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**ENDORSED
 FILED
 ALAMEDA COUNTY**

MAY 15 2008

CLERK OF THE SUPERIOR COURT
 By E. Robinson Deputy

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

12 MICHAEL DIPIRRO,

13 Plaintiff,

14 v.

15 AOpen AMERICA INCORPORATED; and
 16 DOES 1 through 150, inclusive,

17 Defendants.

Case No. RG08 387832

**COMPLAINT FOR CIVIL PENALTIES
 AND INJUNCTIVE RELIEF**

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

BY FAX

NATURE OF THE ACTION

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2 1. This Complaint is a representative action brought by plaintiff MICHAEL DIPIRRO,
3 in the public interest of the citizens of the State of California, to enforce the People's right to be
4 informed of the presence of lead (a toxic chemical) found in certain motherboards manufactured
5 and sold by defendants in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to warn
7 California citizens about their exposure to lead present in or on certain motherboards that
8 defendants manufacture, distribute and/or offer for sale to consumers throughout the State of
9 California.

10 3. High levels of lead are commonly found in the solder in and on motherboards that
11 defendants manufacture, distribute and/or offer for sale to consumers throughout the State of
12 California.

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

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

23 6. Defendants manufacture and sell motherboards with solder containing lead,
24 including, but not limited to, *AOpen i855GMem-LFS Motherboard, Model No. 91.8EM10.15Z (#7*
25 *50519 15228 7)*, which contain excessive levels of the LISTED CHEMICAL. All such
26 motherboards containing the LISTED CHEMICAL shall hereinafter be referred to as the
27 "PRODUCTS."
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1 7. Defendants' failure to warn consumers; sole proprietors, employees, and other
2 persons engaged in the small business field of computer service and repair whom the Occupational
3 Safety Health Act ("OSH ACT") does not cover; and/or other individuals in the State of California
4 about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale of the
5 PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such
6 conduct as well as civil penalties for each such violation.

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

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

13 PARTIES

14 10. Plaintiff MICHAEL DIPIRRO is a citizen of the City and County of San Francisco
15 in the State of California who is dedicated to protecting the health of California citizens through
16 the elimination or reduction of toxic exposures from consumer products, and brings this action in
17 the public interest pursuant to California Health & Safety Code §25249.7.

18 11. Defendant AOpen America Incorporated ("AOpen") is a person doing business
19 within the meaning of California Health & Safety Code §25249.11.

20 12. AOpen manufactures, distributes and/or offers the PRODUCTS for sale or use in
21 the State of California or implies by its conduct that it manufactures, distributes and/or offers the
22 PRODUCTS for sale or use in the State of California.

23 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
24 doing business within the meaning of California Health & Safety Code §25249.11.

25 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,
26 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
27 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
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1 one or more of the PRODUCTS for sale or use in the State of California.

2 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
3 doing business within the meaning of California Health & Safety Code §25249.11.

4 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
5 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
6 the State of California.

7 17. Defendants DOES 101-150 ("RETAIL DEFENDANTS") are each persons doing
8 business within the meaning of California Health & Safety Code §25249.11.

9 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
10 of California.

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

16 20. AOpen, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS,
17 and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as
18 "DEFENDANTS."

19 **VENUE AND JURISDICTION**

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

25 22. The California Superior Court has jurisdiction over this action pursuant to
26 California Constitution Article VI, §10, which grants the Superior Court "original jurisdiction in all
27 causes except those given by statute to other trial courts." The statute under which this action is
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1 brought does not specify any other basis of subject matter jurisdiction.

2 23. The California Superior Court has jurisdiction over DEFENDANTS based on
3 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
4 association that either are citizens of the State of California, have sufficient minimum contacts in
5 the State of California, or otherwise purposefully avail themselves of the California market.
6 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
7 courts consistent with traditional notions of fair play and substantial justice.

8
9 **FIRST CAUSE OF ACTION**

10 **(Violation of Proposition 65)**

11 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 23, inclusive.

13 25. The citizens of the State of California have expressly stated in the Safe Drinking
14 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.5, *et seq.*
15 ("Proposition 65") that they must be informed "about exposures to chemicals that cause cancer,
16 birth defects and other reproductive harm." (*Cal. Health & Safety Code §25249.6.*)

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

21 27. On April 30, 2007, a sixty-day notice of violation, together with the requisite
22 certificate of merit, was provided to AOpen and various public enforcement agencies stating that as
23 a result of AOpen's sale of PRODUCTS, purchasers and users in the State of California were being
24 exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable uses of the
25 PRODUCTS, without the individual purchasers and users first having been provided with a "clear
26 and reasonable warning" regarding such toxic exposures.

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

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

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

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

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

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

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

24 35. DEFENDANTS, and each of them, intended that such exposures to the LISTED
25 CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their
26 deliberate, non-accidental participation in the manufacture, distribution and/or offer for sale or use
27 of PRODUCTS to individuals in the State of California.
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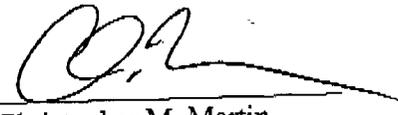
1 distributing or offering the PRODUCTS for sale or use in California, without providing "clear and
 2 reasonable warnings" as defined by 22 CCR §12601, as to the harms associated with exposures to
 3 the LISTED CHEMICAL;

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

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 7 Dated: May 13, 2008

Respectfully Submitted,

HIRST & CHANLER LLP



Christopher M. Martin

Attorney for Plaintiff
 MICHAEL DIPIRRO

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