

Deputy Clerk

BY:

GORDON PARK-LI, CLERK
SPACE BELOW FOR COURT USE ONLY

FEB 22 2006

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

NAME, ADDRESS, TELEPHONE NUMBER OF ATTORNEY(S)
Eric S. Somers, State Bar No. 139050
Lexington Law Group, LLP
1627 Irving Street, San Francisco, CA 94122
(415) 759-4111

ATTORNEY(S) FOR:

AMENDMENT TO
COMPLAINT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN FRANCISCO

CASE NUMBER

GCG-05-446289

Center for Environmental Health

vs. Michaels Stores, Inc., et al.

Plaintiff(s)

Defendant(s)

FICTITIOUS NAME [SEC. 474 C.C.P.]

Upon filing the complaint herein, plaintiff(s) being ignorant of the true name of a defendant, and having designated said defendant in the complaint by the fictitious name of:

Doe 1

and having discovered the true name of the said defendant to be:

Candela Sales Company, Inc.

hereby amends the complaint by inserting such true name in place and stead of such incorrect name wherever it appears in said complaint.



Attorney(s) for plaintiff(s)

INCORRECT NAME [SEC. 473 (a)(1) C.C.P.]

Plaintiff(s) having designated a defendant in the complaint by the incorrect name of

and having discovered the true name of the said defendant to be

hereby amend(s) the complaint by inserting such true name in place and stead of such incorrect name wherever it appears in said complaint.

Attorney(s) for Plaintiff(s)

ORDER

Proper cause appearing, the above amendment to the complaint is allowed.

Dated: _____

Judge

NOV 02 2005

GORDON PARK-LI, Clerk
BY: JUN P. PANELO
Deputy Clerk

1 LEXINGTON LAW GROUP, LLP
Eric S. Somers, State Bar No. 139050
2 Mark N. Todzo, State Bar No. 168389
Howard J. Hirsch, State Bar No. 213209
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

CASE MANAGEMENT CONFERENCE SET

APR 07 2006 - 9 00 AM

5 Attorneys for Plaintiff
6 CENTER FOR ENVIRONMENTAL HEALTH

DEPARTMENT 212

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

CGC 05446289

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

Case No. _____

14 Plaintiff,)

**COMPLAINT FOR INJUNCTIVE
RELIEF, CIVIL PENALTIES AND
RESTITUTION**

15 v.)

16 MICHAELS STORES, INC., HIRSCHBERG)
17 SCHUTZ & CO., INC.; and Defendant DOES 1)
18 through 200, inclusive,)

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

(Other)

19 Defendants.)
20
21
22
23
24
25
26
27
28

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 failure to warn
6 individuals in California that they are being exposed to lead and lead compounds (collectively,
7 "Lead"), chemicals known to the State of California to cause cancer, birth defects and other
8 reproductive harm. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and use of defendants' imitation pearl products that contain Lead.
10 The imitation pearls are found in such products as jewelry, beads and buttons for clothing (the
11 "Products"). Lead is present in the materials and coatings used to make the Products. The route
12 of exposure for the violations is direct ingestion when consumers place the Products in their
13 mouths, ingestion via hand to mouth contact after consumers wear, touch or handle the Products,
14 ingestion via hand to mouth contact when consumers eat or drink after coming into contact with
15 the Products, and dermal absorption directly through the skin when consumers wear, touch or
16 handle the Products. Many of the Products are designed for and marketed to young children and
17 teens, who are particularly likely to place the Products in their mouths and who are also
18 particularly susceptible to Lead poisoning. These exposures occur in homes, workplaces and
19 everywhere else throughout California where people wear, touch or handle the Products. Clear
20 and reasonable warnings are not provided to users of the Products regarding the carcinogenic or
21 reproductive hazards of Lead. Consequently, defendants have violated and continue to violate
22 the warning provision of Proposition 65. Health & Safety Code §25249.6.

23 PARTIES

24 2. 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 reformulation of toxic products to make them
4 safer and the provision of clear and reasonable warnings on hundreds of products sold throughout
5 California. CEH is thus a competent plaintiff and adequate representative of the general public.

6 3. Defendant Michaels Stores, Inc. ("Michaels") is a person in the course of
7 doing business within the meaning of Health & Safety Code §25249.11. Michaels manufactures,
8 distributes and/or sells the Products for sale and use in California.

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

12 5. The true names of DOES 1 through 200 are unknown to plaintiff at this
13 time. When their identities are ascertained, the complaint shall be amended to reflect their true
14 names.

15 6. The defendants identified in Paragraphs 3 and 4 and DOES 1 through 200
16 are collectively referred to herein as "Defendants."

17 JURISDICTION AND VENUE

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

24 8. This Court has jurisdiction over the Defendants because each is a business
25 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
26 intentionally avails itself of the California market through the sale, marketing or use of the
27 Products in California and/or by having such other contacts with California so as to render the
28 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair

1 play and substantial justice.

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

4 **BACKGROUND FACTS**

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

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

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

16 12. On February 27, 1987, the State of California officially listed Lead as a
17 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
18 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
19 the developing fetus, “female reproductive toxicity,” which means harm to the female
20 reproductive system, and “male reproductive toxicity,” which means harm to the male
21 reproductive system. 22 California Code of Regulations (“CCR”) §12000(c). On February 27,
22 1988, one year after it was listed as a chemical known to cause reproductive toxicity, Lead
23 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
24 under Proposition 65. 22 CCR §12000(c); Health & Safety Code §25249.10(b).

25 13. On October 1, 1992, the State of California officially listed lead and lead
26 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
27 listed as a chemicals known to cause cancer, lead and lead compounds became subject to the
28 clear and reasonable warning requirement regarding carcinogens under Proposition 65. 22 CCR

1 §12000(c); Health & Safety Code §25249.10(b).

2 14. Under Proposition 65, an exposure is “knowing” where the party
3 responsible for such exposure has:

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

6 22 CCR §12201(d).

7 15. Defendants know that individuals, including children, wear, touch and
8 handle the Products, thus exposing them to Lead without prior clear and reasonable warning
9 regarding the carcinogenic or reproductive hazards of Lead.

10 16. Defendants intend that individuals, including children, through the
11 reasonably foreseeable use of the Products, wear, touch and handle the Products, thus exposing
12 them to Lead without prior clear and reasonable warning regarding the carcinogenic or
13 reproductive hazards of Lead.

14 17. The Products contain sufficient quantities of Lead such that consumers
15 who wear, touch or handle the Products are exposed to Lead through the reasonably foreseeable
16 use of the Products. These exposures occur when people who wear, touch or handle the Products
17 ingest the Lead by placing the Products directly in their mouths, ingest the Lead by hand to
18 mouth contact, ingest the Lead by eating or drinking after coming into contact with the Products
19 and absorb the Lead directly through the skin. No clear and reasonable warning is provided with
20 the Products regarding the carcinogenic or reproductive hazards of Lead.

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

25 19. On March 28, 2005, CEH provided a 60-Day “Notice of Violation of
26 Proposition 65” to the California Attorney General, the District Attorneys of every county in
27 California, the City Attorneys of every California city with a population greater than 750,000 and
28 to the named Defendants. The March 28, 2005 Notice of Violation is referred to herein as the

1 Notice. In compliance with Health & Safety Code §25249.7(d) and 22 CCR §12903(b), the
2 Notice included the following information: the name and address of the violator; the statute
3 violated; the time period during which violations occurred; specific descriptions of the violations,
4 including the routes of exposure to Lead from the Products and product categories with a specific
5 non-exclusive example of the Products sold and used in violation of Proposition 65; and the
6 name of the specific Proposition 65-listed chemical (Lead) that is the subject of the violation
7 described in the Notice.

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

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

25 22. Any person “violating or threatening to violate” the Proposition 65 may be
26 enjoined in any court of competent jurisdiction. Health & Safety Code §25249.7. “Threaten to
27 violate” is defined to mean “to create a condition in which there is a substantial probability that a
28 violation will occur.” Health & Safety Code §25249.11(e). Proposition 65 provides for civil

1 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

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

4 23. Plaintiff realleges and incorporates by reference as if specifically set forth
5 herein Paragraphs 1 through 22 inclusive.

6 24. By placing the Products into the stream of commerce, Defendants are a
7 person in the course of doing business within the meaning of Health & Safety Code §25249.11.

8 25. The Defendants know that through the reasonably foreseeable use of the
9 Products, users of the Products are exposed to Lead. The Defendants intend that the Products be
10 used in a manner that results in users of the Products being exposed to Lead from the Products.

11 26. The Defendants have failed, and continue to fail, to provide clear and
12 reasonable warning regarding the carcinogenicity and reproductive toxicity of Lead to users of
13 the Products.

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

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

20 Wherefore, plaintiff prays judgment against the Defendants, as set forth hereafter.

21 **PRAYER FOR RELIEF**

22 Wherefore, plaintiff prays for judgment against Defendants as follows:

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

26 2. That the Court, pursuant to Health & Safety Code §25249.7(a),
27 preliminarily and permanently enjoin Defendants from offering the Products for sale in
28 California without providing clear and reasonable warnings, as CEH shall specify in further

1 application to the Court;

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

5 4. That the Court, pursuant to its equitable power, grant restitution to
6 individuals who would not have purchased the Products had they received a clear and reasonable
7 warning that the Products contain Lead;

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

10 6. That the Court grant such other and further relief as may be just and
11 proper.

12
13 Dated: November 1, 2005

Respectfully submitted,

14 LEXINGTON LAW GROUP, LLP

15
16
17 

18 Eric S. Somers, Esq.
19 Attorneys for Plaintiff
20 CENTER FOR ENVIRONMENTAL HEALTH