is: 2150 Kittredge Street, Ste. 450, Berkeley, CA 94704.

On July 15, 2020, I served the following documents:

- Notice of Violation of California Health & Safety Code section 25249.5 et seq.
- Certificate of Merit
- “The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary”

on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below, and depositing it at a United States Postal Service Office for delivery by Certified Mail:

Charles N. Mills, CEO
Medline Industries, Inc.
3 Lakes Dr.
Northfield, Illinois, 60093-2753

Medline Industries, Inc.
c/o Corporation Service Company
2710 Gateway Oaks Dr., Suite 150N
Sacramento, CA 95833

On July 15, 2020, I served the following documents:

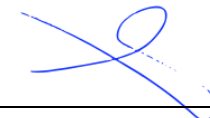
- Notice of Violation of California Health & Safety Code section 25249.5 et seq.
- Certificate of Merit

on each of the District Attorneys on the service list attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the service list attached hereto and depositing it at a United States Postal Service mail box for delivery by First Class Mail.

On July 15, 2020, I served the following documents on the Attorney General using the Attorney General’s Proposition 65 electronic Notice Filing Form (<https://oag.ca.gov/prop65/add-60-day-notice>):

- Notice of Violation of California Health & Safety Code section 25249.5 et seq.
- Certificate of Merit, including Supporting Documentation Required by Title 11, C.C.R. § 3102

Executed on July 15, 2020, at Berkeley, California.



Kwan Hong Teoh