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SUPERIOR COURT

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GORDON J. ... CLERK

BY: ~~ELIAS BUI~~

1 LEXINGTON LAW GROUP
Eric S. Somers, State Bar No. 139050
2 Howard Hirsch, State Bar No. 213209
Lisa Burger, State Bar No. 239676
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff
6 CENTER FOR ENVIRONMENTAL HEALTH

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

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

13)
14 Plaintiff,)

15 v.)

16 UNIQUE INDUSTRIES, INC., and Defendant)
DOES 1 through 200, inclusive,)

17)
18 Defendants.)
19 _____)

Case No. **CGC-09-489838**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

(Other)

CASE MANAGEMENT CONFERENCE SET

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DEPARTMENT 212

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' artificial leis (the "Products").
10 Consumers, including children and pregnant women, are exposed to Lead when they use the
11 Products.

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

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

23 **PARTIES**

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

1 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
2 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
3 cases have resulted in significant public benefit, including reformulation of thousands of
4 products to remove toxic chemicals and to make them safer. CEH also provides information to
5 Californians about the health risks associated with exposure to hazardous substances, where
6 manufacturers and other responsible parties fail to do so.

7 5. Defendant UNIQUE INDUSTRIES, INC. (“Unique Industries”) is a
8 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.
9 Unique Industries manufactures, distributes and/or sells the Products for sale and use in
10 California.

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

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

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

18 JURISDICTION AND VENUE

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

23 10. This Court has jurisdiction over the Defendants because each is a business
24 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
25 intentionally avails itself of the California market through the sale, marketing or use of the
26 Products in California and/or by having such other contacts with California so as to render the
27 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
28 play and substantial justice.

1 11. Venue is proper in the San Francisco Superior Court because one or more
2 of the violations arise in the County of San Francisco.

3 **BACKGROUND FACTS**

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

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

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

15 14. On February 27, 1987, the State of California officially listed lead as a
16 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
17 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
18 the developing fetus, “female reproductive toxicity,” which means harm to the female
19 reproductive system, and “male reproductive toxicity,” which means harm to the male
20 reproductive system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On February 27,
21 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead
22 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
23 under Proposition 65. 27 C.C.R. § 27001(c); Health & Safety Code § 25249.10(b).

24 15. On October 1, 1992, the State of California officially listed lead and lead
25 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
26 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
27 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
28 § 27001(c); Health & Safety Code § 25249.10(b).

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

11 17. There is no safe level of exposure to Lead and even minute amounts of
12 Lead exposure have been shown to permanently reduce mental capacity. Davis, J.M.,
13 Svendgaard, D.J., "Lead and Child Development," *Nature* 329:297-300, 1987. One study on the
14 effect of childhood Lead exposure declared that even the smallest detectable amount of blood
15 Lead levels in children can mean the difference between an A or B grade in school. Lanphear,
16 B.P., Dietrich, K., Auinger, P., Cox, C., "Subclinical Lead Toxicity in U.S. Children and
17 Adolescents," *Neurodevelopmental Disabilities II Platform*, 2000. Another study followed
18 children into adulthood and found a sevenfold increase in the risk for developing a reading
19 disability among children exposed to sufficient levels of Lead as toddlers. Needleman, H.L.,
20 Schell, A., Bellinger, D., Leviton, A., Allred, E.N., "The Long-Term Effects of Exposure to Low
21 Doses of Lead in Childhood: An 11-Year Follow-up Report," *New England Journal of Medicine*,
22 322:83-88, 1990.

23 18. Lead exposures for pregnant women are also of particular concern in light
24 of evidence that even short term Lead exposures *in utero* may have long-term harmful effects.
25 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
26 Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, L., *et al.*, "Reduced
27 Intellectual Development in Children with Prenatal Lead Exposure," *Environmental Health*
28 *Perspectives*, 114:5, 2006.

1 19. Defendants' Products contain sufficient quantities of Lead such that
2 consumers who handle the Products, including children and pregnant women, are exposed to
3 Lead through the average use of the Products. The routes of exposure for the violations are direct
4 ingestion when consumers place the Products in their mouths, ingestion via hand-to-mouth
5 contact after consumers wear, touch or otherwise handle the Products, dermal absorption directly
6 through the skin when consumers wear, touch or otherwise handle the Products, and inhalation of
7 dust containing Lead

8 20. 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 21. 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 22. 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

1 regarding the exposures to Lead alleged in each of the Notices; and (2) based on the information
2 obtained through such consultations, believes that there is a reasonable and meritorious case for a
3 citizen enforcement action based on the facts alleged in each of the Notices. In compliance with
4 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each of the Certificates served on the
5 Attorney General included factual information – provided on a confidential basis – sufficient to
6 establish the basis for the Certificate, including the identity of the person(s) consulted by CEH’s
7 counsel and the facts, studies or other data reviewed by such persons.

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

12 24. Defendants both know and intend that individuals, including children and
13 pregnant women, will touch or handle the Products, thus exposing them to Lead.

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

16 26. Nevertheless, Defendants continue to expose consumers, including
17 children and pregnant women, to Lead without prior clear and reasonable warnings regarding the
18 carcinogenic and/or reproductive hazards of Lead.

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

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

26 **FIRST CAUSE OF ACTION**

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

28 29. CEH realleges and incorporates by reference as if specifically set forth

1 herein Paragraphs 1 through 28, inclusive.

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

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

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

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

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

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

17 **PRAYER FOR RELIEF**

18 Wherefore, CEH prays for judgment against Defendants as follows:

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

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

27 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
28 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;

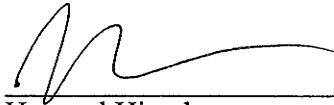
2 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
3 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

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7 Dated: June 25, 2009

Respectfully submitted,

8 LEXINGTON LAW GROUP

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11 _____
12 Howard Hirsch
13 Attorneys for Plaintiff
14 CENTER FOR ENVIRONMENTAL
15 HEALTH

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