

Joseph R. Manning, Jr., Esq. (State Bar No. 223381)
Babak Hashemi., Esq. (State Bar No. 263494)
MANNING LAW, APC
20062 Birch St. Suite 200
Newport Beach, CA 92660
(949) 200-8755 Phone
(866) 843-8308 Fax

Assigned for All Purposes
Judge Peter Wilson

Attorneys for Plaintiff
CALSAFE RESEARCH CENTER, INC.

CX-102

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE-CENTRAL JUDICIAL DISTRICT

CALSAFE RESEARCH CENTER, INC., a
California non-profit corporation

Plaintiff,

v.

EARTHLY TREATS, INC. (D/B/A/ REAL
FOOD FROM THE GROUND UP);
GROCERY OUTLET, INC.; and DOES 1 to
10,

Defendants.

CASE No.: 30-2021-01193600-CU-TT-CXC

**COMPLAINT FOR PERMANENT
INJUNCTION, CIVIL PENALTIES AND
OTHER RELIEF**

Health & Safety Code §25249.5, *et seq.*

Plaintiff CALSAFE RESEARCH CENTER, INC. ("Plaintiff" or "CRC") brings this action
in the interests of the general public and, on information and belief, hereby alleges:

I. INTRODUCTION

1. This Complaint seeks to remedy the continuing failure of Defendants EARTHLY
TREATS, INC. (D/B/A/ REAL FOOD FROM THE GROUND UP); GROCERY OUTLET, INC.;
and DOES 1-10. (hereinafter individually referred to as "Defendant" or collectively as
"Defendants") to warn consumers in California that they are being exposed to lead, a chemical which
are known to the State of California to cause cancer, birth defects and other reproductive harm.

1 According to the Safe Drinking Water and Toxics Enforcement Act of 1986, Health and Safety
2 Code ("H&S Code") section 25249.5 (also known as and referred to hereinafter as "Proposition
3 65"), businesses must provide persons with a "clear and reasonable warning" before exposing
4 individuals to chemicals known to the state to cause cancer or reproductive harm. Such exposures
5 have occurred, and continue to occur, through the Defendants manufacture, distribution, sale, and
6 consumption of a "Snack Cracker" containing lead, referred to herein as "SUBJECT PRODUCTS."
7 The SUBJECT PRODUCTS include Cauliflower Stars Sea Salt.
8

9 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*,
10 ("Proposition 65") it is unlawful for businesses to knowingly and intentionally expose individuals
11 in California to chemicals known to the State to cause cancer, birth defects, or other reproductive
12 harm without providing clear and reasonable warnings to individuals prior to their exposure.
13 Defendants introduce SUBJECT PRODUCTS contaminated with significant quantities of lead into
14 the California marketplace, thereby exposing consumers of their SUBJECT PRODUCTS, many of
15 whom are children, to lead.
16

17 3. Even though Defendants expose children and other consumers to lead, Defendants
18 provide no warnings whatsoever about the carcinogenic hazards associated with lead exposure.
19 Defendants' conduct thus violates the warning provision of Proposition 65. Health & Safety Code
20 § 25249.6.
21

22 4. Lead is one of the chemicals known to the State of California to cause cancer, birth
23 defects and other reproductive harm. Lead is hereinafter referred to as the "LISTED CHEMICAL."
24

25 5. Consumption of the SUBJECT PRODUCTS causes exposures to the LISTED
26 CHEMICAL at levels requiring a "clear and reasonable warning" under Proposition 65. Defendants
27

1 exposed consumers to the LISTED CHEMICAL and have failed to provide the health hazard
2 warnings required by Proposition 65.

3 6. Defendants' continued manufacturing, packaging, distributing, marketing and/or
4 sales of the SUBJECT PRODUCTS without the required health hazard warnings, causes, or
5 threatens to cause, individuals to be involuntarily, unknowingly and unwittingly exposed to levels
6 of the LISTED CHEMICAL that violate Proposition 65.

7 7. Plaintiff seeks injunctive relief compelling Defendants to sufficiently warn
8 consumers in California before exposing them to lead in the SUBJECT PRODUCTS. (Health &
9 Safety Code §25249.47(a).) Plaintiff also seeks civil penalties against Defendants for their
10 violations of Proposition 65 along with attorney's fees and costs. (Health & Safety Code
11 §25249.7(b).)
12

13 II. PARTIES

14 8. Plaintiff CRC is a non-profit corporation organized under California law dedicated
15 to protecting the public from environmental health hazards and toxic exposures. CRC is based in
16 Newport Beach, CA. CRC is a person within the meaning of H&S Code §25249.11 and brings this
17 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code § 25249.7
18 (d) specifies that actions to enforce Proposition 65 may be brought by a person in the public interest,
19 provided certain notice requirements and no other public prosecutor is diligently prosecuting an
20 action for the same violation(s).
21

22 9. Defendant EARTHLY TREATS, INC. (D/B/A/ REAL FOOD FROM THE
23 GROUND UP) is now and was at all times relevant herein a corporation organized under the laws
24 of Delaware and is a person in the course of doing business within the meaning of H&S Code
25
26

1 §25249.11. Defendant EARTHLY TREATS, INC manufactures, distributes, and/or sells SUBJECT
2 PRODUCTS for sale and consumption in California which contain the LISTED CHEMICAL
3 without first giving clear and reasonable warnings.

4 10. Defendant GROCERY OUTLET, INC. is now, and was at all times relevant herein,
5 a California Corporation organized under the laws of California and is a person in the course of
6 doing business within the meaning of H&S Code §25249.11. Defendant GROCERY OUTLET,
7 INC. manufactures, distributes, and/or sells SUBJECT PRODUCTS for sale and consumption in
8 California under the brand name EARTHLY TREATS, INC and other brand names, which contain
9 the LISTED CHEMICAL without first giving clear and reasonable warnings.
10

11 11. DOES 1 through 10 are each a person in the course of doing business within the
12 meaning of Health & Safety Code § 25249.11. DOES 1 through 10 manufacture, distribute, and/or
13 sell SUBJECT PRODUCTS for sale and consumption in California.

14 12. Plaintiff does not know the true names, capacities and liabilities of Defendants DOES
15 Nos. 1-10, inclusive, and therefore sues them under fictitious names. Plaintiff will amend this
16 Complaint to allege the true name and capacities of the DOE Defendants upon being ascertained.
17 Each of these Defendants was in some way legally responsible for the acts, omissions, and/or
18 violations alleged herein.
19

20 13. Defendants separately and each of them, are or were, at all times relevant to the
21 claims in this Complaint and continuing through the present, legally responsible for compliance
22 with the provisions of Proposition 65. Whenever an allegation regarding any act or omission of a
23 Defendant is made herein, such allegation shall be deemed to mean that Defendant, or its agent,
24 officer, director, manager, supervisor, or employee did, or so authorized, or failed to do, such acts
25 while engaged in the affairs of Defendant's business operations and/or while acting within the
26

1 course and scope of their employment or while conducting business for Defendant(s) for a
2 commercial purpose.

3 14. Whenever reference is made to any act or omission of any Defendant, such allegation
4 shall be deemed to mean the act or omission of each Defendant acting individually, jointly, and
5 severally as defined by Civil Code Section 1430 *et seq.*

6
7 **III. JURISDICTION AND VENUE**

8 15. This Court has jurisdiction over this action pursuant to California Constitution
9 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except
10 those given by statute to other trial courts.” The statute under which this action is brought does not
11 specify any other court with jurisdiction.

12 16. This Court has jurisdiction over Defendants because they are business entities that
13 do sufficient business, have sufficient minimum contacts in California or otherwise intentionally
14 avail themselves of the California market, through the sale, marketing and use of their SUBJECT
15 PRODUCTS in California, to render the exercise of jurisdiction over them by the California courts
16 consistent with traditional notions of fair play and substantial justice.

17 17. Venue in this action is proper in the Orange County Superior Court because the
18 cause, or part thereof, arises in the Orange County Superior Court since Defendants’ products are
19 marketed, offered for sale, sold, used, and/or consumed in this county.

20
21 **IV. STATUTORY BACKGROUND**

22 18. The People of the State of California have declared by initiative under Proposition
23 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
24 other reproductive harm.” Proposition 65, § 1(b).

19. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed by the State of California as known to cause cancer, birth defects, or other reproductive harm above certain levels without a “clear and reasonable warning” unless the business responsible for the exposure can prove that it fits within a statutory exemption. California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code, section 25249.6 et seq. states in pertinent part:

No 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. . .

20. On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

21. Defendants' Products contain sufficient quantities of lead such that consumers, including children, who consume the Products are exposed to lead. The route of exposure for the violations is direct ingestion when consumers eat the Products. These exposures occur in homes, schools, workplaces, and everywhere else throughout California where the products are consumed.

22. To test Defendants' SUBJECT PRODUCTS for lead, Plaintiff hired a well-respected and accredited testing laboratory. The results of testing undertaken by Plaintiff of Defendants' SUBJECT PRODUCTS show that the SUBJECT PRODUCTS tested contained lead.

23. At all times relevant to this action, Defendants, therefore, have knowingly and intentionally exposed the consumers of the SUBJECT PRODUCTS to the LISTED CHEMICAL without first giving a clear and reasonable warning to such individuals.

1 24. The SUBJECT PRODUCTS have allegedly been sold by Defendants for use in
2 California since at least June 24, 2017. The SUBJECT PRODUCTS continue to be distributed and
3 sold in California without the requisite warning information.

4 25. As a proximate result of acts by Defendants, as persons in the course of doing
5 business within the meaning of Health & Safety Code §25249.11, individuals throughout the State
6 of California, including in the County of ORANGE have been exposed to the LISTED CHEMICAL
7 without a clear and reasonable warning on the SUBJECT PRODUCTS. The individuals subject to
8 the violative exposures include normal and foreseeable users of the SUBJECT PRODUCTS, as well
9 as all other persons exposed to the SUBJECT PRODUCTS.

11 26. On September 4, 2020, CRC served Defendants and each of the appropriate public
12 enforcement agencies with documents entitled “Notice of Violations of California Health & Safety
13 Code Section 25249.5” that provided Defendants and the public enforcement agencies with notice
14 that Defendants were in violation of Proposition 65 for failing to warn purchasers and individuals
15 using the SUBJECT PRODUCTS that the consumption of the SUBJECT PRODUCTS expose them
16 to lead, a chemical known to the State of California to cause cancer and/or reproductive toxicity
17 (“Prop. 65 Notices”). True and correct copy of the 60-Day Notice (“NOTICE”) is attached hereto
18 as **Exhibit “A”** and is incorporated by reference. The NOTICE is also available on the Attorney
19 General’s website located at <http://oag.ca.gov/prop65>.

21 27. The NOTICE was issued pursuant to, and in compliance with, the requirements of
22 H&S Code §25249.7(d) and the statute’s implementing regulations regarding the notice of the
23 violations to be given to certain public enforcement agencies and to the violator. The NOTICE
24 included, *inter alia*, the following information: the name, address, and telephone number of the
25 noticing individual; the name of the alleged violator(s); the statute violated; the approximate time
26

1 period during which violations occurred; and descriptions of the violations including the chemicals
2 involved, the routes of toxic exposure, and the specific product or type of product causing the
3 violations.

4 28. Defendants were also provided copies of the document with the NOTICE entitled
5 “The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,”
6 which is also known as Appendix A to Title 27 of CCR §25903, via Certified Mail.

7
8 29. The California Attorney General, District Attorneys of every county in California, to
9 the City Attorneys of every California city with a population greater than 750,000, and each of the
10 named Defendants was provided copies of the NOTICE and a Certificate of Merit by the attorney
11 for the noticing party, stating that there is a reasonable and meritorious case for this action and
12 attaching factual information sufficient to establish a basis for the certificate, including the identity
13 of the persons consulted with and relied on by the certifier, and the facts, studies, or other data
14 reviewed by those persons, pursuant to H&S Code §25249.7(h) (2) via online submission.

15
16 30. After expiration of the sixty (60) day notice period, the appropriate public
17 enforcement agencies failed to commence and diligently prosecute a cause of action under H&S
18 Code §25249.5, et seq. against Defendants based on the allegations herein.

19 31. Defendants both know and intend that individuals, including children, will
20 consume the SUBJECT PRODUCTS, thus exposing them to lead.

21 32. Under Proposition 65, an exposure is “knowing” where the party responsible for
22 such exposure has:

23
24 knowledge of the fact that a[n] . . . exposure to a chemical listed
25 pursuant to [Health & Safety Code § 25249.8(a)] is occurring. No
26 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

1 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,§
2 12601).

3 33. As companies that manufacture, import, distribute, and/or sell the Products for use
4 in the California marketplace, Defendants know or should know that the Products contain lead and
5 that individuals who consume the SUBJECT PRODUCTS will be exposed to lead. The lead
6 exposures to consumers who consume the SUBJECT PRODUCTS are a natural and foreseeable
7 consequence of Defendants' placing the SUBJECT PRODUCTS into the stream of commerce.
8

9 34. Defendants have been informed of the lead in their SUBJECT PRODUCTS by the
10 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CRC.
11

12 35. Defendants also have constructive knowledge that their SUBJECT PRODUCTS
13 contain lead due to the widespread media coverage concerning the problem of lead in food
14 products in general.

15 36. Nevertheless, Defendants continue to expose consumers, including children, to lead
16 without prior clear and reasonable warnings regarding the carcinogenic hazards of lead.

17 37. CRC has engaged in good-faith efforts to resolve the claims alleged herein prior
18 to filing this Complaint.

19 38. Any person "violating or threatening to violate" Proposition 65 may be
20 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten
21 to violate" is defined to mean "to create a condition in which there is a substantial probability
22 that a violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for
23 civil penalties not to exceed \$2,500 per day for each violation of Proposition 65.
24

25
26 **V. FIRST CAUSE OF ACTION**

1 **For Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**
2 **the SUBJECT PRODUCTS described in the September 4, 2020**
3 **Prop. 65 NOTICE of Violation**

4 39. Plaintiff refers to, and incorporates by reference, the allegations of all preceding
5 Paragraphs this Complaint, as though fully set forth herein.

6 40. By committing the acts alleged in this Complaint, Defendants at all times relevant to
7 this action, and continuing through the present, have violated, or threaten to violate, H&S Code
8 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals in
9 California to chemicals known to the State of California to cause cancer or reproductive toxicity
10 without first giving clear and reasonable warnings to such persons who consume the SUBJECT
11 PRODUCTS containing the LISTED CHEMICAL, pursuant to H&S Code §§ 25249.6 and
12 25249.11(f).

13 41. By the above-described acts, Defendants have violated, or threaten to violate, H&S
14 Code §25249.6 and are therefore subject to preliminary and permanent injunctions ordering
15 Defendants to stop violating Proposition 65, to provide warnings to all present and future customers,
16 and to provide warnings to DEFENDANTS' past customers who purchased or used the SUBJECT
17 PRODUCTS without receiving a clear and reasonable warning.

18 42. An action for injunctive relief under Proposition 65 is specifically authorized by
19 H&S Code §25249.7(a).

20 43. By the above-described acts, Defendants are liable, pursuant to H&S Code
21 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure to
22 the LISTED CHEMICAL from the SUBJECT PRODUCTS and Plaintiff is appropriately entitled
23 to injunctive relief pursuant to Health and Safety Code, section 25249.7(a).

24 **VI. PRAYER FOR RELIEF**

25 WHEREFORE, PLAINTIFF prays for judgment against Defendants, and each of them, and
26 DOES 1 through 10, as follows:

1. A preliminary and permanent injunction, pursuant to H&S Code §25249.7(b), enjoining Defendants, their agents, employees, assigns and all persons acting in concert or participating with DEFENDANTS, from manufacturing, distributing, marketing or selling the SUBJECT PRODUCTS in California without first providing a clear and reasonable warning, within the meaning of Proposition 65, that the consumers of the SUBJECT PRODUCTS are exposed to the LISTED CHEMICAL;

2. A preliminary and permanent injunction, pursuant to H&S Code §25249.7(b), ordering Defendants, their agents, employees, assigns and all persons acting in concert or participating with DEFENDANTS to take action to stop ongoing unwarned exposures to THE LISTED CHEMICAL resulting from use of the SUBJECT PRODUCTS sold by Defendants, as CRC shall specify in further application to the Court;

3. An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b), against DEFENDANTS in the amount of \$2,500 per day for each violation of Proposition 65;

4. An award to PLAINTIFF of its reasonable attorney's fees and costs of suit pursuant to California Code of Civil Procedure §§ 1032 *et. seq* and 1021.5, as PLAINTIFF shall specify in further applications to the Court; and,

5. For such other and further relief as the Court may deem just and proper.

Dated this 5th day of April, 2021

MANNING LAW, A.P.C

James R. ...

By:

Joseph R. Manning, Jr., Esq.
Babak Hashemi, Esq.
Attorneys for Plaintiff