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ELECTRONICALLY
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Superior Court of California,
County of San Francisco
03/02/2023
Clerk of the Court
BY: JEFFREY FLORES
Deputy Clerk

6 Attorneys for Plaintiff
KEEP AMERICA SAFE AND BEAUTIFUL

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION

12 KEEP AMERICA SAFE AND BEAUTIFUL,
13 Plaintiff,
14 v.
15 KTM SERVICES, INC.; and DOES 1-30,
16 inclusive,
17 Defendants.

Case No.

CGC-23-604905

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

Violation of Proposition 65, The Safe
Drinking Water and Toxic Enforcement Act
of 1986 (Health & Safety Code § 25249.5 *et*
seq.)

UNLIMITED CIVIL

1 Plaintiff KEEP AMERICA SAFE AND BEAUTIFUL, acting in the public interest, alleges a
2 cause of action against Defendants KTM SERVICES, INC. and DOES 1-30.

3 **INTRODUCTION AND NATURE OF THE ACTION**

4 1. This Complaint is a representative action brought by plaintiff Keep America Safe and
5 Beautiful (“**KASB**”) in the public interest of the citizens of the State of California to enforce the
6 People’s right to be informed of the health hazards caused by exposures to the heavy metal, Lead, a
7 toxic chemical found in and on the dried plums manufactured, imported, distributed, sold or offered
8 for sale by Defendants in the State of California.

9 2. By this Complaint, plaintiff seeks to remedy Defendants’ continuing failure to warn
10 individuals not covered by California’s Occupational Safety Health Act, Labor Code § 6300 *et seq.*
11 (“**consumers**”) they are being exposed to substances known to the State of California to cause cancer
12 and birth defects or other reproductive harm through exposures to Lead, when they purchase, ingest
13 or handle Defendants’ dried plums.

14 3. Detectable levels of Lead are found in and on the dried plums that Defendants
15 manufacture, import, sell or distribute for sale to individuals throughout California.

16 4. Pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
17 Health and Safety Code § 25249.6 *et seq.* (“**Proposition 65**”), it is unlawful for a person in the course
18 of doing business to knowingly and intentionally expose consumers in California to chemicals known
19 to the State to cause cancer, birth defects or other reproductive harm, without first providing a “clear
20 and reasonable” health hazard warning to such individuals prior to purchase or use.

21 5. KASB contends and alleges Defendants manufacture, distribute, import, sell, and offer
22 for sale, in and into California dried plums (“**PRODUCTS**”) containing Lead, without Proposition
23 65’s requisite health hazard warning regarding the harms associated with exposures to the chemical,
24 including, but not limited to, *Enjoy Hawaii Premium Sweet Li Hing Mui Dried Plums Best By: 11*
25 *JUN 2022 UPC: 6 79757 17834 0 ASIN: B01CENTIR6*. Defendants’ conduct subjects them to civil
26 penalties for each violation, enjoinder as well as preliminary and permanent injunctive relief.
27 Health & Safety Code § 25249.7(a) and (b).
28

1 **PARTIES**

2 6. Plaintiff KASB is a non-profit corporation organized under the laws of California and
3 acting in the interest of the general public, dedicated to protecting the health of California citizens and
4 the environment through the elimination or reduction of toxic chemicals utilized in manufacturing
5 consumer products and to increasing public awareness of those chemicals through the promotion of
6 sound environmental practices and corporate responsibility. KASB is a person within the meaning of
7 Health & Safety Code § 25249.11(a), and it brings this action in the public interest, pursuant to
8 Health and Safety Code § 25249.7(d).

9 7. Plaintiff is informed, believes, and thereon alleges, at all relevant times, Defendant
10 KTM SERVICES, INC. (“**KTM**”) was and is a “person” “in the course of doing business” with ten
11 (10) or more employees, within the meanings of Health and Safety Code §§ 25249.6 and 25249.11.

12 8. KTM manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale
13 or use in the State of California, or implies by its conduct that it manufactures, imports, distributes,
14 sells, and/or offers the PRODUCTS for sale or use in the State of California.

15 9. Defendants DOES 1-10 (“**MANUFACTURER DEFENDANTS**”) are each a person
16 in the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
17 25249.11. MANUFACTURER DEFENDANTS, and each of them, assemble, fabricate, and
18 manufacture, or each implies by its conduct that it does such for one or more of the PRODUCTS
19 offered for sale or use in California.

20 10. Defendants DOES 11-20 (“**DISTRIBUTOR DEFENDANTS**”) are each a person in
21 the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.
22 DISTRIBUTOR DEFENDANTS, and each of them, distribute, transfer, and transport, or each
23 impliedly does so by its conduct, one or more of the PRODUCTS to individuals, businesses, or
24 retailers for sale or use in the State of California

25 11. Defendants DOES 21-30 (“**RETAILER DEFENDANTS**”) are each a person in the
26 course of doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.
27 RETAILER DEFENDANTS, and each of them, by and through their conduct, offer the PRODUCTS
28 for sale to individuals in the State of California.

1 DEFENDANTS conducted, and continue to conduct, business in the County of San Francisco with
2 respect to the PRODUCTS that are the subject of this action.

3 **REGULATORY BACKGROUND AND LAW**

4 17. In 1986, the people of the State of California approved an initiative addressing the
5 harms caused by hazardous chemicals and declared their right “[t]o be informed about exposures to
6 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp., Proposed
7 General Law, Gen. Elec. (Nov. 4, 1986) at p.3.

8 18. Formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986 and
9 codified at Health & Safety Code § 25249.6 *et seq.*, Proposition 65 states, in relevant part, “[n]o
10 person in the course of doing business shall knowingly and intentionally expose any individual to a
11 chemical known to cause cancer or reproductive toxicity without first giving a clear and reasonable
12 warning to such individual...”

13 19. Under the Act, a “person in the course of doing business” is defined as a business with
14 ten (10) or more employees. Health & Safety Code § 25249.11(b). Businesses are prohibited from
15 exposing individuals to hazardous chemicals without first giving a “clear and reasonable” warning.
16 Health & Safety Code § 25249.6.

17 20. Exposing individuals to hazardous chemicals means to cause individuals to ingest,
18 inhale, contact via body surfaces or otherwise come into contact with a listed chemical. 27 CCR
19 § 25102(i). An exposure to a hazardous chemical is defined as one that “results from a person’s
20 acquisition, purchase, storage, consumption or other reasonably foreseeable use of a product...”
21 27 C.C.R. § 25600(h).

22 21. Under Proposition 65, persons violating the statute may be enjoined in any court of
23 competent jurisdiction and may be subject to civil penalties of up to \$2,500 per day, per violation.
24 Health & Safety Code § 25249.7.

25 22. On February 27, 1987, pursuant to Proposition 65’s implementing regulations,
26 California identified and listed Lead as a chemical known to the State cause birth defects and
27 reproductive harm or reproductive toxicity. Lead became subject to the “clear and reasonable
28

1 warning” requirements one year later, on February 27, 1988. Cal. Code Regs. tit. 27, § 27001(c);
2 Health & Safety Code §§ 25249.8, 25249.10(b).

3 23. On October 1, 1992, pursuant to Proposition 65’s implementing regulations, California
4 identified and listed Lead as a chemical known to the State cause cancer. Lead became subject to the
5 “clear and reasonable warning” requirements one year later, on October 1, 1993. Cal. Code Regs.
6 tit. 27, § 27001(c); Health & Safety Code §§ 25249.8, 25249.10(b).

7 **STATEMENT OF FACTS**

8 24. Plaintiff purchased DEFENDANTS’ PRODUCTS, without a warning, in California.

9 25. Plaintiff investigated and tested DEFENDANTS’ PRODUCTS at an accredited lab,
10 and consulted with a person with relevant and appropriate knowledge and expertise, who, after
11 reviewing the collected data and analyzing the risk of exposure to Lead, determined the PRODUCTS
12 subject consumers in California to exposure to the listed chemical at levels requiring a warning under
13 the statute, based on touching, handling or otherwise utilizing PRODUCTS in accordance with their
14 reasonably foreseeable and intended usages.

15 26. Based on the foregoing, Plaintiff’s attorney executed a certificate of merit, attesting
16 there was a reasonable and meritorious case for this private action and included the factual
17 information supporting the certificate when it served the notice on the California Attorney General’s
18 Office, as required. Health & Safety Code § 25249.7(d); Title 11 C.C.R. § 3102.

19 27. Thereafter, on December 22, 2021, plaintiff served a 60-Day Notice of Violation
20 (“**Notice**”), together with the certificate of merit, on KTM, the California Attorney General’s Office,
21 and the requisite public enforcement agencies, alleging, as a result of DEFENDANTS’ sales of the
22 PRODUCTS, consumers in the State of California were, and are, being exposed to Lead through their
23 reasonably foreseeable use of the PRODUCTS as intended without first receiving a “clear and
24 reasonable warning,” as required by Proposition 65.

25 28. After receiving plaintiff’s Notice, no public enforcement agency has commenced and
26 is diligently prosecuting a cause of action against DEFENDANTS under Proposition 65 to enforce
27 the alleged violations that are the subject of the Notice.
28

1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65 - Against All DEFENDANTS)**

3 29. KASB realleges and incorporates by reference, as if fully stated herein, the allegations
4 set forth in Paragraphs 1 through 28, inclusive.

5 30. DEFENDANTS' PRODUCTS contain Lead in levels requiring a clear and reasonable
6 warning under Proposition 65.

7 31. DEFENDANTS know or should have known the PRODUCTS they manufacture,
8 import, distribute, sell, and offer for sale in California contain Lead. As a result of plaintiff's Notice,
9 DEFENDANTS also have actual knowledge of the presence of Lead in the PRODUCTS.

10 32. The PRODUCTS DEFENDANTS manufacture, import, distribute, sell, and offer for
11 sale in or into the State of California cause exposures to Lead, both direct and/or indirect dermal
12 contact and ingestion, through the reasonably foreseeable use of the PRODUCTS.

13 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
14 continues to cause, exposures to Lead.

15 34. DEFENDANTS know the normal and reasonably foreseeable use of the PRODUCTS
16 exposes individuals to Lead through direct and indirect dermal contact and/or ingestion.

17 35. DEFENDANTS intend that exposures to Lead from the reasonably foreseeable use of
18 the PRODUCTS will occur by their deliberate, non-accidental participation in the California
19 marketplace.

20 36. The exposures to Lead, caused by DEFENDANTS and endured by consumers and
21 other individuals in California, are not exempt from the "clear and reasonable" warning requirements
22 of Proposition 65.

23 37. DEFENDANTS failed to provide a "clear and reasonable warning" to those consumers
24 and other individuals in California who have been, or who will be, exposed to Lead through direct
25 and indirect dermal contact and/or ingestion resulting from the use of the PRODUCTS as intended.

26 38. Contrary to the express policy and statutory prohibition of Proposition 65, consumers
27 and other individuals, exposed to Lead through dermal contact and ingestion as a result of their use of
28 the PRODUCTS that DEFENDANTS sold without a "clear and reasonable" health hazard warning,

1 have suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or
2 adequate remedy at law.

3 39. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS for
4 sale or use in violation of Health and Safety Code § 25249.6, and DEFENDANTS' violations have
5 continued beyond their receipt of plaintiff's Notice. As such, DEFENDANTS' violations are
6 ongoing and continuous in nature and, unless enjoined, will continue in the future.

7 40. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-
8 described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty of \$2,500
9 per day for each violation.

10 41. As a consequence of the above-described acts, Health and Safety Code § 25249.7(a)
11 also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

12 **PRAYER FOR RELIEF**

13 Wherefore, KASB prays for relief and judgment against DEFENDANTS, and each of them,
14 as follows:

15 1. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily and
16 permanently enjoin DEFENDANTS from manufacturing, distributing, importing, marketing or
17 otherwise offering the PRODUCTS for sale or use in California without first providing a "clear and
18 reasonable warning" to consumers addressing the harms associated with exposures to Lead;

19 2. That the Court, pursuant to Health and Safety Code § 25249.7(a), issue preliminary
20 and permanent injunctions mandating DEFENDANTS recall all PRODUCTS currently in the chain
21 of commerce in California that do not bear a clear and reasonable health hazard warning;

22 3. That the Court assess civil penalties against DEFENDANTS, and each of them, in the
23 amount of \$2,500 per day for each violation of Proposition 65, in an amount to be determined at trial;

24 4. That the Court award plaintiff its reasonable attorneys' fees and costs of suit, incurred
25 herein; and

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5. That the Court grant any further relief as it deems just and equitable.

Dated: March 2, 2023

Respectfully submitted,

SEVEN HILLS LLP

By: 

Laralei Paras
Attorneys for Plaintiff
Keep America Safe and Beautiful