

JAN 13 2017

CLERK OF THE COURT

BY: Attilia Sheen
Deputy Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Melvin B. Pearlston (SBN 54291)
Robert B. Hancock (SBN 179438)
PACIFIC JUSTICE CENTER
50 California Street, Suite 1500
San Francisco, California 94111
Tel: (415) 310-1940

Attorneys for Plaintiff
ERIKA MCCARTNEY

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

ERIKA MCCARTNEY, in the public interest,)
Plaintiff,)
v.)
STARWEST BOTANICALS, INC., a California)
corporation; and DOES 1 through 500, inclusive,)
Defendants.)

CIVIL ACTION NO. CGC-14-543348

^{LWK}
~~PROPOSED~~ STIPULATED CONSENT
JUDGMENT

[Cal. Health and Safety Code
Sec. 25249.6, *et seq.*]

1 **1. INTRODUCTION**

2 **1.1** This Action arises out of the alleged violations of California's Safe Drinking Water
3 and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 et seq.
4 (also known as and hereinafter referred to as "Proposition 65") regarding Defendant STARWEST
5 BOTANICALS, INC.'s sale and distribution into California of 4-ounce and one-pound sizes of its
6 Starwest Botanicals Organic Ginkgo Leaf Powder ("the Product") without a clear and reasonable
7 warning apprising consumers the Product contains lead.

8
9 **1.2** Plaintiff ERIKA MCCARTNEY ("MCCARTNEY") is a California resident acting as
10 a private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest
11 pursuant to California Health and Safety Code Section 25249.6 MCCARTNEY asserts that she is
12 dedicated to, among other causes, helping safeguard the public from health hazards by reducing the
13 use and misuse of hazardous and toxic chemicals and substances, facilitating a safe environment for
14 consumers and employees, and encouraging corporate responsibility.

15
16 **1.3** Defendant STARWEST BOTANICALS, INC. ("STARWEST") is a Florida
17 corporation.

18 **1.4** STARWEST distributes and sells the Product.

19 **1.5** MCCARTNEY and STARWEST are hereinafter sometimes referred to individually
20 as a "Party" or collectively as the "Parties."

21
22 **1.6** On or about September 22, 2014, pursuant to California Health and Safety Code
23 Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65
24 ("Notice of Violations") in connection with the Product. This Notice was served on the California
25
26

1 Attorney General, other public enforcers, and STARWEST. A true and correct copy of this Notice
2 of Violation is attached hereto as Exhibit A.

3 **1.7** After more than sixty (60) days passed since service of the Notice of Violations, and
4 no designated governmental agency filed a complaint against STARWEST with regard to the
5 Product. MCCARTNEY filed a complaint (the "Complaint") for injunctive relief and civil
6 penalties. The Complaint is based on the allegations in the aforementioned Notice of Violations.
7 A true and correct copy is attached hereto as Exhibit B.

8 **1.8** The Complaint and the Notice of Violations each allege that STARWEST
9 manufactured, distributed, and/or sold in California the Product, which contains lead, a chemical
10 listed under Proposition 65 as causing cancer and birth defects or other reproductive harm, and
11 exposed consumers thereto. Further, the Complaint and Notices of Violations allege that use of the
12 Product exposes persons in California to lead without first providing clear and reasonable
13 warnings, in violation of California Health and Safety Code Section 25249.6. STARWEST
14 generally denies all material and factual allegations of the Notice of Violation and the Complaint,
15 and specifically denies that the Plaintiff or California consumers have been harmed or damaged by
16 its conduct. MCCARTNEY and STARWEST each reserves all rights to allege additional facts,
17 claims, and affirmative defenses if the Court does not approve this Consent Judgment.

18 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
19 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
20 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of
21 the Parties, or by any of their respective officers, directors, shareholders, employees, agents, parent
22 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,
23
24
25
26

1 wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault,
2 wrongdoing, or liability, including without limitation, any admission concerning any alleged
3 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment
4 shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in
5 any other or future legal proceeding. Provided, however, nothing in this Section shall affect the
6 enforceability of this Consent Judgment.
7

8 **1.10** The "Effective Date" of this Consent Judgment shall be the date this Consent
9 Judgment is entered as a Judgment.

10 **2. JURISDICTION AND VENUE**

11 The Parties stipulate that this Court has jurisdiction over the subject matter of this Action
12 and personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has
13 jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.
14

15 **3. INJUNCTIVE RELIEF**

16 **3.1** Beginning on the Effective Date, STARWEST shall be permanently enjoined from
17 offering the Product for sale to a consumer in California, directly selling it to a consumer in
18 California, or Distributing it into California. "Distributing into California" or "Distribute into
19 California" means to sell to a person in California, ship the Product to California for sale, or to sell
20 any of the Product to a distributor that STARWEST knows or has reason to know will redistribute
21 into or sell the Product in California.
22

23 **3.2** Beginning on the Effective Date, STARWEST shall be permanently enjoined from
24 providing any information supplemental to any Warning about Proposition 65 and/or California
25
26

1 Health and Safety Code Section 25249.5, et seq. by way of its website or any weblink therefrom,
2 which contain the following statement or statements, or any insubstantial variation thereof:

3 (1) "Prop. 65 does not distinguish between chemicals that are absorbed from natural
4 phenomena -- such as volcanic activity, chemicals resulting from worldwide soil, water, and air
5 pollution that are naturally absorbed by plants, local/regional problems like pesticide overspray or
6 chemical leaks -- and those that are intentionally applied like synthetic fertilizers and pesticides or
7 chemicals introduced later in drying, processing or manufacturing."

8
9 (2) "Safe Harbor Levels are often about 1,000 times much lower than those set by the FDA,
10 EPA and WHO."

11 (3) "For many chemicals, the Safe Harbor levels are so low they cannot be reliably
12 achieved in practice. In addition, because of the number of chemicals on both the Safe Harbor List
13 and the full Prop. 65 list, no natural product manufacturer can afford to routinely test for more than
14 even a very few of these chemicals."

15
16 (4) "The federal safety standard set by the FDS for lead in dietary supplements is no more
17 than 10 ppm."

18 (5) "When manufacturing herbal products, it is often impossible to meet Safe Harbor
19 levels. When Safe Harbor levels cannot be met Starwest applies the appropriate Prop. 65 warning
20 to its labels. However, it is quite possible to ensure herbs are well under the national standard."

21 (6) "Our products meet or exceed all applicable Federal safety standards."

22
23 (7) "We only sell products that conform to our standard safety amounts, which are lower
24 than FDA standard safety amounts by many times."

25 Notwithstanding the foregoing, the following statements shall be permissible:
26

1 (1) "Prop. 65 does not distinguish between chemicals resulting from external sources like
2 worldwide soil, water and air pollution, pesticide overspray or chemical leaks, which are then
3 absorbed by plants, and those that are intentionally applied like synthetic fertilizers and pesticides
4 or chemicals introduced later in drying, processing or manufacturing."

5 (2) "Safe Harbor Levels are much lower than those set by the FDA, EPA and WHO."

6 (3) "When manufacturing herbal products, it is often impossible to meet Safe Harbor
7 levels. When Safe Harbor levels cannot be met Starwest applied the appropriate Prop. 65 warning
8 to its labels."
9

10 **4. SETTLEMENT PAYMENT**

11 4.1 STARWEST shall make a total payment of \$232,000 within ten days of the
12 Effective Date, which shall be in full and final satisfaction of any and all civil penalties, and
13 attorneys' fees and costs.
14

15 4.2 The payment will be in the form of four separate checks sent to counsel for
16 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
17 California 94111. The checks shall be payable to the following parties and the payment shall be
18 apportioned as follows: (a) \$100,000 as civil penalties pursuant to California Health and Safety
19 Code Section 25249.7(b)(1). Of this amount, (1) \$75,000 shall be payable to the Office of
20 Environmental Health Hazard Assessment ("OEHHA"); (2) \$20,000 shall be payable to
21 MCCARTNEY; and (3) \$5,000 shall be payable to the California Chapter of the March of Dimes.
22 MCCARTNEY hereby waives her statutory right to any penalties in excess of \$20,000.
23 MCCARTNEY's counsel will forward the remittances to all interested parties. (b) A single
24
25
26

1 payment of of \$132,000, payable to Robert B. Hancock as reimbursement of MCCARTNEY's
2 attorneys' fees, costs, investigation and litigation expenses.

3 **5. MODIFICATION OF CONSENT JUDGMENT**

4 This Consent Judgment may be modified only by: (i) Written agreement and stipulation of
5 the Parties and upon having such stipulation entered as a modified Consent Judgment by the Court;
6 or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one of the Parties.
7

8 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

9 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate this
10 Consent Judgment.

11 **6.2** Any Party may, by motion or application for an order to show cause filed with this
12 Court, enforce the terms and conditions contained in this Consent Judgment. The prevailing party
13 in any such motion or application may request that the Court award its reasonable attorneys' fees
14 and costs associated with such motion or application.
15

16 **7. APPLICATION OF CONSENT JUDGMENT**

17 This Consent Judgment shall apply to and be binding upon the Parties and their respective
18 officers, directors, successors and assigns, and it shall benefit the Parties and their respective
19 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
20 affiliates, franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors,
21 successors, and assigns.
22

23 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

24 **8.1** This Consent Judgment is a full, final, and binding resolution between
25 MCCARTNEY, on behalf of herself and in the public interest, and STARWEST, of any and all
26

1 direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
2 regulations for failure to provide Proposition 65 warnings of exposure to cadmium from the
3 handling, use, or consumption of the Product and fully resolves all claims that have been or could
4 have been asserted in this Action up to and including the Effective Date for failure to provide
5 Proposition 65 warnings for the Product. MCCARTNEY, on behalf of herself and in the public
6 interest, hereby forever releases and discharges, STARWEST and its past and present officers,
7 directors, owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries,
8 divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers,
9 and all other upstream and downstream entities and persons in the distribution chain for the
10 Product, and the predecessors, successors and assigns of any of them (collectively, "Released
11 Parties"), from any and all claims and causes of action and obligations to pay damages, restitution,
12 fines, civil penalties, payment in lieu of civil penalties and expenses (including but not limited to
13 expert analysis fees, expert fees, attorney's fees and costs) (collectively, "Claims") arising under,
14 based on, or derivative of Proposition 65 or its implementing regulations up through the Effective
15 Date based on exposure to cadmium from the Product and/or failure to warn about cadmium, as set
16 forth in the Notice of Violations and the Complaint.
17
18

19 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
20 compliance by any Released Party with Proposition 65 regarding alleged violations in connection
21 with Product as set forth in the Notice of Violations and the Complaint.
22

23 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
24 alleged in the Notice of Violations or the Complaint and relating to the Product that were
25 manufactured, sold or Distributed into California before the Effective Date will develop or be
26

1 discovered. MCCARTNEY, on behalf of herself only, acknowledges that the Claims released
2 herein include all known and unknown Claims and waives California Civil Code Section 1542 as to
3 any such unknown Claims. California Civil Code Section 1542 reads as follows:

4 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
5 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
6 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
7 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
8 OR HER SETTLEMENT WITH THE DEBTOR.”**

8 MCCARTNEY, on behalf of herself only, acknowledges and understands the significance and
9 consequences of this specific waiver of California Civil Code section 1542.

10 **8.4** MCCARTNEY, on one hand, and STARWEST, on the other hand, each release and
11 waive all Claims they may have against each other for any statements or actions made or
12 undertaken by them in connection with the Notice of Violations or the Complaint. However, this
13 shall not affect or limit any Party’s right to seek to enforce the terms of this Consent Judgment.
14

15 **9. CONSTRUCTION AND SEVERABILITY**

16 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
17 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully
18 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction
19 of this Consent Judgment, the terms and conditions shall not be construed against any Party.

20 **9.2** In the event that any of the provisions of this Consent Judgment is held by a court to
21 be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
22 affected.
23

24 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
25 construed in accordance with the laws of the State of California.
26

1 **10. PROVISION OF NOTICE**

2 All notices required to be given to either Party to this Consent Judgment by the other shall
3 be in writing and sent to the following agents listed below by: (a) first-class, registered, (b) certified
4 mail, (b) overnight courier, or (c) personal delivery to the following:

5 **For Erika McCartney:**

6 Melvin B. Pearlston
7 Robert B. Hancock
8 PACIFIC JUSTICE CENTER
9 50 California Street, Suite 1500
San Francisco, California 94111

10 **For Starwest Botanicals, Inc.:**

11 James R. Scadden, Esq.
12 CALL & JENSEN, APC
13 610 Newport Center Drive, Suite 700
Newport Beach, California 92660

14 **11. COURT APPROVAL**

15 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
16 notice a Motion for Court Approval. The Parties shall use their best efforts to support entry of this
17 Consent Judgment.

18 **11.2** If the California Attorney General objects to any term in this Consent Judgment, the
19 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to
20 the hearing on the motion.

21 **11.3** If, despite the Parties' best efforts, either the Court does not approve this Stipulated
22 Consent Judgment, or any concerns of the Attorney General cannot be resolved, it shall be null and
23 void and have no force or effect.
24
25
26

1 **12. EXECUTION AND COUNTERPARTS**

2 This Stipulated Consent Judgment may be executed in counterparts, which taken together
3 shall be deemed one document. A facsimile or .pdf signature shall be construed as valid and as the
4 original signature.

5 **13. ENTIRE AGREEMENT, AUTHORIZATION**

6
7 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of
8 the Parties with respect to the entire subject matter herein, and any and all prior discussions,
9 negotiations, commitments and understandings related hereto. No representations, oral or
10 otherwise, express or implied, other than those contained herein have been made by any Party. No
11 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist
12 or to bind any Party.

13
14 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
15 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
16 provided herein, each Party shall bear its own fees and costs.

17 **14. REQUEST FOR FINDINGS AND FOR APPROVAL**

18 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.
19 The parties request the Court to fully review this Consent Judgment and, being fully informed
20 regarding the matters which are the subject of this action, to:

- 21 (a) Find that the terms and provisions of this Consent Judgment represent a good
22 faith settlement of all matters raised by the allegations of the Complaint, that the matter has been
23 diligently prosecuted, and that the public interest is served by such settlement; and
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

(b) Make the findings pursuant to California Health and Safety Code Section 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

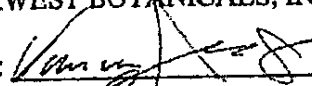
IT IS SO STIPULATED.

Dated: 11/11/10



Erika McCartney

Dated: 11/10/16

STARWEST BOTANICALS, INC.
Name: 

Title: PRESIDENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: 1/13/17



Judge of the Superior Court
HAROLD KAHN

EXHIBIT A TO CONSENT JUDGMENT



Melvin B. Pearlston
Senior Counsel

Of Counsel
Robert B. Hancock

September 22, 2014

**60-DAY NOTICE OF VIOLATIONS OF
CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET. SEQ.
(PROPOSITION 65)**

Dear Alleged Violators and the Appropriate Public Enforcement Agencies:

I represent Erika McCartney in this matter. Ms. McCartney has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), which is codified at California Health & Safety Code §25249.5 *et. seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violators identified below failed to provide required clear and reasonable warnings with the identified products. This letter serves as a notice of these violations to the alleged Violators and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d) of the statute, Ms. McCartney intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

General Information about Proposition 65. A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is an attachment with the copy of this letter served to the alleged Violators identified below.

Alleged Violators. The name of the companies covered by this notice that violated Proposition 65 (hereinafter "the Violators") are:

Starwest Botanicals, Inc.

Consumer Products and Listed Chemical. The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

Starwood Botanicals Gingko Leaf Powder – Lead

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

It should be noted that Ms. McCartney may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

Route of Exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least September 22, 2013, as well as every day since the products were introduced into

the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violators violated Proposition 65 because it failed to provide persons using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, Ms. McCartney is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violators to: (1) recall any products already sold, or undertake best efforts to ensure that the requisite health hazard warnings are provided to those who have received such products; (2) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; and (3) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as expensive and time-consuming litigation. It should be noted that counsel cannot (1) finalize any settlement until after the 60-day notice period has expired; or (2) speak for the California Attorney General or any District or City Attorney who has received this notice. Therefore, while reaching an agreement may satisfy the claims alleged herein, such agreement may not be satisfactory to public prosecutors.

Ms. McCartney has retained me as legal counsel in connection with this matter. Her address is 2124 Lincoln Avenue, #B, Alameda, California, 94501. Her telephone number is 707.502.8635. **Please direct all communications regarding this Notice of Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



Robert B. Hancock

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Violators only)
- Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

Re: Notice of Proposition 65 Violations

Robert B. Hancock declares:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposures to the listed chemicals that are the subject of the action.

4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violators will be able to establish any of the affirmative defenses set forth in the statute.

5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: September 22, 2014



Robert B. Hancock

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States, over the age of 18 years of age, and am not a party to the within action.

On September 22, 2014, I served the following documents: **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET. SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President
Starwest Botanicals, Inc.
161 Main Avenue
Sacramento, California 95838

On September 22, 2014, I served the following documents: **NOTICE OF VIOLATION CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** on the following parties by uploading the foregoing documents at the webpage listed below:

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, CA 94612-0550
<https://oag.ca.gov/prop65/add-60-day-notice>

On September 22, 2014, I served the following documents: **NOTICE OF VIOLATION CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties **on the Service List attached hereto**, and depositing it with the U.S. Postal Service with the postage fully prepaid for delivery by Priority Mail.

Executed under penalty of perjury pursuant to the laws of the State of California on September 22, 2014.



Robert B. Hancock

Notice of Violations of California Health & Safety Code §25249.5 et. seq.
September 22, 2014
Page 5

Service List

District Attorney,
Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612

District Attorney,
Alpine County
P.O. Box 248
Markleeville, CA 96120

District Attorney,
Amador County
708 Court Street, #202
Jackson, CA 95642

District Attorney, Butte County
25 County Center Drive
Oroville, CA 95965

District Attorney,
Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

District Attorney,
Colusa County
547 Market Street
Colusa, CA 95922

District Attorney,
Contra Costa County
900 Ward Street
Martinez, CA 94553

District Attorney,
Del Norte County
450 H Street, Ste. 171
 Crescent City, CA 95531

District Attorney,
El Dorado County
515 Main Street
Placerville, CA 95667

District Attorney,
Fresno County
2220 Tulare Street, #1000
Fresno, CA 93721

District Attorney,
Glenn County
Post Office Box 430
Willows, CA 95988

District Attorney,
Humboldt County
825 5th Street
Eureka, CA 95501

District Attorney,
Imperial County
940 West Main Street, Ste 102
El Centre, CA 92243

District Attorney, Inyo County
230 W. Line Street
Bishop, CA 93514

District Attorney, Kern County
1215 Truxtun Avenue
Bakersfield, CA 93301

District Attorney,
Kings County
1400 West Lacey Boulevard
Hanford, CA 93230

District Attorney, Lake County
255 N. Forbes Street
Lakeport, CA 95453

District Attorney,
Lassen County
220 South Lassen Street, Ste. 8
Susanville, CA 96130

District Attorney,
Los Angeles County
210 W. Temple St., Ste. 18000
Los Angeles, CA 90012

District Attorney,
Madera County
209 West Yosemite Avenue
Madera, CA 93637

District Attorney,
Marin County
3501 Civic Center Dr., Rm 130
San Rafael, CA 94903

District Attorney,
Mariposa County
Post Office Box 730
Mariposa, CA 95338

District Attorney,
Mendocino County
Post Office Box 1000
Ukiah, CA 95482

District Attorney,
Merced County
2222 M Street
Merced, CA 95340

District Attorney,
Modoc County
204 S Court Street, Room 202
Alturas, CA 96101-4020

District Attorney,
Mono County
Post Office Box 617
Bridgeport, CA 93517

District Attorney,
Monterey County
Post Office Box 1131
Salinas, CA 93902

District Attorney, Napa County
931 Parkway Mall
Napa, CA 94559

District Attorney,
Nevada County
201 Commercial St.
Nevada City, CA 95959

District Attorney,
Orange County
401 Civic Center Drive West
Santa Ana, CA 92701

District Attorney,
Placer County
10810 Justice Center Dr.,
Ste. 240
Roseville, CA 95678

District Attorney,
Plumas County
520 Main Street, Room 404
Quincy, CA 95971

District Attorney,
Riverside County
3960 Orange Street
Riverside, CA 92502

District Attorney,
Sacramento County
901 "G" Street
Sacramento, CA 95814

District Attorney,
San Benito County
419 Fourth Street, 2nd Floor
Hollister, CA 95023

District Attorney,
San Bernardino County
316 N. Mountain View Avenue
San Bernardino, CA 92415

District Attorney,
San Diego County
330 W. Broadway, Room 1300
San Diego, CA 92101

District Attorney,
San Francisco County
850 Bryant Street, Room 322
San Francisco, CA 94103

District Attorney,
San Joaquin County
Post Office Box 990
Stockton, CA 95201

District Attorney,
San Luis Obispo County
1035 Palm St. Room 450
San Luis Obispo, CA 93408

District Attorney,
San Mateo County
400 County Ctr., 3rd Floor
Redwood City, CA 94063

District Attorney,
Santa Barbara County
1112 Santa Barbara Street
Santa Barbara, CA 93101

District Attorney,
Santa Clara County
70 West Hedding Street
San Jose, CA 95110

District Attorney,
Santa Cruz County
701 Ocean Street, Room 200
Santa Cruz, CA 95060

District Attorney,
Shasta County
1355 West Street
Redding, CA 96001

District Attorney,
Sierra County
PO Box 457
Downieville, CA 95936

District Attorney,
Siskiyou County
Post Office Box 986
Yreka, CA 96097

District Attorney,
Solano County
675 Texas Street, Ste 4500
Fairfield, CA 94533

District Attorney,
Sonoma County
600 Administration Drive,
Room 212J
Santa Rosa, CA 95403

District Attorney,
Stanislaus County
832 12th Street, Ste 300
Modesto, CA 95353

District Attorney,
Sutter County
446 Second Street
Yuba City, CA 95991

District Attorney,
Tehama County
Post Office Box 319
Red Bluff, CA 96080

District Attorney,
Trinity County
Post Office Box 310
Weaverville, CA 96093

District Attorney,
Tulare County
221 S. Mooney Ave., Rm. 224
Visalia, CA 93291

District Attorney,
Tuolumne County
423 N. Washington Street
Sonora, CA 95370

District Attorney,
Ventura County
600 South Victoria Avenue
Ventura, CA 93009

District Attorney, Yalo County
301 2nd Street
Woodland, CA 95695

District Attorney, Yuba County
215 Fifth Street, Suite 152
Marysville, CA 95901

Los Angeles City Attorney's
Office
City Hall East
200 N. Main Street, Rm 800
Los Angeles, CA 90012

San Diego City Attorney's
Office
1200 3rd Avenue, Ste 1620
San Diego, CA 92101

San Francisco City Attorney's
Office
City Hall, Room 234
1 Drive Carlton B Goodlett
Place
San Francisco, CA 94102

San Jose City Attorney's Office
200 E. Santa Clara St.,
16th Floor
San Jose, CA 95113

EXHIBIT B TO CONSENT JUDGMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Melvin B. Pearlston (SBN 54291)
Robert B. Hancock (SBN 179438)
PACIFIC JUSTICE CENTER
50 California Street, Suite 1500
San Francisco, California 94111
Tel: (415) 310-1940/Fax: (415) 354-3508

Attorneys for Plaintiff

**ENDORSED
FILED**
Superior Court of California
County of San Francisco
DEC 22 2014
CLERK OF THE COURT
BY: MARY A. MORAN
Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

CGC - 14 - 54334

ERIKA MCCARTNEY, in the public interest,)
Plaintiff,)

v.)
STARWEST BOTANICALS, INC., a California)
corporation; and DOES 1 through 500, inclusive,)
Defendants.)

CIVIL ACTION NO.
**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

[Cal. Health and Safety Code.
Sec. 25249.6, *et seq.*]

BY FAX

1 Erika McCartney, in the public interest, based on information and belief and investigation of
2 counsel, except for information based on knowledge, hereby makes the following allegations.

3
4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendant's failure to adequately warn individuals
6 in California that they are being exposed to lead, a chemical known to the State of California to
7 cause cancer, birth defects and other reproductive harm (hereinafter "Lead"). Such exposures have
8 occurred, and continue to occur, through the manufacture, distribution, sale and consumption of
9 Defendant's Ginkgo Leaf Powder (the "Product"). The Product is available to consumers in
10 California through a multitude of retail channels which may include, without limitation: (a) third-
11 party traditional brick-and-mortar retail locations; (b) via the internet through Defendant's website;
12 and (c) via the internet through third-party retail websites. Consumers are exposed to Lead when
13 they consume the Product.
14

15 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
16 unlawful for businesses to knowingly and intentionally expose individuals in California to
17 chemicals known to the State to cause cancer, birth defects or other reproductive harm without
18 providing clear and reasonable warnings to individuals prior to their exposure. Defendant
19 introduces a product contaminated with significant quantities of Lead into the California
20 marketplace, exposing consumers of the Product to Lead.
21

22 3. Despite the fact that the Defendant exposes consumers to Lead, during the relevant
23 period Defendant provided no warning about the carcinogenic or reproductive hazards associated
24 with Lead exposure. Defendant's conduct thus violates the warning provision of Proposition 65,
25 Health & Safety Code § 25249.6.
26

1
2
3
4
5
6
7
8
9
10
11

PARTIES

12 4. Plaintiff brings this enforcement action in the public interest pursuant to Health &
13 Safety Code § 25249.7(d).

14 5. Defendant Starwest Botanicals, Inc. ("STARWEST") is a person in the course of
15 doing business within the meaning of Health & Safety Code § 25249.11. STARWEST
16 manufactures, distributes and/or sells the Product for sale and use in California.

17 6. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When
18 their identities are ascertained, the Complaint shall be amended to reflect their true names.
19

20
21
22

JURISDICTION AND VENUE

23 7. The Court has jurisdiction over this action pursuant to Health & Safety Code §
24 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
25 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
26 other trial courts.

 8. This Court has jurisdiction over Defendant as a business entity that does sufficient
business, has sufficient minimum contacts in California or otherwise intentionally avails itself of
the California market through the sale, marketing or use of the Product in California and/or by
having such other contacts with California so as to render the exercise of jurisdiction over it by the
California courts consistent with traditional notions of fair play and substantial justice.

 9. Venue is proper in San Francisco County Superior Court because one or more of the
violations arise in the County of San Francisco.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BACKGROUND FACTS

10. The People of the State of California have declared by initiative under Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.” Proposition 65 § 1(b).

11. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed by the State of California as known to cause cancer, birth defects or other reproductive harm above certain levels without a “clear and reasonable warning” unless the business responsible for the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6 states, in pertinent part:

No 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

12. On February 27, 1987, the State of California officially listed Lead as a chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive toxicant under three subcategories: “developmental reproductive toxicity,” which means harms to the developing fetus, “female reproductive toxicity,” which means harm to the female reproductive system, and “male reproductive toxicity,” which means harm to the male reproductive system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On February 27, 1988, one year after it was listed as a chemical known to cause reproductive toxicity, Lead became subject to the clear and reasonable warning requirement regarding reproductive toxicants under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

13. On October 1, 1992, the State of California officially listed Lead and Lead compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were

1 listed as chemicals known to cause cancer, Lead and Lead compounds became subject to the clear
2 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
3 27001(c); Health & Safety Code § 25249.10(b).

4 14. There is no safe level of exposure to Lead and even minute amounts of Lead have
5 been proven harmful to children and adults. See Report of the Advisory Committee on Childhood
6 Lead Poisoning Prevention of the Centers For Disease Control and Prevention, "Low Level Lead
7 Exposure Harms Children: A Renewed Call For Primary Prevention," January 2, 2012. A study
8 performed by the California Office of Environment Health Hazard Assessment determined that
9 exposures to Lead even at levels previously considered safe have now been shown to cause adverse
10 health effects including reduced cognitive ability and significant diminution of intellectual
11 potential. Carlisle, *et al.*, "A Blood Lead Benchmark for Assessing Risks from Childhood Lead
12 Exposure," *Journal of Environmental Science and Health*, 44, 2009. This conclusion is based on a
13 meta study of 1,333 children who participated in seven international studies. Lanphear, *et al.*,
14 "Low-Level Environmental Lead Exposure and Children's Intellectual Function: An International
15 Pooled Analysis," *Environmental Health Perspectives*, 113:7, 2005.

16
17
18 15. Lead exposures for pregnant women are also of particular concern in light of
19 evidence that even short-term Lead exposures *in utero* may have long-term harmful effects. Hu,
20 H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
21 Development," *Environmental Health Perspectives* 114:11,2 006; Schnaas, Lourdes, *et al.*,
22 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
23 *Health Perspectives* 114:5, 2006. Increased Lead exposure during pregnancy has also been shown
24 to cause increased risk of premature birth and increased blood pressure in both the mother during
25 pregnancy and the child after birth. Vigeh, *et al.*, "Blood Lead at Currently Acceptable Levels May
26

1 Cause Preterm Labour,” *Occupational Environmental Medicine*, 68:231-234, 2010; Zhang, *et al.*,
2 “Association Between Prenatal Lead Exposure and Blood Pressure in Children,” *Environmental*
3 *Health Perspectives*, 120:3, 2012; Wells, *et al.*, “Low-Level Lead Exposure and Elevations in
4 Blood Pressure During Pregnancy,” 119:5, 2011.

5 16. The level of exposure to a chemical causing reproductive toxicity under Proposition
6 65 is determined by multiplying the level in question times the reasonably anticipated rate of
7 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer
8 products, the level of exposure is calculated using the reasonably anticipated rate of intake or
9 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).

11 17. Defendant’s Product contains sufficient quantities of Lead such that consumers,
12 including pregnant women, who consume the Product are exposed to Lead. The primary route of
13 exposure for the violations is direct ingestion when consumers orally ingest the Product. These
14 exposures occur everywhere in California where the Product is consumed.

15 18. During the relevant period herein, no clear and reasonable warning was provided
16 with the Product regarding the reproductive hazards of Lead.

18 19. Any person acting in the public interest has standing to enforce violations of
19 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
20 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
21 within such time. Health & Safety Code § 25249.7(d).

22 20. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff
23 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General, the
24 District Attorneys of every county in California, the City Attorneys of every California city with a
25 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety
26

1 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)
2 the name and address of each violator; (2) the statute violated; (3) the time period during which
3 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure
4 to Lead from the Product, and (b) the specific type of Product sold and used in violation of
5 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
6 the violations described in each Notice.

7
8 21. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
9 General, the District Attorneys of every county in California, the City Attorneys of every California
10 city with a population greater than 750,000 and to the named Defendant. In compliance with
11 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's
12 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or
13 expertise who reviewed facts, studies or other data regarding the exposures to Lead alleged in each
14 Notice; and (2) based on the information obtained through such consultations, believes that there is
15 a reasonable and meritorious case for a citizen enforcement action based on the facts alleged in
16 each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each
17 Certificate served on the Attorney General included factual information - provided on a confidential
18 basis - sufficient to establish the basis for the Certificate, including the identity of the person(s)
19 consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such persons.

20
21 22. None of the public prosecutors with the authority to prosecute violations of
22 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
23 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
24 Plaintiff's Notices.
25
26

1 23. Defendant both knows and intends that individuals will consume the Product, thus
2 exposing them to Lead.

3 24. Under Proposition 65, an exposure is "knowing" where the party responsible for
4 such exposure has:

5 knowledge of the fact that a[n] ... exposure to a chemical listed pursuant
6 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that
7 the ... exposure is unlawful is required.

8 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.,* Final
9 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
10 12201).

11 25. Defendant has further been informed of the Lead in the Product by the 60-Day
12 Notice of Violation and accompanying Certificate of Merit served on them.

13 26. Defendant also has constructive knowledge that its Product contains Lead due to the
14 widespread media coverage concerning the problem of Lead in consumer products in general, and,
15 in particular Defendant's products.
16

17 27. As an entity that manufactures, imports, distributes and/or sells the Product for use
18 in the California marketplace, Defendant knows or should know that the Product contains Lead and
19 that individuals who consume the Product will be exposed to Lead. The Lead exposures to
20 consumers who consume the Product are a natural and foreseeable consequence of Defendant's
21 placing the Product into the stream of commerce.

22 28. Nevertheless, Defendant continues to expose consumers to Lead without prior clear
23 and reasonable warnings regarding the reproductive hazards of Lead.
24

25 29. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior
26 to filing this Complaint.

1 30. Any person "violating or threatening to violate" Proposition 65 may be enjoined in
2 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is
3 defined to mean "to create a condition in which there is a substantial probability that a violation
4 will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not
5 to exceed \$2,500 per day for each violation of Proposition 65.
6

7 **CAUSE OF ACTION**

8 **(Violations of the Health & Safety Code 25249.6)**

9 31. Plaintiff restates and realleges paragraphs 1 through 30 as though fully set forth
10 herein.

11 32. By placing the Product into the stream of commerce, Defendant is a person in the
12 course of doing business within the meaning of Health & Safety Code § 25249.11.

13 33. Lead is a chemical listed by the State of California as known to cause cancer, birth
14 defects and other reproductive harm.

15 34. Defendant knows that average use of the Product will expose users of the Product to
16 Lead. Defendant intends that the Product be used in a manner that results in exposures to Lead
17 from the Products.
18

19 35. Defendant has failed, and continues to fail, to provide clear and reasonable warnings
20 regarding the reproductive toxicity of Lead to users of the Products.

21 36. By committing the acts alleged above, Defendant has at all times relevant to this
22 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to Lead
23 without first giving clear and reasonable warnings to such individuals regarding the reproductive
24 toxicity of Lead.
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendant as follows:

1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties against the Defendant of up to \$2,500 per day for each violation of Proposition 65 occurring on or after September 22, 2014, or for whatever period the Court deems appropriate;

2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin Defendant from offering the Product for sale in California without either reformulating the Products such that no Proposition 65 warnings are required or providing prior clear and reasonable warnings, as Plaintiff shall specify in further application to the Court;

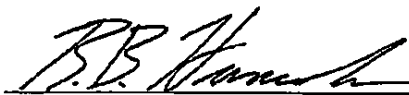
3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendant to take action to stop ongoing unwarranted exposures to Lead resulting from use of Product sold, as Plaintiff shall specify in further application to the Court;

4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable theory or doctrine, grant Plaintiff her reasonable attorneys' fees and costs of suit; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: December 19, 2014

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff