



G R E E N ■ W E L L I N G , P . C .

October 8, 2010

VIA CERTIFIED MAIL

Re: Notice of Violation of California Health & Safety Code Section 25249.6 by Millennium Products, Inc., Whole Foods Market, Inc., & Walgreens, Co.

Dear Prosecutors:

I represent Suzanne Fernandez, a consumer who has purchased and consumed beverages from Whole Foods Market, Inc. ("Whole Foods"), which contained Kombucha, a tea, and which were manufactured and sold by Millennium Products, Inc. ("Millennium"). This letter constitutes notice that Millennium, Whole Foods, and Walgreens, Co. ("Walgreens") have violated the warning requirement of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, commencing with Health & Safety Code § 25249.5 (hereinafter, "Proposition 65").

Specifically, Millennium, Whole Foods, and Walgreens violated Health & Safety Code § 25249.6, which provides "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, except as provided in Section 25249.10." The method of warning should be a warning that appears on the product's label. *See* 27 Cal. Code of Reg. § 25603(c). Pursuant to Proposition 65, California recognizes "Ethyl alcohol in alcoholic beverages" as a chemical known to cause reproductive toxicity. 27 Cal. Code of Regs § 27001(c). "Alcoholic beverage" includes "every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of one percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances." *Consumer Cause, Inc. v. Arkopharma, Inc.* (2003) 106 Cal. App. 4th 824, 829 (citing Cal. Bus. & Prof. Code § 23004).

Commencing in approximately 1995, Millennium began to manufacture and sell unpasteurized beverages, such as "GT's Kombucha" and "Synergy," which contain raw Kombucha. Millennium claims that Kombucha "nourishes the body, delights your taste buds, bolsters your immunity, and makes your spirits fly. You feel on top of the world. Healthier. Happier. Stronger." Millennium also advertises that Kombucha may have other health benefits, and claims that it played a part in curing Millennium's founder's mother's breast cancer. Millennium further explains that its Kombucha "is delicately cultured – some liken it to

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fermentation – for 30 days. During this period, essential nutrients form like active enzymes, viable probiotics, amino acids, antioxidants and polyphenols. All of these combine to create and elixir that immediately works with the body to restore balance and vitality.” Millennium GT’s Kombucha and Synergy beverage labels contain, in fine print underneath the list of ingredients, the following statement: “Please note: Due to the fermentation, this product may contain a trace amount of alcohol (less than 0.5%).”

Millennium failed to warn consumers, in violation of Proposition 65, that its beverages contain significant amounts of ethyl alcohol. In fact, recent studies have shown that some bottled Kombucha beverages contain as much as 4% alcohol. In September 2010, on behalf of Ms. Fernandez, we purchased samples of Millennium’s Kombucha beverages from Walgreen’s stores in California, and sent them to an independent chemistry, microbiology, and food technology laboratory for alcohol content analysis. The results showed that each bottle of Millennium’s Kombucha beverages that we had tested contained alcohol content levels significantly higher than 0.5%.

In June 2010, Whole Foods removed Millennium’s Kombucha beverages from its shelves due to concern over elevated alcohol levels. Shortly thereafter, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”) issued the following statement:

TTB has been advised that a major chain of grocery stores has removed a number of kombucha products from its shelves because of concerns about elevated alcohol content levels. The distribution of an alcohol beverage product that is not labeled as such misleads consumers and could cause potentially serious consequences for consumers, especially pregnant women, children, and individuals who should avoid alcohol for medical reasons.

TTB further announced that it would launch its own investigation to determine if the products are labeled in compliance with federal law. In the meantime, Millennium’s mislabeled Kombucha beverages continue to be sold in stores throughout California, such as Walgreens.

Proposition 65 requires that notice and intent to sue be given to a violator 60-days prior to any lawsuit being filed. With this letter, Ms. Fernandez gives notice of the alleged violation to the noticed parties and the appropriate governmental authorities. This notice covers all Proposition 65 violations presently known to Ms. Fernandez from information presently available. Ms. Fernandez is continuing her investigation which may reveal further violations. A summary of Proposition 65, prepared by the Offices of Environmental Health Hazard Assessment, attached as **Exhibit A**, has been provided to the noticed party.

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Yours very truly,

GREEN • WELLING, P.C.
A Professional Corporation

A handwritten signature in black ink, appearing to read "Robert S. Green" with a stylized flourish at the end.

Robert S. Green

Writer's Direct E-Mail
rsg@classcounsel.com

EXHIBIT A

Barclays Official California Code of Regulations Currentness

Title 27. Environmental Protection

Division 4. Office of Environmental Health Hazard Assessment

Chapter 1. Safe Drinking Water and Toxic Enforcement Act of 1986

Article 9. Miscellaneous

27 CCR Appendix A

Appendix A

OFFICE OF ENVIRONMENTAL HEALTH
HAZARD ASSESSMENT
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
THE SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986
(PROPOSITION 65): A SUMMARY

The following summary has been prepared by the Office of Environmental Health Hazard Assessment, the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and its implementing regulations (see citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 22 of the California Code of Regulations, Sections 12000 through 14000.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List." Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 735 chemical listings have been included as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release or otherwise engage in activities involving those chemicals must comply with the following:

Clear and reasonable warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of listing of the chemical.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of listing of the chemical.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts: Governmental agencies and public water utilities. All agencies of the federal, State or local government, as well as entities operating public water systems, are exempt.

Businesses with nine or fewer employees. Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business can demonstrate that the exposure

occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "no significant risk" levels for more than 250 listed carcinogens.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause birth defects or other reproductive harm ("reproductive toxicants"), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level (NOEL)," divided by a 1,000-fold safety or uncertainty factor. The "no observable effect level" is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

Discharges that do not result in a "significant amount" of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" or "no observable effect" test if an individual were exposed to such an amount in drinking water.

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 22, California Code of Regulations, Section 25903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

FOR FURTHER INFORMATION. . .

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900.

This database is current through 9/17/10 Register 2010, No. 38

27 CCR Appendix A, 27 CA ADC Appendix A

End of Document

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CERTIFICATE OF MERIT
Health and Safety Code Section 25249.7(d)

I, Robert S. Green, hereby declare as follows:

1. This Certificate of Merit accompanies the attached Notice of Violation which alleges that the parties identified in the Notice have violated Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.

2. I am the attorney for the noticed party, Suzanne Fernandez. Ms. Fernandez is a consumer who purchased mislabeled Millennium kombucha tea beverages from Whole Food in various months in 2009 and 2010. The Notice of Violation alleges that the parties identified have exposed persons in California, including Ms. Fernandez, to ethyl alcohol in alcoholic beverages through mislabeled kombucha tea beverages. Please refer to the Notice of Violation for additional details regarding the alleged violations.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action. In particular, I have consulted with the chemists who conducted the laboratory testing for ethyl alcohol in Millennium's kombucha tea beverages and I have relied on the testing results. The testing was conducted by a reputable testing laboratory by experienced scientists. The facts, studies, or other data derived through this investigation overwhelmingly demonstrate that the parties identified in the Notice have exposed persons to ethyl alcohol in alcoholic beverages without providing clear and reasonable warnings.

4. Based on my consultations and the results of laboratory testing, as well as all 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 information provides a credible basis that all elements of the plaintiff's case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the California Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health & Safety Code Section 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: 10/8/10

By: 
Robert S. Green

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