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FILED

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KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: C. Larson, Deputy

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF MARIN

14 CENTER FOR ENVIRONMENTAL HEALTH,)
15 a non-profit corporation,)

16 Plaintiff,)

17 v.)

18 FETCO HOME DECOR, INC.; LIFETIME)
19 BRANDS; and Defendant DOES 1 through 200,)
20 inclusive,)

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

Case No. 01V090292

**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/or use of Defendants' picture frames (the "Products").
10 Consumers in California are exposed to Lead when they use, install, clean, service or otherwise
11 touch or handle the Products.

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

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

22 PARTIES

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

1 play and substantial justice.

2 12. Venue is proper in Marin Superior Court because one or more of the
3 violations arise in the County of Marin.

4 **BACKGROUND FACTS**

5 13. 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 14. To effectuate this goal, Proposition 65 prohibits exposing people to
9 chemicals listed by the State of California as known to cause cancer, birth defects or other
10 reproductive harm above certain levels without a “clear and reasonable warning” unless the
11 business responsible for the exposure can prove that it fits within a statutory exemption. Health
12 & 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 15. 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. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On February
22 27, 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. 27 C.C.R. § 27001(c); Health & Safety Code § 25249.10(b).

25 16. 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 chemicals known to cause cancer, lead and lead compounds became subject to the clear
28

1 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R. §
2 27001(c); Health & Safety Code § 25249.10(b).

3 17. There is no safe level of exposure to Lead and even minute amounts of
4 Lead exposure have been shown to permanently reduce mental capacity. Davis, J.M.,
5 Svendgaard, D.J.; "Lead and Child Development"; *Nature* 329:297-300, 1987. One study on the
6 effect of childhood Lead exposure declared that even the smallest detectable amount of blood
7 Lead levels in children can mean the difference between an A or B grade in school. Lanphear,
8 B.P., Dietrich, K., Auinger, P., Cox, C.; "Subclinical Lead Toxicity in U.S. Children and
9 Adolescents"; *Neurodevelopmental Disabilities II Platform*, 2000. Another study followed
10 children into adulthood and found a sevenfold increase in the risk for developing a reading
11 disability among children exposed to sufficient levels of Lead as toddlers. Needleman, H.L.,
12 Schell, A., Bellinger, D., Leviton, A., Allred, E.N.; "The Long-Term Effects of Exposure to Low
13 Doses of Lead in Childhood: An 11-Year Follow-up Report"; *New England Journal of Medicine*;
14 322:83-88, 1990.

15 18. Defendants' Products contain sufficient quantities of Lead such that
16 consumers who handle the Products are exposed to Lead through the average use of the
17 Products. The route of exposure for the violations is ingestion via hand to mouth contact, dermal
18 absorption directly through the skin, and inhalation of dust containing Lead. These exposures
19 take place when consumers use, install, clean, service or otherwise touch or handle the Products.
20 These exposures occur in homes, schools, workplaces and everywhere else in California where
21 these Products are used.

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

26 20. More than sixty days prior to naming each Defendant in this lawsuit, CEH
27 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
28 the District Attorneys of every county in California, the City Attorneys of every California city

1 with a population greater than 750,000 and to each of the named Defendants. In compliance
2 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each of the Notices included
3 the following information: (1) the name and address of the violators; (2) the statute violated; (3)
4 the time period during which violations occurred; (4) specific descriptions of the violations,
5 including (a) the routes of exposure to Lead from the Products, and (b) the specific type of
6 Products sold and used in violation of Proposition 65; and (5) the name of the specific
7 Proposition 65-listed chemical (Lead) that is the subject of the violations described in each of the
8 Notices.

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

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

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

28 24. The Products typically use solder to hold metal parts together. This solder

1 is often composed of substantial quantities of Lead, to which ordinary consumers are exposed
2 when they touch or handle the Products.

3 25. Defendants have been informed of the Lead in their Products by the 60-
4 Day Notice of Violation served on them by CEH.

5 26. Nevertheless, Defendants continue to expose consumers, including
6 children, to Lead without prior clear and reasonable warnings regarding the carcinogenic or
7 reproductive hazards of Lead.

8 27. CEH has engaged in good-faith efforts to resolve the claims alleged herein
9 prior to filing this complaint.

10 28. Any person "violating or threatening to violate" Proposition 65 may be
11 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
12 violate" is defined to mean "to create a condition in which there is a substantial probability that a
13 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
14 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

15 **FIRST CAUSE OF ACTION**

16 **(Violations of the Health & Safety Code § 25249.6)**

17 29. CEH realleges and incorporates by reference as if specifically set forth
18 herein Paragraphs 1 through 28, inclusive.

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

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

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

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

