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FILED

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KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
by A. Garcia, Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF MARIN

10 CENTER FOR ENVIRONMENTAL HEALTH,)
11 a non-profit corporation, on behalf of the public)
interest,)

12 Plaintiff,

13 v.

14 SMITH & HAWKEN, LTD; and DOES 1)
15 through 200, inclusive,)

16 Defendants.)

Case No. CV 064425

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

[Health & Safety Code §25249.6 *et seq.*]

(Other)

17 Plaintiff Center for Environmental Health, in the public interest, based on
18 information and belief and investigation of counsel, except for information based on personal
19 knowledge, hereby makes the following allegations:

20 **INTRODUCTION**

21 1. This complaint seeks to remedy defendants' continuing failure to warn
22 individuals in California that they are being exposed to lead and lead compounds (collectively,
23 "Lead"), chemicals known to the State of California to cause cancer, birth defects and other
24 reproductive harm. Such exposures have occurred, and continue to occur, through the
25 manufacture, distribution, sale and use of defendants' copper containers with soldered parts,
26 including copper trays, planters, urns, wall fountains, pots, flower buckets, birdbaths, and saucers
27 (the "Products"). The Products are made with leaded solder used to hold metal parts of the
28 copper containers together. Consumers and workers in California are exposed to Lead when they

1 handle the Products.

2 2. Under California’s Proposition 65, Health and Safety Code §25249.5 *et*
3 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
4 to chemicals known to the State to cause cancer, birth defects or other reproductive harm without
5 providing clear and reasonable warnings to individuals prior to their exposure. Despite the fact
6 that Defendants expose individuals in California to Lead through the manufacture, distribution,
7 sale, and use of the Products, Defendants provide no warnings whatsoever about the carcinogenic
8 or reproductive hazards associated with Lead exposure. Defendants’ conduct thus violates the
9 warning provision of Proposition 65. Health & Safety Code §25249.6.

PARTIES

10 3. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH (“CEH”) is a
11 non-profit corporation dedicated to protecting the public from environmental health hazards and
12 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
13 State of California. CEH is a “person” within the meaning of Health & Safety Code
14 §25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
15 Safety Code §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
16 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
17 cases have resulted in significant public benefit, including reformulation of toxic products to
18 make them safer and the provision of clear and reasonable warnings on hundreds of products sold
19 throughout California. CEH is thus a competent plaintiff and adequate representative of the
20 general public.

21 4. Defendant SMITH & HAWKEN, LTD. (“Smith & Hawken”) is a person
22 in the course of doing business within the meaning of Health & Safety Code §25249.11. Smith
& Hawken manufactures, distributes and/or sells the Products for sale and use in California.

23 5. DOES 1-100 are each a person in the course of doing business within the
24 meaning of Health & Safety Code §25249.11. DOES 1 through 100 manufacture, distribute
25 and/or sell the Products for sale or use in California.

26 6. DOES 101-200 are each a person in the course of doing business within
27 the meaning of Health & Safety Code §25249.11. DOES 101 through 200 manufacture,
28 distribute and/or sell the Products for sale or use in California. DOES 101 through 200 have

1 workplaces in California, and are therefore liable for both consumer and occupational exposures
2 under Proposition 65.

3 7. The true names of DOES 1 through 200 are unknown to plaintiff at this
4 time, and are therefore sued under fictitious names. When their identities are ascertained, the
5 complaint shall be amended to reflect their true names.

6 8. Smith & Hawken and DOES 1 through 200 are collectively referred to
7 herein as "Defendants."

8 JURISDICTION AND VENUE

9 9. The Court has jurisdiction over this action pursuant to Health & Safety
10 Code §25249.7, which allows enforcement in any court of competent jurisdiction. The Superior
11 Court has competent jurisdiction over this action pursuant to California Constitution Article VI,
12 Section 10.

13 10. This Court has jurisdiction over the Defendants because each is a business
14 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
15 intentionally avails itself of the California market through the manufacture, sale, marketing or
16 use of the Products in California and/or has such other contacts with California so as to render
17 the exercise of jurisdiction over it by the California courts consistent with traditional notions of
18 fair play and substantial justice.

19 11. Venue is proper in the Marin County Superior Court because one or more of
20 the violations arise in the County of Marin.

21 BACKGROUND FACTS

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

25 13. To effectuate this goal, Proposition 65 requires that individuals be
26 provided with a "clear and reasonable warning" before being exposed to chemicals listed by the
27 State of California as known to cause cancer, birth defects and other reproductive harm unless
28 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

1 state to cause cancer or reproductive toxicity without first giving
2 clear and reasonable warning to such individual. . .

3 14. On February 27, 1987, the State of California officially listed lead as a
4 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
5 toxicant under three subcategories: "developmental reproductive toxicity," which means harm to
6 the developing fetus, "female reproductive toxicity," which means harm to the female
7 reproductive system, and "male reproductive toxicity," which means harm to the male
8 reproductive system. 22 California Code of Regulations ("CCR") §12000(c). On February 27,
9 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead
10 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
11 under Proposition 65. 22 CCR §12000(c); Health & Safety Code §25249.10(b).

12 15. On October 1, 1992, the State of California officially listed lead and lead
13 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
14 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
15 and reasonable warning requirement regarding carcinogens under Proposition 65. 22 CCR
16 §12000(c); Health & Safety Code §25249.10(b).

17 16. There is no safe level of exposure to Lead and even minute amounts of
18 Lead exposure have been shown to permanently reduce mental capacity. Davis, JM, Svendgaard,
19 DJ; "Lead and Child Development"; *Nature* 329:297-300, 1987. Another study on the effect of
20 childhood Lead exposure declared that even the smallest detectable amount of blood Lead levels
21 in children can mean the difference between an A or B grade in school. Lanphear, BP, Dietrich,
22 K, Auinger, P, Cox, C; "Subclinical Lead Toxicity in U.S. Children and Adolescents";
23 *Neurodevelopmental Disabilities II Platform*, 2000. Another study followed children into
24 adulthood and found a sevenfold increase in the risk for developing a reading disability among
25 children exposed to sufficient levels of Lead as toddlers. Needleman, HL, Schell, A, Bellinger,
26 D, Leviton, A, Allred, EN; "The Long-Term Effects of Exposure to Low Doses of Lead in
27 Childhood: An 11-Year Follow-up Report"; *New England Journal of Medicine*; 322:83-88, 1990.
28 More recent studies have demonstrated significant harm from exposure to lead at extremely low
exposure levels. Lanphear, BP, Hornung, R.; "Low-level environmental lead exposure and

1 children's intellectual function: an international pooled analysis"; *Environmental Health*
2 *Perspectives*; 113:7:894 2005, and Canfield, R. L., Henderson, Jr. C. R.; *see also* "Intellectual
3 Impairment in Children with Blood Lead Concentrations below 10 µg per Deciliter"; *New*
4 *England Journal of Medicine*; 348:1517 2003.

5 17. Defendants' Products contain sufficient quantities of Lead such that
6 individuals who handle the Products are exposed to Lead through the average use of the Product.
7 Consumer exposures to Lead take place when consumers use, display, install, clean, service or
8 otherwise touch or handle the Products. Consumers are exposed to Lead from the Products
9 dermally when consumers come into contact with the or otherwise touch the Lead containing
10 surfaces of the Products. Exposures also occur through hand to mouth activity that occurs after
11 consumers touch the Lead containing surfaces and then touch their mouths. These exposures
12 occur in homes, schools, workplaces, and everywhere else in California where these products are
13 used. Occupational exposures to Lead occur throughout California when workers manufacture,
14 assemble, ship, display, sell, store, handle or otherwise come into contact with the Products.
15 Occupational exposures also occur through dermal contact and hand to mouth contact with Lead
16 containing surfaces of the Products. Persons exposed include workers in factories, warehouses,
17 and distribution centers and clerks in retail stores that come into contact with the Products.

18 18. Lead-free solders are readily available as a substitute for the Lead
19 containing solder used to make the Products.

20 19. 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 20. On April 24, 2006, CEH provided a 60-Day Notice of Violation of
25 Proposition 65 (the "Notice") to the California Attorney General, the District Attorneys of every
26 county in California, the City Attorneys of every California city with a population greater than
27 750,000 and to Smith & Hawken. The Notice contained the information required by Health &
28 Safety Code §25249.7(d) and 22 Cal. Code Regs. §12903(b).

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

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

18 23. Defendants both know and intend that individuals will handle the
19 Products, thus exposing them to Lead.

20 24. The Products usually use un-coated solder to hold metal parts together.
21 This solder is often composed of substantial quantities of Lead.

22 25. Smith & Hawken has been informed of the Lead in its Products by the
23 Notice served on it by CEH.

24 26. Nevertheless, Defendants continue to expose individuals to Lead without
25 prior clear and reasonable warnings regarding the carcinogenic or reproductive hazards of Lead.

26 27. CEH has engaged in good-faith efforts to resolve the claims alleged herein
27 prior to filing this complaint. Smith & Hawken never responded to these efforts.

28 28. Any person “violating or threatening to violate” Proposition 65 may be

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

5 **FIRST CAUSE OF ACTION**
6 **(Violations of the Health & Safety Code §25249.6 - Consumer Exposures)**
7 **(Against All Defendants)**

8 29. CEH realleges and incorporates by reference as if specifically set forth
9 herein Paragraphs 1 through 28 inclusive.

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

12 31. Defendants know that the Products will expose consumers to Lead.
13 Defendants intend that the Products be handled and used in a manner that results in consumers
14 being exposed to Lead contained in the Products.

15 32. The Defendants have failed, and continue to fail, to provide clear and
16 reasonable warnings regarding the carcinogenicity and reproductive toxicity of the Lead
17 contained in the Products.

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

20 34. By committing the acts alleged above, the Defendants have at all times
21 relevant to this complaint violated Proposition 65 by knowingly and intentionally exposing
22 individuals to Lead without first giving clear and reasonable warnings to such individuals
23 regarding the carcinogenicity and reproductive toxicity of Lead.

24 Wherefore, Plaintiff prays judgment against the Defendants, as set forth hereafter.

25 **SECOND CAUSE OF ACTION**
26 **(Violations of the Health & Safety Code §25249.6 - Occupational Exposures)**
27 **(Against Defendants Smith & Hawken, Ltd., and Does 101-200)**

28 35. Plaintiff realleges and incorporates by reference as if specifically set forth
herein Paragraphs 1 through 34 inclusive.

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

3 37. Defendants Smith & Hawken, Ltd., and Does 101-200 (collectively,
4 “Occupational Exposure Defendants”) know that the Products will expose employees to Lead.
5 The Occupational Exposure Defendants intend that the Products be handled and used in a manner
6 that results in employees being exposed to Lead contained in the Products.

7 38. The Occupational Exposure Defendants have failed, and continue to fail,
8 to provide clear and reasonable warnings regarding the carcinogenicity and reproductive toxicity
9 of the Lead in the Products.

10 39. Lead is a chemical listed by the State of California as known to cause
11 cancer, birth defects and other reproductive harm.

12 40. By committing the acts alleged above, the Occupational Exposure
13 Defendants have at all times relevant to this complaint violated Proposition 65 by knowingly and
14 intentionally exposing employees to Lead in their workplaces without first giving clear and
15 reasonable warnings to such individuals regarding the carcinogenicity and reproductive toxicity
16 of Lead.

17 Wherefore, Plaintiff prays judgment against the Occupational Exposure
18 Defendants, as set forth hereafter.

19 **PRAYER FOR RELIEF**

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

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

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

28 3. That the Court, pursuant to Health & Safety Code §25249.7(a), order

1 Defendants to take action to stop ongoing unwarned exposures to Lead resulting from use of
2 Products sold by Defendants, as Plaintiff shall specify in further application to the Court;

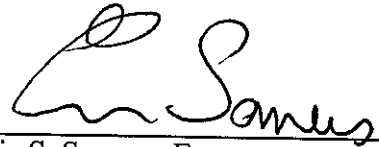
3 4. That the Court, pursuant to Code of Civil Procedure §1021.5 and any other
4 applicable theory, grant Plaintiff his reasonable attorneys' fees and costs of suit; and

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

7
8 Dated: October 10, 2006

Respectfully submitted,

9 LEXINGTON LAW GROUP, LLP

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11 

12 Eric S. Somers, Esq.
13 Attorneys for Plaintiff
14 CENTER FOR ENVIRONMENTAL
15 HEALTH