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KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

By: D. Taylor, Deputy

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN

11
12 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

13 Plaintiff,)

14 v.)

15
16 ASPEN PET PRODUCTS, INC.; DOSKOCIL)
MANUFACTURING CO., INC.; PETSMART,)
17 INC.; SWING LTD. and Defendant DOES 1)
through 200, inclusive,)

18
19 Defendants.)
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27)
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Case No. C1V090989

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

(Other)

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 knowledge,
3 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 and birth defects or other
8 reproductive harm. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and use of Defendants' whistles and keychains (the "Products").
10 Consumers, including children, are exposed to Lead when they use the Products.

11 2. Under California's Proposition 65, Health and Safety Code §25249.5, *et*
12 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
13 to chemicals known to the State to cause cancer, birth defects or other reproductive harm without
14 providing clear and reasonable warnings to individuals prior to their exposure. Defendants
15 introduce Products contaminated with significant quantities of Lead into the California
16 marketplace, exposing consumers of their Products, many of whom are children, to Lead.

17 3. Despite the fact that Defendants expose children and other consumers to
18 Lead, Defendants provide no warnings whatsoever about the carcinogenic or reproductive
19 hazards associated with Lead exposure. Defendants' conduct thus violates the warning provision
20 of Proposition 65. Health & Safety Code §25249.6.

21 **PARTIES**

22 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
23 non-profit corporation dedicated to protecting the public from environmental health hazards and
24 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
25 State of California. CEH is a "person" within the meaning of Health & Safety Code
26 §25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
27 Safety Code §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
28 group that has prosecuted a large number of Proposition 65 cases in the public interest. These

cases have resulted in significant public benefit, including reformulation of thousands of products to remove toxic chemicals and to make them safer. CEH also provides information to Californians about the health risks associated with exposure to hazardous substances, where manufacturers and other responsible parties fail to do so.

5. Defendant ASPEN PET PRODUCTS, INC. (“Aspen Pet Products”) is a person in the course of doing business within the meaning of Health & Safety Code §25249.11. Aspen Pet Products manufactures, distributes and/or sells the Products for sale and use in California.

6. Defendant DOSKOCIL MANUFACTURING CO., INC. (“Dorskocil”) is a person in the course of doing business within the meaning of Health & Safety Code §25249.11. Dorskocil manufactures, distributes and/or sells the Products for sale and use in California.

7. Defendant PETSMART, INC. (“Petsmart”) is a person in the course of doing business within the meaning of Health & Safety Code §25249.11. Petsmart manufactures, distributes and/or sells the Products for sale and use in California.

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

9. DOES 1 through 200 are each a person in the course of doing business within the meaning of Health & Safety Code §25249.11. DOES 1 through 200 manufacture, distribute and/or sell the Products for sale or use in California.

10. The true names of DOES 1 through 200 are unknown to CEH at this time. When their identities are ascertained, the Complaint shall be amended to reflect their true names.

11. The defendant identified in paragraphs 5 to 8 and DOES 1 through 200 are collectively referred to herein as “Defendants.”

JURISDICTION AND VENUE

12. The Court has jurisdiction over this action pursuant to Health & Safety Code §25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to California Constitution Article VI, Section 10, because this case is a cause not given by statute

1 to other trial courts.

2 13. This Court has jurisdiction over the Defendants because each is a business
3 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
4 intentionally avails itself of the California market through the sale, marketing or use of the
5 Products in California and/or by having such other contacts with California so as to render the
6 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
7 play and substantial justice.

8 14. Venue is proper in the Marin Superior Court because one or more of the
9 violations arise in the County of Marin.

10 **BACKGROUND FACTS**

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

14 16. To effectuate this goal, Proposition 65 prohibits exposing people to
15 chemicals listed by the State of California as known to cause cancer, birth defects or other
16 reproductive harm above certain levels without a “clear and reasonable warning” unless the
17 business responsible for the exposure can prove that it fits within a statutory exemption. Health
18 & Safety Code §25249.6 states, in pertinent part:

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

22 17. On February 27, 1987, the State of California officially listed lead as a
23 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
24 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
25 the developing fetus, “female reproductive toxicity,” which means harm to the female
26 reproductive system, and “male reproductive toxicity,” which means harm to the male
27 reproductive system. 27 California Code of Regulations (“C.C.R.”) §27001(c). On February 27,
28 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead

1 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
2 under Proposition 65. 27 C.C.R. §27001(c); Health & Safety Code §25249.10(b).

3 18. On October 1, 1992, the State of California officially listed lead and lead
4 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
5 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
6 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
7 §27001(c); Health & Safety Code §25249.10(b).

8 19. Young children are especially susceptible to the toxic effects of Lead.
9 Children show a greater sensitivity to Lead's effects than do adults. Adverse health impacts from
10 Lead exposure generally occur in children at lower blood Lead levels than in adults. Children
11 absorb and retain more Lead in proportion to their weight than do adults. Young children also
12 show a greater prevalence of iron deficiency, a condition that can increase gastrointestinal
13 absorption of Lead. The body accumulates Lead over a lifetime and releases it slowly, so even
14 small doses received in childhood, over time, can cause adverse health impacts, including but not
15 limited to reproductive toxicity, later in life. For example, in times of physiological stress, such
16 as pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby
17 increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

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

1 322:83-88, 1990.

2 21. Defendants' Products contain sufficient quantities of Lead such that
3 consumers, including children, who handle the Products are exposed to Lead through the average
4 use of the Products. The routes of exposure for the violations include direct ingestion when
5 consumers place the Products in their mouths to blow the whistles, ingestion via hand to mouth
6 contact after consumers touch, handle or use the Products, and dermal absorption directly
7 through the skin when consumers touch, handle or use the Products.

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

12 23. More than sixty days prior to naming each Defendant in this lawsuit, CEH
13 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
14 the District Attorneys of every county in California, the City Attorneys of every California city
15 with a population greater than 750,000 and to each of the named Defendants. In compliance with
16 Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each of the Notices included the
17 following information: (1) the name and address of the violators; (2) the statute violated; (3) the
18 time period during which violations occurred; (4) specific descriptions of the violations,
19 including (a) the routes of exposure to Lead from the Products, and (b) the specific type of
20 Products sold and used in violation of Proposition 65; and (5) the name of the specific
21 Proposition 65-listed chemical (Lead) that is the subject of the violations described in each of the
22 Notices.

23 24. CEH also sent a Certificate of Merit for each of the Notices to the
24 California Attorney General, the District Attorneys of every county in California, the City
25 Attorneys of every California city with a population greater than 750,000 and to the named
26 Defendants. In compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each
27 of the Certificates certified that CEH's counsel: (1) has consulted with one or more persons with
28 relevant and appropriate experience or expertise who reviewed facts, studies or other data

herein Paragraphs 1 through 30, inclusive.

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

33. Defendants know that average use of the Products will expose users of the Products to Lead. Defendants intend that the Products be used in a manner that results in users of the Products being exposed to Lead contained in the Products.

34. The Defendants have failed, and continue to fail, to provide clear and reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of the Products.

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

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

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

PRAYER FOR RELIEF

Wherefore, CEH prays for judgment against Defendants as follows:

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

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

3. That the Court, pursuant to Health & Safety Code §25249.7(a), order Defendants to take action to stop ongoing unwarned exposures to Lead resulting from use of

1 Products sold by Defendants, as CEH shall specify in further application to the Court;

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

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

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7 Dated: March 2, 2009

Respectfully submitted,

8 LEXINGTON LAW GROUP, LLP

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11 Eric S. Somers
12 Attorneys for Plaintiff
13 CENTER FOR ENVIRONMENTAL
14 HEALTH
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