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County of San Francisco

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

GABRIEL ESPINOZA,

Plaintiff,

vs.

THE KROGER CO.,

Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF** **CGC-25-625462**

**(Violation of Health & Safety Code § 25249.5 et
seq.)**

Plaintiff Gabriel Espinoza ("Plaintiff"), by and through his attorneys, alleges the following cause of action in the public interest of the citizens of the State of California.

BACKGROUND OF THE CASE

1. Plaintiff brings this representative action on behalf of all California citizens to enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part, "[n]o 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 ...". Health & Safety Code § 25249.6.

2. This complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California to enforce the People's right to be informed of the health hazards caused by exposure to lead, a toxic chemical found in *Simple Truth*™ gluten free freeze dried cinnamon apples sold and/or distributed by defendant The Kroger Co. ("Kroger" or "Defendant") in California.

1 3. Lead is a harmful chemical known to the State of California to cause cancer and
2 birth defects or other reproductive harm. On October 1, 1992, the state of California listed lead as
3 a chemical known to cause cancer and it has come under the purview of Proposition 65 regulations
4 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
5 25249.10(b). On February 27, 1987, the State of California listed lead as a chemical known to
6 cause birth defects or other reproductive harm.

7 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
8 within California or sell products therein to comply with Proposition 65 regulations. Included in
9 such regulations is the requirement that businesses must label any product containing a Proposition
10 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
11 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
12 chemical.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
14 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
15 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
16 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
17 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
18 25249.7.

19 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
20 without a requisite exposure warning, *Simple Truth*[™] gluten free freeze dried cinnamon apples
21 (the “Products”) that expose persons to lead when used for their intended purpose.

22 7. Defendant’s failure to warn consumers and other individuals in California of the
23 health hazards associated with exposure to lead in conjunction with the sale and/or distribution of
24 the Products is a violation of Proposition 65 and subjects Defendant to the enjoinder and civil
25 penalties described herein.

26 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition 65
27 in accordance with Health and Safety Code § 25249.7(b).
28

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendant to provide purchasers or users of the Products with required warnings related to the dangers and health hazards associated with exposure to lead pursuant to Health and Safety Code § 25249.7(a).

10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

PARTIES

11. Plaintiff is a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals in products sold in California and to improve human health by reducing hazardous substances contained in such items. He brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

12. Defendant The Kroger Co., through its business, effectively imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant The Kroger Co. is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

VENUE AND JURISDICTION

13. Venue is proper in the County of San Francisco because one or more of the instances of wrongful conduct occurred, and continue to occur in this county and/or because Defendant conducted, and continues to conduct, business in the County of San Francisco with respect to the Products.

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

15. This Court has jurisdiction over Defendant because Defendant is either a citizen of the State of California, has sufficient minimum contacts with the State of California, is registered with the California Secretary of State as foreign corporations authorized to do business in the State

1 of California, and/or has otherwise purposefully availed itself of the California market. Such
2 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
3 permissible with traditional notions of fair play and substantial justice.

4 **STATUTORY BACKGROUND**

5 16. The people of the State of California declared in Proposition 65 their right “[t]o be
6 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
7 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

8 17. To effect this goal, Proposition 65 requires that individuals be provided with a
9 “clear and reasonable warning” before being exposed to substances listed by the State of California
10 as causing cancer and birth defects or other reproductive harm. H&S Code § 25249.6 states, in
11 pertinent part:

12 No person in the course of doing business shall knowingly and intentionally expose any
13 individual to a chemical known to the state to cause cancer or reproductive toxicity without
14 first giving clear and reasonable warning to such individual...

15 18. In this case, exposures are caused by consumer products. A “Consumer Product” is
16 defined as “any article, or component part thereof, including food, that is produced, distributed, or
17 sold for the personal use, consumption or enjoyment of a consumer.” (Cal. Code Regs., tit. 27, §
18 25600.1, subd. (d).) Food includes “dietary supplements” as defined in California Code of
19 Regulations, title 17, section 10200. (*Id.* at subd. (g).) An exposure to a chemical in a Consumer
20 Product is one “which results from a person’s acquisition, purchase, storage, consumption or other
21 reasonably foreseeable use of a consumer good, or any exposure that results from receiving a
22 consumer service.” (27 CCR § 25602, para (b).) H&S Code § 25603(c) states that “a person in the
23 course of doing business ... shall provide a warning to any person to whom the product is sold or
24 transferred unless the product is packaged or labeled with a clear and reasonable warning.”
25
26
27
28

19. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or more of the following methods individually or in combination:¹

a. A warning that appears on a product's label or other labeling.

b. Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs, menus, or a combination thereof.

c. The warnings provided pursuant to subparagraphs (a) and (b) shall be prominently placed upon a product's labels or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

d. A system of signs, public advertising identifying the system and toll-free information services, or any other system that provides clear and reasonable warnings.

20. Proposition 65 provides that any “person who violates or threatens to violate” the statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase “threaten to violate” is defined to mean creating “a condition in which there is a substantial probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

FACTUAL BACKGROUND

21. On October 1, 1992, the state of California listed lead as a chemical known to cause cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On February 27, 1987, the State of California listed lead as a chemical known to cause birth defects or other

¹ Alternatively, a person in the course of doing business may elect to comply with the warning requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30, 2016, and operative on August 30, 2018.

1 reproductive harm. In summary, lead was listed under Proposition 65 as a chemical known to the
2 State to cause cancer and birth defects or other reproductive harm.

3 22. The exposures that are the subject of the Notice result from the purchase,
4 acquisition, and recommended use of the Products. The primary route of exposure to lead is
5 through ingestion. When foods contaminated with lead are consumed, ingestion of lead will occur
6 which will increase blood lead levels. No clear and reasonable warning is provided with the
7 Products regarding the health hazards of exposure.

8 23. Defendant has processed, marketed, distributed, offered to sell and/or sold the
9 Products in California since at least September 27, 2024. The Products continue to be distributed
10 and sold in California without the requisite warning information.

11 24. At all times relevant to this action, Defendant has knowingly and intentionally
12 exposed users and/or consumers of the Products to lead without first giving a clear and reasonable
13 exposure warning to such individuals.

14 25. As a proximate result of acts by Defendant, as a person in the course of doing
15 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
16 California, including in San Francisco County, have been exposed to lead without a clear and
17 reasonable warning on the Products. The individuals subject to the violative exposures include
18 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
19 the Products.

20 **SATISFACTION OF NOTICE REQUIREMENTS**

21 26. On August 4, 2024, Plaintiff purchased the Products from The Kroger Co. At the
22 time of purchase, Defendant did not provide a Proposition 65 exposure warning for lead or any
23 other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
24 *supra*.

25 27. On September 10, 2024, the Products were sent to a testing laboratory to determine
26 if, and what amount of, lead a consumer would be exposed to per serving size.

27 28. On September 18, 2024, the laboratory provided the results of its analysis. Results
28 of this test determined the Product exposes users to lead (the "Chemical Test Report").

1 29. Plaintiff provided the Chemical Test Report and Products to an analytical chemist
2 to determine if, based on the findings of the Chemical Test Report and the reasonable and
3 foreseeable use of the Products, exposure to lead will occur at levels that require Proposition 65
4 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
5 Code of Regulations.

6 30. On September 27, 2024, Plaintiff received from the analytical chemist an exposure
7 assessment report which concluded that persons in California who use the Products will be exposed
8 to levels of lead that require a Proposition 65 exposure warning.

9 31. On September 27, 2024, Plaintiff gave notice of alleged violation of Health and
10 Safety Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens
11 to lead contained in the Products without proper warning, subject to a private action to Defendant
12 and to the California Attorney General's office and the offices of the County District attorneys and
13 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
14 violations allegedly occurred.

15 32. The Notice complied with all procedural requirements of Proposition 65 including
16 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
17 least one person with relevant and appropriate expertise who reviewed relevant data regarding lead
18 exposure, and that counsel believed there was meritorious and reasonable cause for a private
19 action.

20 33. After receiving the Notice, and to Plaintiff's best information and belief, none of
21 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
22 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are
23 the subject of the Notice.

24 34. Plaintiff is commencing this action more than sixty (60) days from the date of the
25 Notice to Defendant, as required by law.

1 **FIRST CAUSE OF ACTION**

2 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

3 35. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 34 of
4 this Complaint as though fully set forth herein.

5 36. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
6 the Product.

7 37. Use of the Products will exposed users to lead, a hazardous chemical found on the
8 Proposition 65 list of chemicals known to be hazardous to human health.

9 38. The Product does not comply with the Proposition 65 warning requirements.

10 39. Plaintiff, based on his best information and belief, avers that at all relevant times
11 herein, and at least since September 27, 2024, continuing until the present, that Defendant has
12 continued to knowingly and intentionally expose California users and consumers of the Product to
13 lead without providing required warnings under Proposition 65.

14 40. The exposures that are the subject of the Notice result from the purchase,
15 acquisition, and recommended use of the Products. The primary route of exposure to lead is
16 through ingestion. When foods contaminated with lead are consumed, ingestion of lead will occur
17 which will increase blood lead levels. No clear and reasonable warning is provided with the
18 Products regarding the health hazards of exposure.

19 41. Plaintiff, based on his best information and belief, avers that such exposures will
20 continue every day until clear and reasonable warnings are provided to purchasers and users or
21 until this known toxic chemical is removed from the Products.

22 42. Defendant has knowledge that the normal and reasonably foreseeable use of the
23 Products exposes individuals to lead, and Defendant intends that exposures to lead will occur by
24 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
25 Products to consumers in California

26 43. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
27 Complaint.
28

44. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above described acts, each Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

45. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendant and requests the following relief:

A. That the court assess civil penalties against Defendant in the amount of \$2,500 per day for each violation for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);

B. That the court preliminarily and permanently enjoin Defendant mandating Proposition 65 compliant warnings on the Products;

C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the amount of \$50,000.00.

D. That the court grant any further relief as may be just and proper.

Dated: May 20, 2025

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