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CENTER FOR ENVIRONMENTAL HEALTH

FILED
ALAMEDA COUNTY

JUL 12 2019
JUL 12 2019
CLERK OF THE SUPERIOR COURT
By *Jamila Puerto* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,
a non-profit corporation,

Plaintiff,

v.

WHOLE FOODS MARKET CALIFORNIA,
INC.; ALLEGRO COFFEE COMPANY; and
DOES 1 through 200, inclusive,

Defendants.

Case No. Rg19026800

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to inorganic arsenic oxides and inorganic
7 arsenic compounds (collectively, "Arsenic"), a chemical known to the State of California to cause
8 cancer and birth defects or other reproductive harm. Such exposures have occurred, and continue
9 to occur, when people consume Starkey Spring Water that is sold by Defendants. Consumers,
10 including pregnant women and children, are exposed to Arsenic when they consume Starkey
11 Spring Water.

12 2. Under California's Proposition 65, Health & Safety Code §25249.5, *et seq.*, it is
13 unlawful for businesses to knowingly and intentionally expose individuals in California to
14 chemicals known to the State to cause cancer, birth defects, or other reproductive harm without
15 first providing clear and reasonable warnings to exposed individuals. Defendants introduce
16 Starkey Spring Water containing significant quantities of arsenic into the California marketplace,
17 thereby exposing consumers of Starkey Spring Water, many of whom are pregnant women and
18 children, to Arsenic.

19 3. Despite the fact that Defendants expose pregnant women, children, and other
20 consumers to Arsenic, Defendants provide no warnings whatsoever about the carcinogenic or
21 reproductive hazards associated with Arsenic exposure. Defendants' conduct thus violates the
22 warning provision of Proposition 65. Health & Safety Code §25249.6.

23 PARTIES

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a non-profit
25 corporation dedicated to protecting the public from environmental health hazards and toxic
26 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of
27 California. CEH is a "person" within the meaning of Health & Safety Code §25249.11(a) and
28 brings this enforcement action in the public interest pursuant to Health & Safety Code

1 §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has
2 prosecuted a large number of Proposition 65 cases in the public interest. These cases have
3 resulted in significant public benefit, including the reformulation of thousands of products to
4 remove toxic chemicals and to make them safer. CEH also provides information to Californians
5 about the health risks associated with exposure to hazardous substances, where manufacturers and
6 other responsible parties fail to do so.

7 5. Defendant WHOLE FOODS MARKET CALIFORNIA, INC. is a person in the
8 course of doing business within the meaning of Health & Safety Code §25249.11. Defendant
9 WHOLE FOODS MARKET CALIFORNIA, INC. markets, distributes, or sells Starkey Spring
10 Water for sale or use in California.

11 6. Defendant ALLEGRO COFFEE COMPANY is a person in the course of doing
12 business within the meaning of Health & Safety Code §25249.11. Defendant ALLEGRO
13 COFFEE COMPANY markets, distributes, or sells Starkey Spring Water for sale or use in
14 California.

15 7. DOES 1 through 200 are each a person in the course of doing business within the
16 meaning of Health & Safety Code §25249.11. DOES 1 through 200 manufacture, distribute, or
17 sell Starkey Spring Water for sale or use in California.

18 8. The true names of DOES 1 through 200 are either unknown to CEH at this time or
19 the applicable time period before which CEH may file a Proposition 65 action has not run. When
20 their identities are ascertained or the applicable time period before which CEH may file a
21 Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

22 9. The defendants identified in paragraphs 5 and 6 and DOES 1 through 200 are
23 collectively referred to herein as "Defendants."

24 **JURISDICTION AND VENUE**

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

1 11. This Court has jurisdiction over Defendants because each is a business entity that
2 does sufficient business, has sufficient minimum contacts in California, or otherwise intentionally
3 avails itself of the California market through the sale, marketing, or use of Starkey Spring Water
4 in California or by having such other contacts with California so as to render the exercise of
5 jurisdiction over it by the California courts consistent with traditional notions of fair play and
6 substantial justice.

7 12. Venue is proper in Alameda County Superior Court because one or more of the
8 violations arise in the County of Alameda.

9 **BACKGROUND FACTS**

10 13. The People of the State of California have declared by initiative under Proposition
11 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
12 other reproductive harm.” Proposition 65, §1(b).

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

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

21 15. On February 27, 1987, the State of California officially listed arsenic (inorganic
22 arsenic compounds) as a chemical known to cause cancer. 27 California Code of Regulations
23 (“C.C.R.”) §27001(b). On February 27, 1988, one year after it was listed as a chemical known to
24 cause cancer, arsenic (inorganic arsenic compounds) became subject to the clear and reasonable
25 warning requirement regarding carcinogens under Proposition 65. Health & Safety Code
26 §25249.10(b).

27 16. On May 1, 1997, the State of California officially listed arsenic (inorganic oxides)
28 as a chemical known to cause reproductive toxicity. Arsenic (inorganic oxides) is specifically

1 identified as a developmental toxicant, which means it tends to harm the developing fetus. 27
2 C.C.R. §27001(c). On May 1, 1998, one year after it was listed as a chemical known to cause
3 reproductive toxicity, arsenic (inorganic oxides) became subject to the clear and reasonable
4 warning requirement regarding reproductive toxicants under Proposition 65. Health & Safety
5 Code §25249.10(b).

6 17. There is no safe level of exposure to Arsenic and even minute amounts of Arsenic
7 have been proven harmful. *See, e.g., James, K., et al., International Encyclopedia of Public*
8 *Health* (2d ed. 2017), p. 170-175. The U.S. Environmental Protection Agency (“EPA”) has set a
9 “maximum contaminant level goal” for Arsenic in water – the level below which there is no
10 known or expected risk to health – at zero. EPA states that exposure to Arsenic is linked to
11 cancer of the skin, bladder, lung, kidney, nasal passages, liver, and prostate. *See EPA, Technical*
12 *Fact Sheet: Final Rule for Arsenic in Drinking Water* (January 2001). With respect to
13 reproductive hazards from Arsenic exposures, recent studies have demonstrated reproductive
14 harm at very low exposure levels that continue to drop. *See, e.g., Wang, B., et al., “Prenatal*
15 *exposure to arsenic and neurobehavioral development of newborns in China,” 121 Environmental*
16 *International* (2018), p. 421-427.

17 18. Bottled water, such as Starkey Spring Water, is generally believed by consumers
18 to be safer than tap water. This is one reason Starkey Spring Water costs hundreds of times more
19 than tap water. Defendants take affirmative steps to promote this belief, such as by marketing
20 Starkey Spring Water as “pure.” Consumers who purchase and drink Starkey Spring Water are
21 thus more likely to care about water safety issues than persons who drink tap water. This makes
22 the failure to warn about Arsenic in Starkey Spring Water even more egregious.

23 19. Starkey Spring Water contains sufficient quantities of Arsenic such that
24 consumers, including pregnant women and children, who consume Starkey Spring Water are
25 exposed to a significant amount of Arsenic. The primary route of exposure for the violations is
26 direct ingestion when consumers drink Starkey Spring Water. These exposures occur in homes,
27 workplaces, and everywhere else throughout California where Starkey Spring Water is consumed.

28

1 20. No clear and reasonable warning is provided with Starkey Spring Water regarding
2 the carcinogenic or reproductive hazards of Arsenic.

3 21. Any person acting in the public interest has standing to enforce violations of
4 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
5 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
6 within such time. Health & Safety Code §25249.7(d).

7 22. More than sixty days prior to naming each Defendant in this lawsuit, CEH
8 provided a 60-Day “Notice of Violation” of Proposition 65 to the California Attorney General, to
9 the District Attorneys of every county in California, to the City Attorneys of every California city
10 with a population greater than 750,000, and to each of the named Defendants. In compliance with
11 Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each Notice included the following
12 information: (1) the name and address of each violator; (2) the statute violated; (3) the time period
13 during which violations occurred; (4) specific descriptions of the violations, including (a) the
14 routes of exposure to Arsenic from Starkey Spring Water, and (b) the specific type of products
15 sold and used in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed
16 chemical that is the subject of the violations described in each Notice.

17 23. CEH also sent a Certificate of Merit for each Notice to the California Attorney
18 General, to the District Attorneys of every county in California, to the City Attorneys of every
19 California city with a population greater than 750,000, and to each of the named Defendants. In
20 compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each Certificate
21 certified that CEH’s counsel: (1) has consulted with one or more persons with relevant and
22 appropriate experience or expertise who reviewed facts, studies, or other data regarding the
23 exposures to Arsenic alleged in each Notice; and (2) based on the information obtained through
24 such consultations, believes that there is a reasonable and meritorious case for a citizen
25 enforcement action based on the facts alleged in each Notice. In compliance with Health &
26 Safety Code §25249.7(d) and 11 C.C.R. §3102, each Certificate served on the Attorney General
27 included factual information – provided on a confidential basis – sufficient to establish the basis
28

1 for the Certificate, including the identity of the person(s) consulted by CEH's counsel and the
2 facts, studies, or other data reviewed by such persons.

3 24. None of the public prosecutors with the authority to prosecute violations of
4 Proposition 65 has commenced or is diligently prosecuting a cause of action against Defendants
5 under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in any of CEH's
6 Notices regarding Arsenic in Starkey Spring Water.

7 25. Defendants both know and intend that individuals, including pregnant women and
8 children, will consume Starkey Spring Water, thus exposing them to Arsenic. Specifically, in
9 2016 and 2017, Defendants issued two separate recalls of more than 2,000 cases of Starkey
10 Spring Water after tests by regulators showed Arsenic levels exceeding the federal drinking water
11 threshold level of 10 parts per billion ("ppb"). In 2019, Consumer Reports published an article
12 reporting that its own testing found Arsenic levels in Starkey Spring Water just under this 10 ppb
13 threshold, which Defendants did not deny despite admitting that they test "every production run
14 of water before it is sold."

15 26. Furthermore, the Starkey Spring Water website displays a "2019 Bottled Water
16 Quality Report" stating that "Arsenic levels above 5 ppb and up to 10 ppb are present" in Starkey
17 Spring Water. That report also contains a test result indicating that a Starkey Spring Water
18 sample tested contained 8 ppb Arsenic. Attached hereto as **Exhibit 1** is a true and correct copy of
19 the "2019 Bottled Water Quality Report," downloaded from the Starkey Spring Water website
20 (*see* <https://tinyurl.com/starkeywaterarsenic>) on July 10, 2019.

21 27. Nevertheless, Defendants continue to expose consumers, including pregnant
22 women and children, to Arsenic without prior clear and reasonable warnings regarding the
23 carcinogenic or reproductive hazards of Arsenic.

24 28. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
25 filing this Complaint.

26 29. Any person "violating or threatening to violate" Proposition 65 may be enjoined in
27 any court of competent jurisdiction. Health & Safety Code §25249.7. "Threaten to violate" is
28 defined to mean "to create a condition in which there is a substantial probability that a violation

1 will occur.” Health & Safety Code §25249.11(e). Proposition 65 provides for civil penalties not
2 to exceed \$2,500 per day for each violation of Proposition 65.

3
4 **FIRST CAUSE OF ACTION**
(Violations of Health & Safety Code §25249.6)

5 30. CEH realleges and incorporates by reference as if specifically set forth herein
6 Paragraphs 1 through 29, inclusive.

7 31. By placing Starkey Spring Water into the stream of commerce, each Defendant is
8 a person in the course of doing business within the meaning of Health & Safety Code §25249.11.

9 32. Arsenic is a chemical listed by the State of California as known to cause cancer,
10 birth defects, and other reproductive harm.

11 33. Defendants know that average use of Starkey Spring Water will expose users of
12 these products to Arsenic. Defendants intend that Starkey Spring Water be used in a manner that
13 results in exposures to Arsenic from these products.

14 34. Defendants have failed, and continue to fail, to provide clear and reasonable
15 warnings regarding the carcinogenicity and reproductive toxicity of Arsenic to users of Starkey
16 Spring Water.

17 35. By committing the acts alleged above, Defendants have at all times relevant to this
18 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
19 Arsenic without first giving clear and reasonable warnings to such individuals regarding the
20 carcinogenicity and reproductive toxicity of Arsenic.

21 **PRAYER FOR RELIEF**

22 CEH prays for judgment against Defendants as follows:

23 1. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
24 permanently enjoin Defendants from offering Starkey Spring Water that will be sold in California
25 without either reducing the Arsenic levels in Starkey Spring Water such that no Proposition 65
26 warnings are required or providing prior clear and reasonable warnings, as CEH shall specify in
27 further application to the Court;

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2. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil penalties against each Defendant in the amount of \$2,500 per day for each violation of Proposition 65 according to proof;

3. That the Court, pursuant to Health & Safety Code §25249.7(a), order Defendants to take action to stop ongoing unwarned exposures to Arsenic resulting from use Starkey Spring Water sold by Defendants, as CEH shall specify in further application to the Court;

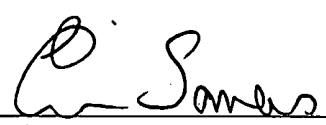
4. That the Court, pursuant to Code of Civil Procedure §1021.5 or any other applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

Dated: July 12, 2019

Respectfully submitted,

LEXINGTON LAW GROUP



Eric S. Somers
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH