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ENDORSED
FILED
ALAMEDA COUNTY

DEC 19 2006

CLERK (_____) & COURT
By **M. Salcido** _____
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, Ph.D.,

Plaintiff,

v.

INTERCON MERCHANDISING SOURCE,
INC.; and DOES 1 through 150, inclusive,

Defendants.

Case No. **RG06302939**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Cal. Health & Safety Code §25249.6 et seq.)

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff WHITNEY R.
3 LEEMAN, Ph.D., in the public interest of the citizens of the State of California, to enforce the
4 People’s right to be informed of the presence of lead (a toxic chemical) found in certain cosmetic
5 kits containing a combination of eye shadow, eye liner pencil, and/or blush manufactured,
6 distributed and/or sold by defendants in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to warn
8 California citizens about their exposure to lead present in or on certain cosmetic kits containing a
9 combination of eye shadow, eye liner pencil, and/or blush that defendants manufacture, distribute
10 and/or offer for sale to consumers throughout the State of California.

11 3. High levels of lead are commonly found in and on the eye shadow, eye liner pencil,
12 and/or blush contained in the cosmetic kits that defendants manufacture, distribute and/or offer for
13 sale to consumers throughout the State of California.

14 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
15 California Health & Safety Code §25249.6 *et seq.* (hereinafter Proposition 65), “No person in the
16 course of doing business shall knowingly and intentionally expose any individual to a chemical
17 known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
18 warning to such individual...” (*Cal. Health & Safety Code §25249.6.*)

19 5. On February 27, 1987, California identified and listed lead as a chemical known to
20 cause birth defects and other reproductive harm. Lead became subject to the warning requirement
21 one year later and was therefore subject to the “clear and reasonable warning” requirements of
22 Proposition 65, beginning on February 27, 1988. (*22 CCR §12000(c); Cal. Health & Safety Code*
23 *§25249.8.*) Lead shall hereinafter be referred to as the “LISTED CHEMICAL.”

24 6. Defendants manufacture, distribute, and/or sell cosmetic kits containing a
25 combination of eye shadow, eye liner pencil, and/or blush containing lead including, but not
26 limited to, *Color Concepts 74 pc Deluxe Color Blockbuster, Item #31452 (#0 32531 31452 3)*,
27 which contain excessive levels of the LISTED CHEMICAL. All such cosmetic kits containing of
28 a combination of eye shadow, eye liner pencil, and/or blush containing the LISTED CHEMICAL

1 shall hereinafter be referred to as the "PRODUCTS."

2 7. Studies show that pregnant woman subject to high levels of lead exposure face
3 increased risks of spontaneous abortions, miscarriages and still births. But even low levels of lead
4 exposure can adversely affect a pregnancy, causing premature birth, shortened gestation, decreased
5 fetal growth and retarded fetal mental development. In a January 1997 report to Congress, United
6 States Department of Health and Human Services ("HHS") noted that the developing nervous
7 system of a fetus is particularly vulnerable to lead toxicity. Studies by HHS and the United States
8 Agency for Toxic Substances and Disease Registry report that the lead in the maternal blood can
9 readily cross the placenta barrier and enter the developing brain and nervous system of the fetus.

10 8. The allegations in this complaint are particularly significant where defendants
11 cosmetic kits target women in their reproductive years.

12 9. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
13 and permanent injunctive relief to compel defendants to provide purchasers or users of the
14 PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL.
15 (*Cal. Health & Safety Code §25249.7(a).*)

16 10. Plaintiff also seeks civil penalties against defendants for their violations of
17 Proposition 65, as provided for by California Health & Safety Code §25249.7(b).

18 **PARTIES**

19 11. Plaintiff WHITNEY R. LEEMAN, Ph.D. is a citizen of the State of California who
20 is dedicated to protecting the health of California citizens through the elimination or reduction of
21 toxic exposures from consumer products, and brings this action in the public interest pursuant to
22 California Health & Safety Code §25249.7.

23 12. Defendant INTERCON MERCHANDISING SOURCE, INC. ("INTERCON") is a
24 person doing business within the meaning of California Health & Safety Code §25249.11.

25 13. INTERCON manufactures, distributes and/or offers the PRODUCTS for sale or use
26 in the State of California or implies by its conduct that it manufactures, distributes and/or offers the
27 PRODUCTS for sale or use in the State of California.

28

1 14. Defendants DOES 1-50 (hereinafter MANUFACTURER DEFENDANTS) are each
2 persons doing business within the meaning of California Health & Safety Code §25249.11.

3 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,
4 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
5 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
6 one or more of the PRODUCTS for sale or use in the State of California.

7 16. Defendants DOES 51-100 (hereinafter DISTRIBUTOR DEFENDANTS) are each
8 persons doing business within the meaning of California Health & Safety Code §25249.11.

9 17. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
10 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
11 the State of California.

12 18. Defendants DOES 101-150 (hereinafter RETAIL DEFENDANTS) are each persons
13 doing business within the meaning of California Health & Safety Code §25249.11.

14 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
15 of California.

16 20. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
17 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code
18 of Civil Procedure §474. Plaintiff is informed and believes, and on that basis alleges, that each of
19 the fictitiously named defendants is responsible for the acts and occurrences herein alleged. When
20 ascertained, their true names shall be reflected in an amended complaint.

21 21. INTERCON, MANUFACTURER DEFENDANTS, DISTRIBUTOR
22 DEFENDANTS, RETAIL DEFENDANTS, shall, where appropriate, collectively be referred to
23 hereinafter as “DEFENDANTS.”

24 VENUE AND JURISDICTION

25 22. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
26 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one
27 or more instances of wrongful conduct occurred, and continues to occur, in the County of Alameda
28 and/or because DEFENDANTS conducted, and continue to conduct, business in this County with

1 respect to the PRODUCTS.

2 23. The California Superior Court has jurisdiction over this action pursuant to
3 California Constitution Article VI, §10, which grants the Superior Court “original jurisdiction in all
4 causes except those given by statute to other trial courts.” The statute under which this action is
5 brought does not specify any other basis of subject matter jurisdiction.

6 24. The California Superior Court has jurisdiction over DEFENDANTS based on
7 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
8 association that either is a citizen of the State of California, has sufficient minimum contacts in the
9 State of California, or otherwise purposefully avails itself of the California market.

10 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
11 courts consistent with traditional notions of fair play and substantial justice.

12 **FIRST CAUSE OF ACTION**

13 **(Violation of Proposition 65)**

14 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
15 Paragraphs 1 through 24, inclusive.

16 26. The citizens of the State of California have expressly stated in the Safe Drinking
17 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.6, *et seq.*
18 (Proposition 65) that they must be informed “about exposures to chemicals that cause cancer, birth
19 defects and other reproductive harm.” (*Cal. Health & Safety Code §25249.6.*)

20 27. Proposition 65 states, “No person in the course of doing business shall knowingly
21 and intentionally expose any individual to a chemical known to the state to cause cancer or
22 reproductive toxicity without first giving clear and reasonable warning to such individual...” (*Id.*)

23 28. On October 13, 2006, a sixty-day notice of violation, together with the requisite
24 certificate of merit, was provided to INTERCON and various public enforcement agencies stating
25 that as a result of INTERCON’s sale of PRODUCTS, purchasers and users in the State of
26 California were being exposed to the LISTED CHEMICAL resulting from the reasonably
27 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having been
28 provided with a “clear and reasonable warning” regarding such toxic exposures.

1 29. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
2 the PRODUCTS for sale or use in violation of California Health & Safety Code §25249.6 and
3 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale or use in
4 violation of California Health & Safety Code §25249.6 has continued to occur beyond
5 INTERCON's receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and
6 believes that such violations will continue to occur into the future.

7 30. After receipt of the claims asserted in the sixty-day notice of violation, the
8 appropriate public enforcement agencies have failed to commence and diligently prosecute a cause
9 of action against INTERCON under Proposition 65.

10 31. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
11 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
12 limits.

13 32. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
14 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED
15 CHEMICAL.

16 33. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as to
17 expose individuals to the LISTED CHEMICAL through ingestion, inhalation, ocular absorption
18 and/or dermal contact during the reasonably foreseeable use of the PRODUCTS.

19 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
20 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
21 by 22 CCR §12601(b).

22 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
23 the PRODUCTS would expose individuals to the LISTED CHEMICAL through ingestion,
24 inhalation, ocular absorption and/or dermal contact.

25 36. DEFENDANTS, and each of them, intended that such exposures to the LISTED
26 CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their
27 deliberate, non-accidental participation in the manufacture, distribution and/or offer for sale or use
28 of PRODUCTS to individuals in the State of California.

1 37. DEFENDANTS failed to provide a “clear and reasonable warning” to those
2 consumers and/or other individuals in the State of California who were or who could become
3 exposed to the LISTED CHEMICAL through ingestion, inhalation, ocular absorption and/or
4 dermal contact during the reasonably foreseeable use of the PRODUCTS.

5 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
6 directly by California voters, individuals exposed to the LISTED CHEMICAL through ingestion,
7 inhalation, ocular absorption and/or dermal contact resulting from the reasonably foreseeable use
8 of the PRODUCTS, sold by DEFENDANTS without “clear and reasonable warning,” have
9 suffered, and continue to suffer, irreparable harm, for which harm they have no plain, speedy or
10 adequate remedy at law.

11 39. As a consequence of the above-described acts, DEFENDANTS, and each of them,
12 are liable for a maximum civil penalty of \$2,500 per day for each violation pursuant to California
13 Health & Safety Code §25249.7(b).

14 40. As a consequence of the above-described acts, California Health & Safety Code
15 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against
16 DEFENDANTS.

17 41. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
18 set forth hereinafter.

19 **PRAYER FOR RELIEF**

20 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

21 1. That the Court, pursuant to California Health & Safety Code §25249.7(b), assess
22 civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each
23 violation alleged herein;


24 2. That the Court, pursuant to California Health & Safety Code §25249.7(a),
25 preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing,
26 distributing or offering the PRODUCTS for sale or use in California, without providing “clear and
27 reasonable warnings” as defined by 22 CCR §12601, as to the harms associated with exposures to
28 the LISTED CHEMICAL;

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- 3. That the Court grant plaintiff her reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: December 19, 2006

Respectfully Submitted,
HIRST & CHANLER, LLP


Aparna L. Reddy
Attorneys for Plaintiff
WHITNEY R. LEEMAN, Ph.D.