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FILED
ALAMEDA COUNTY

MAY - 8 2008

CLERK OF THE SUPERIOR COURT
 By George Clark
 Deputy

5 Attorneys for Plaintiff
 6 CENTER FOR ENVIRONMENTAL HEALTH

7
 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 COUNTY OF ALAMEDA

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 12 CENTER FOR ENVIRONMENTAL HEALTH,)
 13 a non-profit corporation,)

Case No. RG 08386432

14 Plaintiff,

**COMPLAINT FOR INJUNCTIVE
 RELIEF AND CIVIL PENALTIES**

15 v.

Health & Safety Code §25249.5 *et seq.*

16 GENERAL ELECTRIC COMPANY; CUNO,
 17 INCORPORATED; ECOWATER SYSTEMS,
 18 LLC; EVERPURE, LLC; ; KX INDUSTRIES,
 L.P.; SEARS, ROEBUCK AND CO.;
 19 WHIRLPOOL CORPORATION; WHIRLPOOL)
 WATER PRODUCTS; and Defendant DOES 1)
 20 through 500, inclusive,)

SUMMONS ISSUED

21 Defendants.
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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 personal
3 knowledge, hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This complaint seeks to remedy defendants' continuing discharge and
6 release of arsenic, a chemical known to the State of California to cause cancer and birth defects
7 or other reproductive harm, into sources of drinking water. Such discharges and releases have
8 occurred, and continue to occur, through the sale and use of defendants' drinking water filtration
9 systems utilizing activated carbon filters and replacement filters used in such systems. Arsenic is
10 present in the activated carbon used in the filters and replacement filters of defendants' drinking
11 water filtration systems. These drinking water filtration systems utilizing activated carbon filters
12 and replacement filters used in such systems (excluding any industrial filters) are referred to
13 herein as the "Products." The Products contain sufficient quantities of arsenic such that arsenic
14 will leach from the Products into water flowing through and emanating from them. People who
15 use the Products, including children, consume water from the Products after arsenic has leached
16 from the Products into the water. Therefore, the Products and the water emanating from these
17 Products are sources of drinking water. These discharges occur in homes, businesses, and other
18 places throughout California where the Products are used.

19 2. This complaint further seeks to remedy defendants' continuing failure to
20 warn individuals in California that they are being exposed to arsenic, a chemical known to the
21 State of California to cause cancer and birth defects or other reproductive harm. Such exposures
22 have occurred, and continue to occur, through the sale and use of the Products. The route of
23 exposure for the violations is ingestion of arsenic-laced water discharged through the Products.
24 These exposures occur in homes, businesses, and other places throughout California where the
25 Products are used. Clear and reasonable warnings are not provided with the Products regarding
26 the carcinogenic or reproductive hazards of arsenic.

26 **PARTIES**

27 3. Plaintiff Center For Environmental Health ("CEH") is a non-profit
28 corporation dedicated to protecting the public from environmental health hazards and toxic

1 exposures. CEH is based in Oakland and incorporated under the laws of the State of California.
2 CEH is a "person" within the meaning of Health & Safety Code §25249.11(a) and brings this
3 enforcement action in the public interest pursuant to Health & Safety Code §25249.7(d). CEH
4 has prosecuted a large number of Proposition 65 cases in the public interest that have resulted in
5 significant public benefit, including reformulation of toxic products to make them safer and the
6 provision of clear and reasonable warnings on hundreds of products sold in California. CEH also
7 provides information to Californians about the health risks associated with exposure to hazardous
8 substances, where manufacturers and other responsible parties fail to do so.

9 4. Defendant CUNO, Incorporated ("CUNO") is a person in the course of
10 doing business within the meaning of Health & Safety Code §25249.11. CUNO manufactures,
11 distributes and/or sells the Products for sale and use in California.

12 5. Defendant EcoWater Systems, LLC ("EcoWater") is a person in the course
13 of doing business within the meaning of Health & Safety Code §25249.11. EcoWater
14 manufactures, distributes and/or sells the Products for sale and use in California.

15 6. Defendant Everpure, LLC ("Everpure") is a person in the course of doing
16 business within the meaning of Health & Safety Code §25249.11. Everpure manufactures,
17 distributes and/or sells the Products for sale and use in California.

18 7. Defendant General Electric Company ("GE") is a person in the course of
19 doing business within the meaning of Health & Safety Code §25249.11. GE manufactures,
20 distributes and/or sells the Products for sale and use in California.

21 8. Defendant KX Industries, L.P. ("KX Industries") is a person in the course
22 of doing business within the meaning of Health & Safety Code §25249.11. KX Industries
23 manufactures, distributes and/or sells the Products for sale and use in California.

24 9. Defendant Sears, Roebuck and Company ("Sears") is a person in the
25 course of doing business within the meaning of Health & Safety Code §25249.11. Sears
26 manufactures, distributes and/or sells the Products for sale and use in California.

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1 10. Defendant Whirlpool Corporation (“Whirlpool”) is a person in the course
2 of doing business within the meaning of Health & Safety Code §25249.11. Whirlpool
3 manufactures, distributes and/or sells the Products for sale and use in California.

4 11. Defendant Whirlpool Water Products (“Whirlpool Water”) is a person in
5 the course of doing business within the meaning of Health & Safety Code §25249.11. Whirlpool
6 Water manufactures, distributes and/or sells the Products for sale and use in California.

7 12. DOES 1-500 are each a person in the course of doing business within the
8 meaning of Health & Safety Code §25249.11 and a person within the meaning of Business &
9 Professions Code §17201. DOES 1 through 500 manufacture, distribute and/or sell the Products
10 for sale or use in California.

11 13. The true names of DOES 1 through 500 are unknown to plaintiff at this
12 time. When their identities are ascertained, the complaint shall be amended to reflect their true
13 names. The Defendants identified in paragraphs 4 through 11 and DOES 1 through 500 are
14 collectively referred to herein as “Defendants.”

15 **JURISDICTION AND VENUE**

16 14. The Court has jurisdiction over this action pursuant to Health & Safety
17 Code §25249.7, which allows enforcement in any court of competent jurisdiction. The
18 California Superior Court has jurisdiction over this action pursuant to California Constitution
19 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all cases except
20 those given by statute to other trial courts.” The statute under which this action is brought does
21 not grant jurisdiction to any other trial court.

22 15. This Court has jurisdiction over the Defendants because each is a
23 corporation or other entity that has sufficient minimum contacts in California, is a citizen of
24 California, or otherwise intentionally avails itself of the California market either through the
25 distribution, sale or use of the Products in the State of California or by having a manufacturing
26 facility located in California so as to render the exercise of jurisdiction over it by the California
27 courts consistent with traditional notions of fair play and substantial justice.

1 16. Venue is proper in the Alameda County Superior Court because one or
2 more of the violations arise in the County of Alameda.

3 **BACKGROUND FACTS**

4 17. The People of the State of California have declared by referendum under
5 Proposition 65 their right “[t]o protect themselves and the water they drink against chemicals that
6 cause cancer, birth defects, or other reproductive harm.” Proposition 65, §1(a).

7 18. To effectuate this goal, California’s Health & Safety Code §25249.5 *et*
8 *seq.* (“Proposition 65”) prohibits businesses from discharging or releasing into drinking water
9 chemicals listed by the State of California as known to cause cancer, birth defects or other
10 reproductive harm unless the business responsible for the discharge or release can prove that it
11 fits within a statutory exemption. Health & Safety Code §25249.5 states, in pertinent part:

12 No person in the course of doing business shall knowingly discharge or
13 release a chemical known to the state to cause cancer or reproductive
14 toxicity into water or onto or into land where such chemical passes or
probably will pass into any source of drinking water....

15 19. On February 27, 1987, the State of California officially listed arsenic
16 (inorganic arsenic compounds) as a chemical known to cause cancer. On October 27, 1988,
17 twenty months later, arsenic (inorganic arsenic compounds) became subject to the Proposition
18 65 prohibition on “discharge or release” of carcinogens into drinking water. 22 California Code
19 of Regulations (“CCR”) §12000(c); Health & Safety Code §25249.9(a).

20 20. On May 1, 1997, the State of California officially listed arsenic (inorganic
21 oxides) as a chemical known to cause reproductive toxicity. On January 1, 1999, twenty months
22 later, arsenic (inorganic oxides) became subject to the Proposition 65 prohibition on “discharge
23 or release” of reproductive toxins into drinking water. 22 CCR §12000(c); Health & Safety Code
24 §25249.9(a). Arsenic (inorganic arsenic compounds) and arsenic (inorganic oxides) are referred
25 to interchangeably herein as “Arsenic.”

26 21. The Products contain sufficient quantities of Arsenic such that Arsenic
27 will leach from the Products into water flowing through and emanating from them.

28 22. In *People ex rel. Lungren v. Sup. Ct. of San Francisco (American*

1 *Standard*), 14 Cal.4th 294 (1996), the California Supreme Court determined that faucet water is a
2 “source of drinking water.” In *American Standard*, the Court adopted the view that the phrase a
3 “source of drinking water” includes “the point of procurement or emanation of drinking water.”
4 14 Cal.4th at 303. The Products are a point of procurement or emanation of drinking water.
5 Therefore, the Products and the water which flows through them are sources of drinking water
6 under Health & Safety Code §25249.5.

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

10 24. To effectuate this goal, Proposition 65 requires that individuals be
11 provided with a “clear and reasonable warning” before being exposed to chemicals listed by the
12 State of California as causing cancer, birth defects and other reproductive harm unless the
13 business responsible for the exposure can prove that it fits within a statutory exemption. Health
14 & Safety Code §25249.6 states, in pertinent part:

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

19 25. On February 27, 1988, one year after it was listed as a chemical known to
20 cause cancer, arsenic (inorganic arsenic compounds) became subject to the clear and reasonable
21 warning requirement regarding carcinogens under Proposition 65. 22 CCR §12000(c); Health &
22 Safety Code §25249.10(b).

23 26. On May 1, 1998, one year after it was listed as a chemical known to cause
24 reproductive toxicity, arsenic (inorganic oxides) became subject to the clear and reasonable
25 warning requirement regarding reproductive toxins under Proposition 65. 22 CCR §12000(c);
26 Health & Safety Code §25249.10(b).

27 27. The Products contain sufficient quantities of Arsenic such that users of
28 the Products are exposed to Arsenic through the reasonably foreseeable use of the Products. No
clear and reasonable warning is provided with these products regarding the carcinogenic or

1 reproductive hazards of Arsenic.

2 28. Under Proposition 65, a discharge or exposure is “knowing” where the
3 party responsible for such discharge or exposure has:

4 knowledge of the fact that a discharge of, release of, or exposure to
5 a chemical listed pursuant to Health and Safety Code §25249.8(a)
6 is occurring. No knowledge that the discharge, release or exposure
7 is unlawful is required.

8 22 CCR §12201(d).

9 29. Defendants know or should know that the Products discharge Arsenic into
10 sources of drinking water.

11 30. Defendants know or should know that the Products expose people to
12 Arsenic.

13 31. In fact, there has been extensive discussion within the water filtration
14 system industry about the discharge of Arsenic from drinking water filtration systems using
15 activated carbon filters. The Water Quality Association, an international trade association
16 representing the water treatment industry, has even formed an “Arsenic-Activated Carbon Task
17 Group.” Most of the Defendants or their affiliates are members of the Water Quality
18 Association.

19 32. The discharge of Arsenic from activated carbon water filters was
20 specifically discussed at an August 8, 2000 meeting of the Water Quality Association. At that
21 meeting, a report was presented of a multi-year study conducted by Defendant KX Industries.
22 The KX Industries study concluded that, “arsenic and antimony contamination occurs broadly in
23 activated carbons,” and that “[t]his contamination leads to extractable levels of arsenic and
24 antimony that can often exceed the current arsenic and antimony standards and pervasively
25 exceed the proposed future arsenic standard.” The proposed future arsenic standard referred to is
26 now federal the federal drinking water standard of 10 parts per billion (“ppb”), which is twice the
27 level that has been determined to pose a significant risk of cancer under Proposition 65’s
28 implementing regulations.

33. On August 28, 2000, just a few weeks after the Water Quality Association

1 meeting described above, Defendant KX Industries submitted a report to the United States
2 Environmental Protection Agency (“EPA”) concerning the leaching of Arsenic from activated
3 carbon water filters. The Chief Executive Officer of KX Industries later wrote in the June 2003
4 issue of *Water Conditioning & Purification* magazine, an industry publication, that, “This filing
5 [with EPA] served to shield the point-of-use/point-of-entry (POU/POE) water treatment industry
6 from liability and prosecution under the Toxic Substances Control Act for distribution of
7 products known to expose users to a hazardous chemical. As a result of this filing, the most
8 severe potential penalties for use of contaminated activated carbons have been mitigated for the
9 entire industry; but this filing does not provide a shield against legal prosecution under state
10 statutes such as Proposition 65.”

11 34. That same June 2003 article also reported the results of testing of Arsenic
12 leaching from activated carbon filters. Even though the samples tested by the authors were
13 “selected by the manufacturer to represent the lowest possible extractables,” thirteen of the
14 nineteen manufacturers’ activated carbon samples leached sufficient quantities of Arsenic such
15 that water exposed to those samples contained arsenic levels in excess of the federal drinking
16 water standard of 10 ppb. Moreover, the authors of the study admitted that current quality
17 assurance procedures were not “likely to provide accurate guidance on product quality and
18 sustainable control of arsenic and antimony extractables from POU/POE [point-of-use/point-of-
19 entry] activated carbons, even with the best manufacturers and their best available grades.”

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

24 36. More than sixty days before naming each Defendant in this suit, CEH
25 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,
26 the District Attorneys of every county in California, the City Attorneys of every California city
27 with a population greater than 750,000, and to each named Defendant. In compliance with
28 Health & Safety Code §25249.7(d) and 22 CCR §12903(b), each Notice of Violation included

1 the following information: the name and address of the violator; the statute violated; the time
2 period during which violations occurred; specific descriptions of the violations, including the
3 source of drinking water at issue, the routes of exposure to Arsenic from the Products, and the
4 specific type of Products sold and used in violation of Proposition 65; and the name of the
5 specific Proposition 65-listed chemical that is the subject of the violation described in the Notice.

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

20 38. None of the public prosecutors with the authority to prosecute violations
21 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action under Health
22 & Safety Code §25249.5 *et seq.* against Defendants based on the claims asserted in the Notice
23 and herein. Nor has the Attorney General contacted CEH or its counsel regarding the Certificate
24 or any of the confidential supporting information provided to the Attorney General.

25 39. Proposition 65 provides for injunctive relief and civil penalties not to
26 exceed \$2,500 per day for each violation of Proposition 65.

27 40. Plaintiff has engaged in good-faith efforts to resolve the claims alleged
28 herein prior to filing this complaint.

FIRST CAUSE OF ACTION
(Violations of Health & Safety Code §25249.5)

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3 41. Plaintiff realleges and incorporates by reference as if specifically set forth
4 herein Paragraphs 1 through 40 inclusive.

5 42. By placing the Products into the stream of commerce, Defendants are
6 persons in the course of doing business within the meaning of Proposition 65.

7 43. Defendants know that through the reasonably foreseeable use of the
8 Products, Arsenic is discharged or released into sources of drinking water in California.

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

11 45. Since on or after October 27, 1988, and continuing through the present,
12 Defendants have engaged in conduct which violates Proposition 65 by placing into commerce
13 Products which are known to discharge Arsenic into sources of drinking water.

14 Wherefore, Plaintiff prays judgement against Defendants, as set forth hereafter.

SECOND CAUSE OF ACTION
(Violations of the Health & Safety Code §25249.6)

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16 46. Plaintiff realleges and incorporates by reference as if specifically set forth
17 herein Paragraphs 1 through 45 inclusive.

18 47. By placing the Products into the stream of commerce, Defendants are
19 persons in the course of doing business within the meaning of Health & Safety Code §25249.11.

20 48. Defendants know that through the reasonably foreseeable use of the
21 Products, users of the Products are exposed to Arsenic, Defendants intend that the Products be
22 used in a manner that results in users of the Products being exposed to Arsenic from the
23 Products.

24 49. Defendants have failed, and continue to fail, to provide clear and
25 reasonable warning regarding the carcinogenicity and reproductive toxicity of Arsenic to users of
26 the Products.

27 50. Arsenic is a chemical listed by the State of California as known to cause
28 cancer and birth defects or other reproductive harm.

1 51. By committing the acts alleged above, Defendants have, since on or after
2 February 27, 1988, violated Proposition 65 by knowingly and intentionally exposing individuals
3 to Arsenic without first giving clear and reasonable warning to such individuals regarding the
4 carcinogenicity and reproductive toxicity of Arsenic.

5 Wherefore, Plaintiff prays judgement against Defendants, as set forth hereafter.

6 **PRAYER FOR RELIEF**

7 Wherefore, Plaintiff prays for judgment against Defendants as follows:

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

11 2. That the Court, pursuant to Health & Safety Code §25249.7(a),
12 preliminarily and permanently enjoin Defendants from offering for sale in California Products
13 which discharge or release Arsenic into drinking water, as Plaintiff shall specify in further
14 application to the Court;

15 3. That the Court, pursuant to Health & Safety Code §25249.7(a),
16 preliminarily and permanently enjoin Defendants from offering the Products for sale in
17 California with sufficient quantities of Arsenic such that users of the Products are exposed to a
18 "significant amount" of Arsenic under Proposition 65 without providing clear and reasonable
19 warnings, as Plaintiff shall specify in further application to the Court;

20 4. That the Court, pursuant to Health & Safety Code §25249.7(a), order
21 Defendants to take action to stop ongoing discharges of Arsenic into sources of drinking water
22 from use of Products sold by Defendants, as Plaintiff shall specify in further application to the
23 Court;

24 5. That the Court, pursuant to Health & Safety Code §25249.7(a), order
25 Defendants to take action to stop ongoing unwarned exposures to Arsenic resulting from use of
26 Products sold by Defendants, as Plaintiff shall specify in further application to the Court;

27 6. That the Court, pursuant to Code of Civil Procedure §1021.5 and any other
28 applicable theory, grant Plaintiff its reasonable attorneys' fees and costs of suit; and

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

Dated: May 7, 2008

Respectfully submitted,
LEXINGTON LAW GROUP, LLP



Howard Hirsch
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL
HEALTH