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23CV419872
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KEEP AMERICA SAFE AND BEAUTIFUL

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11 UNLIMITED CIVIL JURISDICTION

12 KEEP AMERICA SAFE AND BEAUTIFUL,

13 Plaintiff,

14 v.

15 DOUGLAS-CROSS ENTERPRISES, INC.;

16 and DOES 1-30, inclusive,

17 Defendants.

Case No. 23CV419872

**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 DOUGLAS-CROSS ENTERPRISES, 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 metals, Lead
7 and Mercury, toxic chemicals found in dried mushroom powder manufactured, imported, distributed,
8 sold or offered 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 and Mercury, when they
13 purchase, ingest or handle Defendants’ dried mushroom powder.

14 3. Detectable levels of Lead and Mercury are found in the dried mushroom powder that
15 Defendants manufacture, import, sell or distribute for sale to consumers 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
22 offer for sale, in and into California dried mushroom powder (“**PRODUCTS**”) containing Lead and
23 Mercury, without Proposition 65’s requisite health hazard warning regarding the harms associated
24 with exposures to the chemical, including, but not limited to, *Rub with Love by Tom Douglas*
25 (*Mushroom, 3.5 oz*); *Exp: 07/2023, UPC 6 72361 00030 4 ASIN B000VBVZRK*. Defendants’
26 conduct subjects them to civil penalties for each violation, enjoinder as well as preliminary and
27 permanent injunctive relief. Health & Saf. 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 or migrating into food sources from pollution, and to increasing public awareness
6 of those chemicals through the promotion of sound environmental practices and corporate
7 responsibility. KASB is a person within the meaning of Health & Safety Code § 25249.11(a), and it
8 brings this action in the public interest, pursuant to Health and Safety Code § 25249.7(d).

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

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

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

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

26 11. Defendants DOES 21-30 (“**RETAILER DEFENDANTS**”) are each a person in the
27 course of doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.
28

1 RETAILER DEFENDANTS, and each of them, by and through their conduct, offer the PRODUCTS
2 for sale to consumers in the State of California.

3 12. At this time, the true names of Defendants DOES 1 through 30, inclusive, are
4 unknown to plaintiff, who, therefore, sues said DOES Defendants by their fictitious names, pursuant
5 to Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, each of
6 the fictitiously named Defendants is responsible in some manner for the acts and occurrences alleged
7 herein and the damages caused thereby. When ascertained, their true names and capacities shall be
8 reflected in an amended complaint.

9 13. At all times mentioned herein, DOUGLAS-CROSS, MANUFACTURER
10 DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall,
11 hereinafter, where appropriate, be referred to collectively as the “DEFENDANTS.”

12 **JURISDICTION AND VENUE**

13 14. This Court has jurisdiction over this action, pursuant to Cal. Health & Safety Code
14 § 25249.7, allowing enforcement by any court of competent jurisdiction. The California Superior
15 Court has jurisdiction over this action, pursuant to California Constitution Article VI, section 10,
16 which grants the Superior Court “original jurisdiction in all causes except those given by statute to
17 other trial courts.” The statute under which this action is brought does not specify any other basis of
18 subject matter jurisdiction.

19 15. The California Superior Court has jurisdiction over DEFENDANTS, based on
20 plaintiff’s information and good faith belief DEFENDANTS are each a person, firm, corporation or
21 association that is a citizen of the State of California, does sufficient business in California, has
22 sufficient minimum contacts in California, and/or otherwise purposefully and intentionally avail
23 themselves of the California market through their manufacture, importation, distribution, promotion,
24 marketing or sale of PRODUCTS within the State. DEFENDANTS’ purposeful availment renders the
25 exercise of personal jurisdiction by California courts consistent with traditional notions of fair play
26 and substantial justice.

27 16. Venue is proper in the Superior Court for the County of Santa Clara, pursuant to Code
28 of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of competent jurisdiction,

1 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
2 wrongful conduct occurred, and continue to occur, in this county, and/or because DEFENDANTS
3 conducted, and continue to conduct, business in the County of Santa Clara with respect to the
4 PRODUCTS that are the subject of this action.

5 **REGULATORY BACKGROUND AND LAW**

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

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

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

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

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

27 22. On February 27, 1987, pursuant to Proposition 65’s implementing regulations,
28 California identified and listed Lead as a chemical known to the State cause birth defects and

1 reproductive harm or reproductive toxicity. Lead became subject to the “clear and reasonable
2 warning” requirements one year later, on February 27, 1988. 27 CCR § 27001(b); Health & Saf.
3 Code §§ 25249.8, 25249.10(b).

4 23. On October 1, 1992, pursuant to Proposition 65’s implementing regulations, California
5 identified and listed Lead as a chemical known to the State to cause cancer. Lead as a carcinogen
6 became subject to the “clear and reasonable warning” requirements one year later, on October 1,
7 1993. Cal. Code Regs. tit. 27, § 27001(c); Health & Saf. Code §§ 25249.8, 25249.10(b).

8 24. On July 1, 1987, pursuant to Proposition 65’s implementing regulations, California
9 identified and listed methylmercury and methylmercury compounds (“Organic Mercury”) as a
10 chemical known to cause developmental toxicity. Organic Mercury became subject to the “clear and
11 reasonable warning” requirements on July 1, 1988. Cal. Code Regs. tit. 27, § 27001(b), (c); Health &
12 Saf. Code §§ 25249.8, 25249.10(b).

13 25. On May 1, 1996, pursuant to Proposition 65’s implementing regulations, California
14 identified and listed Organic Mercury as a chemical known to cause cancer. Organic Mercury as a
15 carcinogen became subject to the “clear and reasonable warning” requirements one year later, on
16 October 1, 1993. 27, CCR § 27001(b)

17 26. On July 1, 1990, California listed mercury and mercury compounds (“Inorganic
18 Mercury”) as known to cause developmental toxicity. Inorganic Mercury became subject to the “clear
19 and reasonable warning” requirements on July 1, 1991. Cal. Code Regs. tit. 27, § 27001(b); Health &
20 Saf. Code §§ 25249.8, 25249.10(b). Organic Mercury and Inorganic Mercury are collectively referred
21 to herein as “Mercury.”

22 **STATEMENT OF FACTS**

23 27. DEFENDANTS’ PRODUCTS were purchased without a warning in California.

24 28. Plaintiff investigated and tested DEFENDANTS’ PRODUCTS at an accredited lab,
25 and consulted with a person with relevant and appropriate knowledge and expertise, who, after
26 reviewing the collected data and analyzing the risk of exposure to Lead and Mercury, determined the
27 PRODUCTS contain Lead and Mercury and subject consumers in California to exposure to the listed
28

1 chemicals at levels requiring a warning under the statute, based on ingesting, touching or otherwise
2 utilizing PRODUCTS in accordance with their reasonably foreseeable and intended usages.

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

7 30. Thereafter, on October 6, 2022, plaintiff served a 60-Day Notice of Violation
8 (“**Notice**”), together with the certificate of merit, on DOUGLAS-CROSS, the California Attorney
9 General’s Office, and the requisite public enforcement agencies, alleging, as a result of
10 DEFENDANTS’ sales of the PRODUCTS, consumers in the State of California were, and are, being
11 exposed to Lead and Mercury through their reasonably foreseeable use of the PRODUCTS as
12 intended without first receiving a “clear and reasonable warning,” as required by Proposition 65.

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

16 **FIRST CAUSE OF ACTION**

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

18 32. KASB realleges and incorporates by reference, as if fully stated herein, the allegations
19 set forth in Paragraphs 1 through 31, inclusive.

20 33. DEFENDANTS’ PRODUCTS contain Lead and Mercury in levels requiring a clear
21 and reasonable warning under Proposition 65.

22 34. DEFENDANTS know or should have known the PRODUCTS they manufacture,
23 import, distribute, sell, and offer for sale in California contain Lead and Mercury. As a result of
24 plaintiff’s Notice, DEFENDANTS also have actual knowledge of the presence of Lead and Mercury
25 in the PRODUCTS.

26 35. The PRODUCTS DEFENDANTS manufacture, import, distribute, sell, and offer for
27 sale in or into the State of California cause exposures to Lead and Mercury, both direct and indirect
28 ingestion and dermal contact, through the reasonably foreseeable use of the PRODUCTS.

1 36. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
2 continues to cause, exposures to Lead and Mercury.

3 37. DEFENDANTS know the normal and reasonably foreseeable use of the PRODUCTS
4 exposes consumers to Lead and Mercury through direct and indirect ingestion and dermal contact.

5 38. DEFENDANTS intend that exposures to Lead and Mercury from the reasonably
6 foreseeable use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
7 California marketplace.

8 39. The exposures to Lead and Mercury, caused by DEFENDANTS and endured by
9 consumers in California, are not exempt from the “clear and reasonable” warning requirements of
10 Proposition 65.

11 40. DEFENDANTS failed to provide a “clear and reasonable warning” to those consumers
12 in California who have been, or who will be, exposed to Lead and Mercury through direct and
13 indirect ingestion and dermal contact resulting from the use of the PRODUCTS as intended.

14 41. Contrary to the express policy and statutory prohibition of Proposition 65, consumers,
15 exposed to Lead and Mercury through ingestion and dermal contact as a result of their use of the
16 PRODUCTS that DEFENDANTS sold without a “clear and reasonable” health hazard warning, have
17 suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate
18 remedy at law.

19 42. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS for
20 sale or use in violation of Health and Safety Code § 25249.6, and DEFENDANTS’ violations have
21 continued beyond their receipt of plaintiff’s Notice. As such, DEFENDANTS’ violations are
22 ongoing and continuous in nature and, unless enjoined, will continue in the future.

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

26 44. As a consequence of the above-described acts, Health and Safety Code § 25249.7(a)
27 also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.
28

1 **PRAYER FOR RELIEF**

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

4 1. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily and
5 permanently enjoin DEFENDANTS from manufacturing, distributing, importing, marketing or
6 otherwise offering the PRODUCTS for sale or use in California without first providing a “clear and
7 reasonable warning” to consumers addressing the harms associated with exposures to Lead and
8 Mercury;

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

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

14 4. That the Court award plaintiff its reasonable attorneys’ fees and costs of suit, incurred
15 herein; and

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

17 Dated: July 26, 2023

Respectfully submitted,

18 SEVEN HILLS LLP

19
20 By: 

Laralei Paras

Attorneys for Plaintiff

Keep America Safe and Beautiful