

1 DANIELLE R. FUGERE (State Bar No. 160873)
2 AS YOU SOW
3 Main Post Office, P.O. Box 751
4 Berkeley, California 94701
5 Telephone: (510) 735-8156
6 Facsimile: (510) 735-8143
7 Dfugere@asyousow.org

8 *Attorney for Plaintiff*

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

09/02/2022 at 12:26:39 PM

By: Angela Linhares,
Deputy Clerk

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ALAMEDA**

11 AS YOU SOW, a 501(c)(3) non-profit
12 corporation,

13 Plaintiff,

14 v.

15 FRONTIER COOPERATIVE,

16 Defendant.

Case No. _____

**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 as a chemical known to the State
11 to cause cancer, developmental, and reproductive harm.

12 3. On information and belief, Defendant Frontier Cooperative manufactures,
13 produces, packages, imports, supplies, markets, sells, and/or otherwise distributes in California,
14 including via the internet, spinach products containing lead, including but not limited to, Frontier
15 Co-Op Spinach Flakes Certified Organic and Frontier Co-Op Spinach Powder Certified Organic
16 (“Covered Products”).

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

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

26 //

27 //

28 //

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
5 Sow has, since 1992, worked to bring manufacturers and whole industries into compliance with
6 the Toxic Enforcement Act, as part of its work to ensure safer consumer products, promote
7 corporate accountability, and create a sustainable marketplace that does not degrade human
8 health or the planet. As You Sow brings this action as a private attorney general in the public
9 interest pursuant to Health & Safety Code section 25249.7, subdivision (d).

10 7. Defendant FRONTIER COOPERATIVE is, on information and belief, a business
11 entity with ten or more employees that has manufactured, produced, packaged, imported,
12 supplied, marketed, sold, and/or otherwise distributed in California, including via the internet,
13 spinach products containing lead, including but not limited to the Covered Products.

14 **JURISDICTION AND VENUE**

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

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

22 10. Venue is proper in the Superior Court of California, Alameda County, pursuant to
23 Code of Civil Procedure sections 393 and 395, because this Court is a court of competent
24 jurisdiction, because Plaintiff seeks civil penalties against Defendant Frontier Cooperative,
25 because one or more instances of wrongful conduct occurred and continue to occur in Alameda
26 County, and/or because Defendant Frontier Cooperative conducted and continues to conduct
27 business in this county with respect to the consumer products at issue in this case.
28

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

LEGAL BACKGROUND

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

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

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

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

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

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

14. Among other requirements, the Toxic Enforcement Act 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 giving clear and reasonable warning to such individual, except as provided in Section 25249.10.” (Health & Safety Code § 25249.6.)

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

16. The Office of Environmental Health Hazard Assessment (OEHHA), which is part of the California Environmental Protection Agency (CalEPA), is the lead agency charged with

1 implementing the Toxic Enforcement Act. (Health & Safety Code § 25249.12.) OEHHA has
2 promulgated regulations implementing the Toxic Enforcement Act. (*See* 27 Cal. Code Reg. §
3 25102 *et seq.*)

4 17. On February 27, 1987, OEHHA listed lead as a chemical known to the State to
5 cause developmental toxicity and male and female reproductive toxicity. (27 Cal. Code Reg. §
6 27001(b).)

7 18. On October 1, 1992, OEHHA listed lead as a chemical known to the State to
8 cause cancer. (27 Cal. Code Reg. § 27001(b).)

9 19. For many of the chemicals listed under the Act, OEHHA has established “safe
10 harbor levels,” which include Maximum Allowable Dose Levels (MADLs) for chemicals
11 causing developmental and reproductive toxicity and No Significant Risk Levels (NSRLs) for
12 cancer-causing chemicals. The established MADL for lead is 0.5 µg/day (oral). (27 Cal. Code
13 Reg. § 25805(b).) The established NSRL for lead is 15 µg/day (oral). (27 Cal. Code Reg. §
14 25705(b).)

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

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

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

- 27 (1) A symbol consisting of a black exclamation point in a yellow equilateral
28 triangle with a bold black outline. Where the sign, label or labeling for the product

1 is not printed using the color yellow, the symbol may be printed in black and
2 white. The symbol shall be placed to the left of the text of the warning, in a size
3 no smaller than the height of the word “WARNING”.

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

5 ... (B) For exposures to listed reproductive toxicants, the words, “This product
6 can expose you to [name of one or more chemicals], a chemical [or chemicals]
7 known to the State of California to cause birth defects or other reproductive harm.
8 For more information go to www.P65Warnings.ca.gov/product.”¹

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

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

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

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

23 **FACTUAL BACKGROUND**

24 27. The Covered Products are spinach products that are manufactured, produced,
25 packaged, imported, supplied, marketed, sold, and/or otherwise distributed in California by
26 Defendant Frontier Cooperative.

27
28

¹ 27 Cal. Code Reg. § 25603(a).

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

3 29. Since at least August 19, 2019, Defendant has marketed, manufactured, produced,
4 packaged, imported, sold, and/or otherwise distributed the Covered Products in the State of
5 California.

6 30. On information and belief, Defendant has had knowledge that the Covered
7 Products contain lead since at least August 19, 2019.

8 31. The primary route of exposure to lead from Defendant's products is ingestion.
9 This exposure to lead results from the intended and reasonably foreseeable use of the Covered
10 Products.

11 32. On August 19, 2020, Plaintiff served Defendant Frontier Cooperative with a
12 written notice of violation stating that Defendant had violated the Toxic Enforcement Act by
13 exposing individuals to lead in the Covered Products without providing a clear and reasonable
14 warning. True and correct copies of Plaintiff's sixty-day notice are attached as Exhibit 1 to this
15 Complaint.

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

19 34. On January 5, 2021, Plaintiff purchased the Covered Products and obtained
20 testing from an independent laboratory demonstrating that the Covered Products continued to
21 contain lead.

22 35. On September 8, 2021, Plaintiff purchased the Covered Products and obtained
23 testing from an independent laboratory demonstrating that the Covered Products continued to
24 contain lead.

25 36. Defendant has knowingly and intentionally exposed consumers in California to
26 lead. These exposures have been knowing and intentional, because they result from Defendant's
27 marketing, manufacturing, producing, packaging, importing, sale, and/or distribution of the
28

1 Covered Products, which contain lead, with knowledge that reasonably foreseeable use of the
2 Covered Products will result in consumers' exposure to lead by way of ingestion.

3 37. In accordance with Health and Safety Code section 25249.7(d), this action is
4 being commenced more than 60 days from the date that Plaintiff provided notice of the violation
5 of Health and Safety Code section 25249.6 alleged herein to the Attorney General and the district
6 attorneys and city attorneys in whose jurisdiction the violations are alleged to have occurred, and
7 to Defendant. The notices provided included certificates of merit that complied with the
8 requirements of Health and Safety Code section 25249.7(d)(1). Factual information sufficient to
9 establish the basis of the certificate of merit was attached to the certificate of merit served on the
10 Attorney General.

11 38. Neither the Attorney General, nor any district attorney, city attorney, or any other
12 public prosecutor has commenced and is diligently prosecuting an action against the violations
13 alleged herein.

14 **FIRST CAUSE OF ACTION**
15 **(Violation of Health & Safety Code § 25249.6)**

16 39. Plaintiff re-alleges and incorporates by reference all the allegations set forth in
17 this Complaint.

18 40. By committing the acts alleged above, Defendant has, in the course of doing
19 business, knowingly and intentionally exposed individuals to chemicals known to the State of
20 California to cause developmental and reproductive toxicity without first giving clear and
21 reasonable warning to such individuals, within the meaning of Health and Safety Code section
22 25249.6.

23 41. These actions violate Health and Safety Code section 25249.6 and render
24 Defendant liable for civil penalties up to \$2,500 per day for each violation, as well as other
25 remedies.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff prays that the Court:
28

A. Grant civil penalties to be paid by Defendant pursuant to Health & Safety Code § 25249.7;

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

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

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

Respectfully submitted,

Dated: August 24, 2022

AS YOU SOW

By:

Danielle R. Fugere
Attorney for Plaintiff

EXHIBIT 1



August 19, 2020

**ATTORNEY GENERAL COPY: CONTAINS OFFICIAL
INFORMATION PER EVIDENCE CODE § 1040**

**NOTICE OF VIOLATION OF
CALIFORNIA HEALTH & SAFETY CODE § 25249.5 ET SEQ.**

Attorney General Xavier Becerra
c/o Proposition 65 Coordinator
Office of the Attorney General
P.O. Box 70550
Oakland, CA 94612-0550

Re: Notice of Violation of California Health & Safety Code §25249.5 *et seq.*

Dear Attorney General Becerra:

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 & Toxic Enforcement Act of 1986 (“Proposition 65”), codified at Health & Safety Code section 25249.5 *et seq.*; specifically 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 ...” This letter serves to provide AYS’s notification of these violations to the public enforcement agencies. 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:

- Frontier Cooperative

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

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

- Frontier Co-Op Spinach Flakes Certified Organic
- Frontier Co-Op Spinach Powder Certified Organic

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

Duration of violation. These ongoing violations have occurred on every day since at least August 19, 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 Frontier Cooperative)

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.

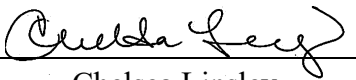
I am in-house counsel and Staff Attorney of the noticing party.

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 chemical that is 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: August 19, 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 August 19, 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:

Frontier Cooperative
3021 78th St.
Norway, IA 52318

Frontier Cooperative
c/o CT Corporation System
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

On August 19, 2020, I served the following documents:

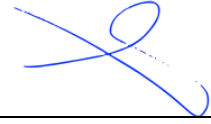
- Notice of Violation of California Health & Safety Code section 25249.5 et seq.
- Certificate of Merit

on each of the District Attorneys on the service list attached hereto either (1) 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, or (2) via electronic service to the email addresses listed. The specific method of delivery is indicated in the service list.

On August 19, 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 August 19, 2020, at Berkeley, California.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a loop and a trailing flourish.

Kwan Hong Teoh