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CONSUMER ADVOCACY GROUP, INC.

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES**

11 CONSUMER ADVOCACY GROUP, INC.,
in the public interest,

12
13 Plaintiff,

14 v.

15 THE NAPOLEON CO., a Washington
Corporation;
16 BRISTOL FARMS DBA LAZY ACRES
MARKET, INC., a California Corporation;
17 and DOES 1-10,

18 Defendants.
19

CASE NO. **24STCV09065**

COMPLAINT FOR PENALTY AND
INJUNCTION

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

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

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23 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges one cause of action against
24 defendants THE NAPOLEON CO.; BRISTOL FARMS DBA LAZY ACRES MARKET, INC.
25 and DOES 1-10 as follows:

26 **THE PARTIES**

27 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff” or “CAG”) is an
28 organization qualified to do business in the State of California. CAG is a person within

1 the meaning of Health and Safety Code Section 25249.11, subdivision (a). CAG, acting
2 as a private attorney general, brings this action in the public interest as defined under
3 Health and Safety Code Section 25249.7, subdivision (d).

4 2. Defendant THE NAPOLEON CO. (“NAPOLEON”) is a Washington Corporation doing
5 business in the State of California at all relevant times herein.

6 3. Defendant BRISTOL FARMS DBA LAZY ACRES MARKET, INC. (“BRISTOL”) is a
7 California Corporation, qualified to do business in California and doing business in the
8 State of California at all relevant times herein.

9 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-10,
10 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
11 Complaint to allege their true names and capacities when ascertained. Plaintiff is
12 informed, believes, and thereon alleges that each fictitiously named defendant is
13 responsible in some manner for the occurrences herein alleged and the damages caused
14 thereby.

15 5. At all times mentioned herein, the term “Defendants” includes NAPOLEON, BRISTOL,
16 and DOES 1-10.

17 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
18 times mentioned herein have conducted business within the State of California.

19 7. Upon information and belief, at all times relevant to this action, each of the Defendants,
20 including DOES 1-10, was an agent, servant, or employee of each of the other
21 Defendants. In conducting the activities alleged in this Complaint, each of the
22 Defendants was acting within the course and scope of this agency, service, or
23 employment, and was acting with the consent, permission, and authorization of each of
24 the other Defendants. All actions of each of the Defendants alleged in this Complaint
25 were ratified and approved by every other Defendant or their officers or managing
26 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the
27 alleged wrongful conduct of each of the other Defendants.

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1 8. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
2 Defendants was a person doing business within the meaning of Health and Safety Code
3 Section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
4 employees at all relevant times.

5 **JURISDICTION**

6 9. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
7 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
8 those given by statute to other trial courts. This Court has jurisdiction over this action
9 pursuant to Health and Safety Code Section 25249.7, which allows enforcement of
10 violations of Proposition 65 in any Court of competent jurisdiction.

11 10. This Court has jurisdiction over Defendants named herein because Defendants either
12 reside or are located in this State or are foreign corporations authorized to do business in
13 California, are registered with the California Secretary of State, or who do sufficient
14 business in California, have sufficient minimum contacts with California, or otherwise
15 intentionally avail themselves of the markets within California through their
16 manufacture, distribution, promotion, marketing, or sale of their products within
17 California to render the exercise of jurisdiction by the California courts permissible
18 under traditional notions of fair play and substantial justice.

19 11. Venue is proper in the County of Los Angeles because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
21 because Defendants conducted, and continue to conduct, business in the County of Los
22 Angeles with respect to the consumer product that is the subject of this action.

23 **BACKGROUND AND PRELIMINARY FACTS**

24 12. In 1986, California voters approved an initiative to address growing concerns about
25 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
26 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
27 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
28

1 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code Sections
2 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
3 from contamination, to allow consumers to make informed choices about the products
4 they buy, and to enable persons to protect themselves from toxic chemicals as they see
5 fit.

6 13. Proposition 65 requires the Governor of California to publish a list of chemicals known
7 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
8 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains over
9 700 chemicals and chemical families. Proposition 65 imposes warning requirements and
10 other controls that apply to Proposition 65-listed chemicals.

11 14. All businesses with ten (10) or more employees that operate or sell products in California
12 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
13 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
14 water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear and
15 reasonable” warnings before exposing a person, knowingly and intentionally, to a
16 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

17 15. Proposition 65 provides that any person "violating or threatening to violate" the statute
18 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
19 25249.7. "Threaten to violate" means "to create a condition in which there is a
20 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
21 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
22 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

23 16. Plaintiff identified certain practices of manufacturers and distributors of Anchovies of
24 exposing, knowingly and intentionally, persons in California to Cadmium and Cadmium
25 Compounds of such products without first providing clear and reasonable warnings of
26 such to the exposed persons prior to the time of exposure. Plaintiff later discerned that
27 Defendants engaged in such practice.

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1 17. On October 1, 1987 the Governor of California added Cadmium and Cadmium
2 Compounds (“Cadmium”) to the list of chemicals known to the State to cause cancer
3 (*Cal. Code Regs.* tit. 27, § 27001(b)). Pursuant to Health and Safety Code Sections
4 25249.9 and 25249.10, twenty (20) months after addition of Cadmium to the list of
5 chemicals known to the State to cause cancer, Cadmium became fully subject to
6 Proposition 65 warning requirements and discharge prohibitions.

7 18. On May 1, 1997, the Governor of California added Cadmium to the list of chemicals
8 known to the State to cause developmental and reproductive toxicity (*Cal. Code Regs.*
9 tit. 27, § 27001(c)). Cadmium is known to the State to cause developmental, and male
10 reproductive toxicity. Pursuant to Health and Safety Code Sections 25249.9 and
11 25249.10, twenty (20) months after addition of Cadmium to the list of chemicals known
12 to the State to cause developmental and reproductive toxicity, Cadmium became fully
13 subject to Proposition 65 warning requirements and discharge prohibitions.

14 **SATISFACTION OF PRIOR NOTICE**

15 19. Plaintiff served the following notices for alleged violations of Health and Safety Code
16 Section 25249.6, concerning consumer products exposures:

- 17 a. On or about June 13, 2023, Plaintiff gave notice of alleged violations of Health
18 and Safety Code Section 25249.6, concerning consumer products exposures
19 subject to a private action to NAPOLEON, BRISTOL, and to the California
20 Attorney General, County District Attorneys, and City Attorneys for each city
21 containing a population of at least 750,000 people in whose jurisdictions the
22 violations allegedly occurred, concerning the Anchovies.

23 20. Before sending the notice of alleged violations, Plaintiff investigated the consumer
24 products involved, the likelihood that such products would cause users to suffer
25 significant exposures to Cadmium and Cadmium Compounds, and the corporate
26 structure of each of the Defendants.

1 21. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
2 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
3 Plaintiff who executed the certificate had consulted with at least one person with relevant
4 and appropriate expertise who reviewed data regarding the exposures to Cadmium and
5 Cadmium Compounds, the subject Proposition 65-listed chemical of this action. Based
6 on that information, the attorney for Plaintiff who executed the Certificate of Merit
7 believed there was a reasonable and meritorious case for this private action. The
8 attorney for Plaintiff attached to the Certificate of Merit served on the Attorney General
9 the confidential factual information sufficient to establish the basis of the Certificate of
10 Merit.

11 22. Plaintiff's notice of alleged violations also included a Certificate of Service and a
12 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
13 (Proposition 65) A Summary." *Health & Safety Code § 25249.7(d)*.

14 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
15 gave notice of the alleged violations to NAPOLEON, BRISTOL, and the public
16 prosecutors referenced in Paragraph 19.

17 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
18 any applicable district attorney or city attorney has commenced and is diligently
19 prosecuting an action against the Defendants.

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21 **FIRST CAUSE OF ACTION**

22 **(By CONSUMER ADVOCACY GROUP, INC. and against NAPOLEON,**
23 **BRISTOL, and DOES 1-10 for Violations of Proposition 65, The Safe Drinking**
24 **Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et***
25 ***seq.*))**

26 **Seafood Products**

27 25. Plaintiff repeats and incorporates by reference paragraphs 1 through 24 of this complaint
28 as though fully set forth herein.

1 26. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
2 distributor, promoter, or retailer of Anchovies, including but not limited to: “Napoleon
3 Since 1903”; “Classic Taste”; “Flat Anchovies”; “Packed in Olive Oil”; “Net Wt. 3.5 oz
4 (100 g)”; “Imported By The Napoleon Co.”; “Product of Peru”; “Best By: Apr 2023”;
5 “LR22K21”; “UPC 041253002502”.

6 27. Anchovies contains Cadmium.

7 28. Defendants knew or should have known that Cadmium has been identified by the State
8 of California as a chemical known to cause cancer, and reproductive toxicity and
9 therefore was subject to Proposition 65 warning requirements. Defendants were also
10 informed of the presence of Cadmium in Anchovies within Plaintiff’s notice of alleged
11 violations further discussed above at Paragraph 19a.

12 29. Plaintiff’s allegations regarding Anchovies concerns “[c]onsumer products exposure[s],”
13 which “is an exposure that results from a person’s acquisition, purchase, storage,
14 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
15 that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, § 25602(b)*.
16 Anchovies are consumer products, and, as mentioned herein, exposures to Cadmium
17 took place as a result of such normal and foreseeable consumption and use.

18 30. Plaintiff is informed, believes, and thereon alleges that between June 13, 2020 and the
19 present, each of the Defendants knowingly and intentionally exposed California
20 consumers and users of Anchovies, which Defendants manufactured, distributed, or sold
21 as mentioned above, to Cadmium, without first providing any type of clear and
22 reasonable warning of such to the exposed persons before the time of exposure.
23 Defendants have distributed and sold Anchovies in California. Defendants know and
24 intend that California consumers will use and consume Anchovies, thereby exposing
25 them to Cadmium. Further, Plaintiff is
26 informed, believes, and thereon alleges that Defendants are selling Anchovies under a
27 brand or trademark that is owned or licensed by the Defendants or an entity affiliated
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1 thereto; have knowingly introduced Cadmium into Anchovies or knowingly caused
2 Cadmium to be created in Anchovies; have covered, obscured or altered a warning label
3 that has been affixed to Anchovies by the manufacturer, producer, packager, importer,
4 supplier or distributor of Anchovies; have received a notice and warning materials for
5 exposure from Anchovies without conspicuously posting or displaying the warning
6 materials; and/or have actual knowledge of potential exposure to Cadmium from
7 Anchovies. Defendants thereby violated Proposition 65.

8 31. The principal routes of exposure are through ingestion, especially direct (oral) ingestion,
9 inhalation, and trans-dermal absorption. Persons sustain exposures primarily by eating
10 and consuming Anchovies, and additionally by handling Anchovies without wearing
11 gloves or any other personal protective equipment, or by touching bare skin or mucous
12 membranes with gloves after handling Anchovies, as well as through direct and indirect
13 hand to mouth contact, hand to mucous membrane, or even breathing in particulate
14 matter dispersed from Anchovies. Plaintiff is informed, believes, and thereon alleges
15 that each of Defendants' violations of Proposition 65 as to Anchovies have been ongoing
16 and continuous, as Defendants engaged and continue to engage in conduct which
17 violates Health and Safety Code Section 25249.6, including the manufacture,
18 distribution, promotion, and sale of Anchovies, so that a separate and distinct violation of
19 Proposition 65 occurred each and every time a person was exposed to Cadmium by
20 Anchovies as mentioned herein.

21 32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
22 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
23 violations alleged herein will continue to occur into the future.

24 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
25 \$2,500.00 per day per individual exposure to Cadmium from Anchovies, pursuant to
26 Health and Safety Code Section 25249.7(b).

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1 34. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
2 filing this Complaint.

3 **PRAYER FOR RELIEF**

4 Plaintiff demands against each of the Defendants as follows:

- 5 1. A permanent injunction mandating Proposition 65-compliant warnings;
6 2. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);
7 3. Costs of suit;
8 4. Reasonable attorney fees and costs; and
9 5. Any further relief that the court may deem just and equitable.

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11 Dated: April 10, 2024

YEROUSHALMI & YEROUSHALMI*

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13 */s/ Reuben Yeroushalmi*

14 _____
15 Reuben Yeroushalmi
16 Attorneys for Plaintiff,
17 CONSUMER ADVOCACY GROUP, INC.
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