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KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: *R. Smith, Deputy*

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

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

14 Plaintiff,)

15 v.)

16 MULTI-PURE INTERNATIONAL;)
17 OMNIPURE FILTER COMPANY, INC.; PUR)
WATER PURIFICATION PRODUCTS, INC.;)
18 THE PROCTER & GAMBLE COMPANY;)
THE PROCTER & GAMBLE DISTRIBUTING)
19 LLC; THE PROCTER & GAMBLE)
20 MANUFACTURING COMPANY; and)
Defendant DOES 1 through 500, inclusive,)

21 Defendants.)
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Case No. CV 093704

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.5, *et seq.*

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 discharge and
6 release of arsenic, a chemical known to the State of California to cause cancer and birth defects
7 or other reproductive harm, into sources of drinking water. Such discharges and releases have
8 occurred, and continue to occur, through the sale and use of defendants' drinking water filtration
9 systems utilizing activated carbon filters and replacement filters used in such systems. Arsenic is
10 present in the activated carbon used in the filters and replacement filters of defendants' drinking
11 water filtration systems. These drinking water filtration systems utilizing activated carbon filters
12 and replacement filters used in such systems (excluding any industrial filters) are referred to
13 herein as the "Products." The Products contain sufficient quantities of arsenic such that arsenic
14 will leach from the Products into water flowing through and emanating from them. People who
15 use the Products, including children, consume water from the Products after arsenic has leached
16 from the Products into the water. Therefore, the Products and the water emanating from these
17 Products are sources of drinking water. These discharges occur in homes, businesses and other
18 places throughout California where the Products are used.

19 2. This Complaint further seeks to remedy defendants' continuing failure to
20 warn individuals in California that they are being exposed to arsenic, a chemical known to the
21 State of California to cause cancer and birth defects or other reproductive harm. Such exposures
22 have occurred, and continue to occur, through the sale and use of the Products. The route of
23 exposure for the violations is ingestion of arsenic-laced water discharged through the Products.
24 These exposures occur in homes, businesses, and other places throughout California where the
25 Products are used. Clear and reasonable warnings are not provided with the Products regarding
26 the carcinogenic or reproductive hazards of arsenic.

27 **PARTIES**

28 3. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a

1 non-profit corporation dedicated to protecting the public from environmental health hazards and
2 toxic exposures. CEH is based in Oakland and incorporated under the laws of the State of
3 California. CEH is a "person" within the meaning of Health & Safety Code §25249.11(a) and
4 brings this enforcement action in the public interest pursuant to Health & Safety Code
5 §25249.7(d). CEH has prosecuted a large number of Proposition 65 cases in the public interest
6 that have resulted in significant public benefit, including reformulation of toxic products to make
7 them safer and the provision of clear and reasonable warnings on hundreds of products sold in
8 California. CEH also provides information to Californians about the health risks associated with
9 exposure to hazardous substances, where manufacturers and other responsible parties fail to do
10 so.

11 4. Defendant MULTI-PURE INTERNATIONAL ("Multipure") is a person
12 in the course of doing business within the meaning of Health & Safety Code §25249.11.
13 Multipure manufactures, distributes and/or sells the Products for sale and use in California.

14 5. Defendant OMNIPURE FILTER COMPANY, INC. ("Omnipure") is a
15 person in the course of doing business within the meaning of Health & Safety Code §25249.11.
16 Omnipure manufactures, distributes and/or sells the Products for sale and use in California.

17 6. Defendant PUR WATER PURIFICATION PRODUCTS, INC. ("Pur") is a
18 person in the course of doing business within the meaning of Health & Safety Code §25249.11.
19 Pur manufactures, distributes and/or sells the Products for sale and use in California.

20 7. Defendant THE PROCTER & GAMBLE COMPANY ("Procter &
21 Gamble") is a person in the course of doing business within the meaning of Health & Safety
22 Code §25249.11. Procter & Gamble manufactures, distributes and/or sells the Products for sale
23 and use in California.

24 8. Defendant THE PROCTER & GAMBLE DISTRIBUTING LLC ("Procter
25 & Gamble Distributing") is a person in the course of doing business within the meaning of
26 Health & Safety Code §25249.11. Procter & Gamble Distributing manufactures, distributes
27 and/or sells the Products for sale and use in California.

28 9. Defendant THE PROCTER & GAMBLE MANUFACTURING

1 COMPANY (“Procter & Gamble Manufacturing”) is a person in the course of doing business
2 within the meaning of Health & Safety Code §25249.11. Procter & Gamble Manufacturing
3 manufactures, distributes and/or sells the Products for sale and use in California.

4 10. DOES 1-500 are each a person in the course of doing business within the
5 meaning of Health & Safety Code §25249.11 and a person within the meaning of Business &
6 Professions Code §17201. DOES 1 through 500 manufacture, distribute and/or sell the Products
7 for sale or use in California.

8 11. The true names of DOES 1 through 500 are unknown to CEH at this time.
9 When their identities are ascertained, the complaint shall be amended to reflect their true names.

10 12. The defendants identified in paragraphs 4 through 9 and DOES 1 through
11 500 are collectively referred to herein as “Defendants.”

12 JURISDICTION AND VENUE

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

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

23 15. Venue is proper in the Marin Superior Court because one or more of the
24 violations arise in the County of Marin.

25 BACKGROUND FACTS

26 16. The People of the State of California have declared by referendum under
27 Proposition 65 their right “[t]o protect themselves and the water they drink against chemicals that
28 cause cancer, birth defects, or other reproductive harm.” Proposition 65, §1(a).

1 17. To effectuate this goal, California’s Health & Safety Code §25249.5, *et*
2 *seq.* (“Proposition 65”) prohibits businesses from discharging or releasing into drinking water
3 chemicals listed by the State of California known to cause cancer, birth defects or other
4 reproductive harm unless the business responsible for the discharge or release can prove that it
5 fits within a statutory exemption. Health & Safety Code §25249.5 states, in pertinent part:

6 No person in the course of doing business shall knowingly discharge or
7 release a chemical known to the state to cause cancer or reproductive
8 toxicity into water or onto or into land where such chemical passes or
 probably will pass into any source of drinking water

9 18. On February 27, 1987, the State of California officially listed arsenic
10 (inorganic arsenic compounds) as a chemical known to cause cancer. On October 27, 1988,
11 twenty months later, arsenic (inorganic arsenic compounds) became subject to the Proposition 65
12 prohibition on “discharge or release” of carcinogens into drinking water. 27 California Code of
13 Regulations (“C.C.R.”) §27001(c); Health & Safety Code §25249.9(a).

14 19. On May 1, 1997, the State of California officially listed arsenic (inorganic
15 oxides) as a chemical known to cause reproductive toxicity. Arsenic (inorganic oxides) are
16 specifically identified as reproductive toxicants under the “developmental reproductive toxicity”
17 category, which means they tend to harm the developing fetus. On January 1, 1999, twenty
18 months later, arsenic (inorganic oxides) became subject to the Proposition 65 prohibition on
19 “discharge or release” of reproductive toxins into drinking water. 27 C.C.R. §27001(c); Health
20 & Safety Code §25249.9(a). Arsenic (inorganic arsenic compounds) and arsenic (inorganic
21 oxides) are referred to interchangeably herein as “Arsenic.”

22 20. The Products contain sufficient quantities of Arsenic such that Arsenic
23 will leach from the Products into water flowing through and emanating from them.

24 21. In *People ex rel. Lungren v. Superior Court of San Francisco (American*
25 *Standard)* (1996) 14 Cal.4th 294, the California Supreme Court determined that faucet water is a
26 “source of drinking water.” In *American Standard*, the Supreme Court adopted the view that the
27 phrase a “source of drinking water” includes “the point of procurement or emanation of drinking
28 water.” 14 Cal.4th at 303. The Products are a point of procurement or emanation of drinking

1 water. Therefore, the Products and the water which flows through them are sources of drinking
2 water under Health & Safety Code §25249.5.

3 22. The People of the State of California have also declared by referendum
4 under Proposition 65 their right “[t]o be informed about exposures to chemicals that cause
5 cancer, birth defects and other reproductive harm.” Proposition 65, §1(b).

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

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

14 24. On February 27, 1988, one year after it was listed as a chemical known to
15 cause cancer, arsenic (inorganic arsenic compounds) became subject to the clear and reasonable
16 warning requirement regarding carcinogens under Proposition 65. 27 C.C.R. §27001(c); Health
17 & Safety Code §25249.10(b).

18 25. On May 1, 1998, one year after it was listed as a chemical known to cause
19 reproductive toxicity, arsenic (inorganic oxides) became subject to the clear and reasonable
20 warning requirement regarding reproductive toxins under Proposition 65. 27 C.C.R. §27001(c);
21 Health & Safety Code §25249.10(b).

22 26. The Products contain sufficient quantities of Arsenic such that users of
23 the Products are exposed to Arsenic through the reasonably foreseeable use of the Products. No
24 clear and reasonable warning is provided with the Products regarding the carcinogenic or
25 reproductive hazards of Arsenic.

26 27. Under Proposition 65, a discharge or exposure is “knowing” where the
27 party responsible for such discharge or exposure has:

28 knowledge of the fact that a discharge of, release of, or exposure to
a chemical listed pursuant to Health and Safety Code §25249.8(a)

1 of the Act is occurring. No knowledge that the discharge, release
2 or exposure is unlawful is required.

3 27 C.C.R. §25102(n).

4 28. Defendants know or should know that the Products discharge Arsenic into
5 sources of drinking water.

6 29. Defendants know or should know that the Products expose people to
7 Arsenic.

8 30. There has been extensive discussion within the water filtration system
9 industry about the discharge of Arsenic from drinking water filtration systems using activated
10 carbon filters. The Water Quality Association, an international trade association representing the
11 water treatment industry, has even formed an "Arsenic-Activated Carbon Task Group." Most of
12 the Defendants or their affiliates are members of the Water Quality Association.

13 31. The discharge of Arsenic from activated carbon water filters was
14 specifically discussed at an August 8, 2000 meeting of the Water Quality Association. At that
15 meeting, a report was presented of a multi-year study conducted by KX Industries, L.P. The KX
16 Industries, L.P. study concluded that, "arsenic and antimony contamination occurs broadly in
17 activated carbons," and that "[t]his contamination leads to extractable levels of arsenic and
18 antimony that can often exceed the current arsenic and antimony standards and pervasively
19 exceed the proposed future arsenic standard." The proposed future arsenic standard referred to is
20 now the federal drinking water standard of 10 parts per billion ("ppb"), which is twice the level
21 that has been determined to pose a significant risk of cancer under Proposition 65's
22 implementing regulations.

23 32. On August 28, 2000, just a few weeks after the Water Quality Association
24 meeting described above, one of its members submitted a report to the United States
25 Environmental Protection Agency ("EPA") concerning the leaching of Arsenic from activated
26 carbon water filters. The author of that report later wrote in the June 2003 issue of *Water*
27 *Conditioning & Purification* magazine, an industry publication, that, "This filing [with EPA]
28 served to shield the point-of-use/point-of-entry (POU/POE) water treatment industry from
liability and prosecution under the Toxic Substances Control Act for distribution of products

1 known to expose users to a hazardous chemical. As a result of this filing, the most severe
2 potential penalties for use of contaminated activated carbons have been mitigated for the entire
3 industry; but this filing does not provide a shield against legal prosecution under state statutes
4 such as Proposition 65.”

5 33. That same June 2003 article also reported the results of testing of Arsenic
6 leaching from activated carbon filters. Even though the samples tested by the authors were
7 “selected by the manufacturer to represent the lowest possible extractables,” thirteen of the
8 nineteen manufacturers’ activated carbon samples leached sufficient quantities of Arsenic such
9 that water exposed to those samples contained arsenic levels in excess of the federal drinking
10 water standard of 10 ppb. Moreover, the authors of the study admitted that current quality
11 assurance procedures were not “likely to provide accurate guidance on product quality and
12 sustainable control of arsenic and antimony extractables from POU/POE [point-of-use/point-of-
13 entry] activated carbons, even with the best manufacturers and their best available grades.”

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

18 35. More than sixty days before naming each Defendant in this suit, CEH
19 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,
20 the District Attorneys of every county in California, the City Attorneys of every California city
21 with a population greater than 750,000, and to each named Defendant. In compliance with
22 Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each of the Notices included the
23 following information: (1) the name and address of the violators; (2) the statute violated; (3) the
24 time period during which violations occurred; (4) specific descriptions of the violations,
25 including (a) the source of drinking water at issue, (b) the routes of exposure to Arsenic from the
26 Products, and (c) the specific type of Products sold and used in violation of Proposition 65; and
27 (5) the name of the specific Proposition 65-listed chemical (Arsenic) that is the subject of the
28 violations described in each of the Notices.

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

15 37. None of the public prosecutors with the authority to prosecute violations
16 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action under Health
17 & Safety Code §25249.5, *et seq.*, against Defendants based on the claims asserted in CEH's
18 Notice and herein. Nor has the Attorney General contacted CEH or its counsel regarding the
19 Certificate or any of the confidential supporting information provided to the Attorney General.

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

25 39. CEH has engaged in good-faith efforts to resolve the claims alleged herein
26 prior to filing this Complaint.

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1 **FIRST CAUSE OF ACTION**
2 **(Violations of Health & Safety Code §25249.5)**

3 40. CEH realleges and incorporates by reference as if specifically set forth
4 herein Paragraphs 1 through 39, inclusive.

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

7 42. Defendants know that through the reasonably foreseeable use of the
8 Products, Arsenic is discharged or released into sources of drinking water in California.

9 43. Arsenic is a chemical listed by the State of California as known to cause
10 cancer and birth defects or other reproductive harm.

11 44. Since at least four years prior to the filing of this complaint, and
12 continuing through the present, Defendants have engaged in conduct which violates Proposition
13 65 by placing into commerce Products which are known to discharge Arsenic into sources of
14 drinking water.

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

16 **SECOND CAUSE OF ACTION**
17 **(Violations of the Health & Safety Code §25249.6)**

18 45. CEH realleges and incorporates by reference as if specifically set forth
19 herein Paragraphs 1 through 44 inclusive.

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

22 47. Defendants know that through the reasonably foreseeable use of the
23 Products, users of the Products are exposed to Arsenic. Defendants intend that the Products be
24 used in a manner that results in users of the Products being exposed to Arsenic from the
25 Products.

26 48. Defendants have failed, and continue to fail, to provide clear and
27 reasonable warning regarding the carcinogenicity and reproductive toxicity of Arsenic to users of
28 the Products.

49. Arsenic is a chemical listed by the State of California as known to cause

1 other applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and
2 7. That the Court grant such other and further relief as may be just and
3 proper.
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5 Dated: July 24, 2009

Respectfully submitted,

LEXINGTON LAW GROUP

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