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6

ELECTRONICALLY
FILED

Superior Court of California,
County of San Francisco

12/15/2023
Clerk of the Court
BY: SHENEQUA GLADNEY
Deputy Clerk

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF SAN FRANCISCO

9 UNLIMITED CIVIL JURISDICTION

CGC-23-611124

10
11 KEEP AMERICA SAFE AND BEAUTIFUL,

12 Plaintiff,

13 v.

14 DIASPORA CO. LLC; and DOES 1-30,
15 inclusive,

16 Defendants.
17

Case No.

**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 DIASPORA CO. LLC 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 the Moringa powder manufactured, imported, distributed, sold or offered for
8 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 eat, consume, or
13 otherwise ingest Defendants’ Moringa powder.

14 3. Detectable levels of Lead are found in the Moringa powder 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 Moringa powder (“**PRODUCTS**”) containing Lead, without
23 Proposition 65’s requisite health hazard warning regarding the harms associated with exposures to the
24 chemical, including, but not limited to, *Kudligi Moringa, 8 Ounces, Harvested/Milled by: 3/21, Best*
25 *if used by: 9/22*. Defendants’ conduct subjects them to civil penalties for each violation, enjoinder
26 as well as preliminary and permanent injunctive relief. Health & Safety Code § 25249.7(a) and (b).

1 **PARTIES**

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

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

13 8. DIASPORA manufactures, imports, distributes, sells, and/or offers the PRODUCTS
14 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
15 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 individuals, 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 individuals 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
6 of the fictitiously named Defendants is responsible in some manner for the acts and occurrences
7 alleged herein and the damages caused thereby. When ascertained, their true names and capacities
8 shall be reflected in an amended complaint.

9 13. At all times mentioned herein, DIASPORA, MANUFACTURER DEFENDANTS,
10 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, hereinafter, where
11 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
25 the exercise of personal jurisdiction by California courts consistent with traditional notions of fair
26 play and substantial justice.

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

1 jurisdiction, because plaintiff seeks civil penalties against DEFENDANTS, because one or more
2 instances of wrongful conduct occurred, and continue to occur, in this county, and/or because
3 DEFENDANTS conducted, and continue to conduct, business in the County of San Francisco with
4 respect to the 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 & Safety Code § 25249.11(b). Businesses are prohibited from
17 exposing individuals to hazardous chemicals without first giving a “clear and reasonable” warning.
18 Health & Safety Code § 25249.6.

19 20. Exposing individuals to hazardous chemicals means to cause individuals to ingest,
20 inhale, contact via body surfaces or otherwise come into contact with a listed chemical. 27 CCR
21 § 25102(i). An exposure to a hazardous chemical is defined as one that “results from a person’s
22 acquisition, purchase, storage, consumption or other reasonably foreseeable use of a product...”
23 27 C.C.R. § 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 & Safety 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 cause birth defects and reproductive

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

8 **STATEMENT OF FACTS**

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

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

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

20 27. Thereafter, on July 3, 2023, plaintiff served a 60-Day Notice of Violation (“**Notice**”),
21 together with the certificate of merit, on DIASPORA, the California Attorney General’s Office, and
22 the requisite public enforcement agencies, alleging, as a result of DEFENDANTS’ sales of the
23 PRODUCTS, consumers in the State of California were, and are, being exposed to Lead through their
24 reasonably foreseeable use of the PRODUCTS as intended without first receiving a “clear and
25 reasonable warning,” as required by Proposition 65.

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

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: December 15, 2023

Respectfully submitted,

SEVEN HILLS LLP

By: 

Kimberly Gates Johnson
Attorneys for Plaintiff
Keep America Safe and Beautiful