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KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

By: D. Taylor Deputy

ANDREW L. PACKARD (State Bar No. 168690)  
HALLIE B. ALBERT (State Bar No. 258737)  
ERIK M. ROPER (State Bar No. 259756)  
Law Offices of Andrew L. Packard  
100 Petaluma Blvd. N Ste 301  
Petaluma, CA 94952  
Tel. (707) 763-7227  
Fax. (707) 763-9227  
E-mail: Andrew@PackardLawOffices.com

Attorneys for Plaintiff  
Environmental Research Center

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF MARIN

Environmental Research Center, a non-profit  
California corporation,

Plaintiff,

v.

Nefful U.S.A., Inc., a corporation,

Defendant.

Case No. CIV1004183

**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

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

Plaintiff Environmental Research Center brings this action in the interests of the  
general public and, on information and belief, hereby alleges:

**INTRODUCTION**

1. This action seeks to remedy Defendant's continuing failure to warn thousands  
of consumers in California that they are being exposed to lead, a substance known to the State  
of California to cause cancer, birth defects and other reproductive harm. Defendant  
manufactures, packages, distributes, markets, and/or sells in California certain herbal products  
containing lead (collectively referred to hereinafter as the "PRODUCTS").

1           2.       Lead and lead compounds (hereinafter, the "LISTED CHEMICALS") are  
2 substances known to the State<sup>1</sup> of California to cause cancer, birth defects and other  
3 reproductive harm.

4           3.       The use and/or handling of the PRODUCTS causes exposures to the LISTED  
5 CHEMICALS at levels requiring a "clear and reasonable warning" under California's Safe  
6 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code")  
7 §25249.5, *et seq.* (also known as "Proposition 65"). Defendant has failed to provide the health  
8 hazard warnings required by Proposition 65.

9           4.       Defendant's continued manufacturing, packaging, distributing, marketing and/or  
10 sales of the PRODUCTS without the required health hazard warnings, causes individuals to be  
11 involuntarily and unwittingly exposed to levels of the LISTED CHEMICALS that violate  
12 Proposition 65.

13          5.       Plaintiff seeks injunctive relief enjoining Defendant from the continued  
14 manufacturing, packaging, distributing, marketing and/or sales of the PRODUCTS in  
15 California without provision of clear and reasonable warnings regarding the risks of cancer,  
16 birth defects and other reproductive harm posed by exposure to the LISTED CHEMICALS  
17 through the use and/or handling of the PRODUCTS. Plaintiff seeks an injunctive order  
18 compelling Defendant to bring its business practices into compliance with Proposition 65 by  
19 providing a clear and reasonable warning to each individual who has been and who in the  
20 future may be exposed to LISTED CHEMICALS from the use of the PRODUCTS. Plaintiff  
21 also seeks an order compelling Defendant to identify and locate each individual person who in  
22 the past has purchased the PRODUCTS, and to provide to each such purchaser a clear and  
23 reasonable warning that the use of the PRODUCTS will cause exposures to the LISTED  
24 CHEMICALS.

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<sup>1</sup> All statutory and regulatory references herein are to California law, unless otherwise specified.

1           6.     In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to  
2 remedy Defendant's failure to provide clear and reasonable warnings regarding exposures to  
3 the LISTED CHEMICALS.

4                                   **JURISDICTION AND VENUE**

5           7.     This Court has jurisdiction over this action pursuant to California Constitution  
6 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes  
7 except those given by statute to other trial courts." The statute under which this action is  
8 brought does not specify any other basis for jurisdiction.

9           8.     This Court has jurisdiction over Defendant because, based on information and  
10 belief, Defendant is a business having sufficient minimum contacts with California, or  
11 otherwise intentionally availing itself of the California market through the distribution and sale  
12 of the PRODUCTS in the State of California to render the exercise of jurisdiction over it by the  
13 California courts consistent with traditional notions of fair play and substantial justice.

14           9.     Venue in this action is proper in the Marin Superior Court because the  
15 Defendant has violated California law in the County of Marin.

16                                   **PARTIES**

17           10.    Plaintiff Environmental Research Center ("ERC") is a non-profit corporation  
18 organized under California's Non-Profit Public Benefit Corporation Law group. ERC is  
19 dedicated to, among other causes, reducing the use and misuse of hazardous and toxic  
20 substances, consumer protection, worker safety and corporate responsibility.

21           11.    ERC is a person within the meaning of H&S Code §25118 and brings this  
22 enforcement action in the public interest pursuant to H&S Code §25249.7(d).  
23 Defendant Nefful U.S.A., Inc.

24           12.    Defendant Nefful U.S.A., Inc. ("NEFFUL") is a corporation organized under  
25 the laws of the State of California and a person doing business within the meaning of H&S  
26 Code §25249.11.

1           13.     NEFFUL manufactures, packages, distributes, markets and/or sells one or more  
2 of the PRODUCTS for sale or use in California.

3                                   **STATUTORY BACKGROUND**

4           14.     The People of the State of California have declared in Proposition 65 their right  
5 "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other  
6 reproductive harm." (Section 1(b) of Initiative Measure, Proposition 65).

7           15.     To effect this goal, Proposition 65 requires that individuals be provided with a  
8 "clear and reasonable warning" before being exposed to substances listed by the State of  
9 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent  
10 part:

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

15           16.     Proposition 65 provides that any person "violating or threatening to violate" the  
16 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7.) The phrase  
17 "threatening to violate" is defined to mean creating "a condition in which there is a substantial  
18 likelihood that a violation will occur." (H&S Code §25249.11(e).) Violators are liable for civil  
19 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

20                                   **FACTUAL BACKGROUND**

21           17.     On February 27, 1987, the State of California officially listed the chemical lead  
22 as a chemical known to cause reproductive toxicity. Lead became subject to the warning  
23 requirement one year later and was therefore subject to the "clear and reasonable" warning  
24 requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of  
25 Regulations ("CCR") §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

26           18.     On October 1, 1992, the State of California officially listed the chemicals lead  
and lead compounds as chemicals known to cause cancer. Lead and lead compounds became  
subject to the warning requirement one year later and were therefore subject to the "clear and

1 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR §  
2 25000, *et seq.*; H&S Code §25249.6, *et seq.*)

3 19. Plaintiff is informed and believes, and based on such information and belief  
4 alleges the PRODUCTS have been distributed and/or sold to individuals in California without  
5 clear and reasonable warning since at least August 10, 2007. The PRODUCTS continue to be  
6 distributed and sold in California without the requisite warning information.

7 20. As a proximate result of acts by Defendant, as a person in the course of doing  
8 business within the meaning of Health & Safety Code §25249.11, individuals throughout the  
9 State of California, including in the County of Marin, have been exposed to the LISTED  
10 CHEMICALS without clear and reasonable warning. The individuals subject to the violative  
11 exposures include normal and foreseeable users of the PRODUCTS, as well as all other  
12 persons exposed to the PRODUCTS.

13 21. At all times relevant to this action, Defendant has knowingly and intentionally  
14 exposed the users and/or handlers of the PRODUCTS to LISTED CHEMICALS without first  
15 giving a clear and reasonable warning to such individuals.

16 22. Individuals using or handling the PRODUCTS are exposed to the LISTED  
17 CHEMICALS in excess of the "maximum allowable daily" and "no significant risk " levels  
18 determined by the State of California, as applicable, within the meaning of H&S Code  
19 §25249.10(c).

20 23. At all times relevant to this action, Defendant has, in the course of doing  
21 business, failed to provide individuals using and/or handling the PRODUCTS with a clear and  
22 reasonable warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.

23 24. The PRODUCTS continue to be distributed and sold in California without the  
24 requisite clear and reasonable warning.

1 FIRST CAUSE OF ACTION

2 (Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning  
3 those PRODUCTS described in Plaintiff's May 24, 2010 60-Day Notice of Violation)

4 25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,  
5 inclusive, as if specifically set forth herein.

6 26. On May 24, 2010, Plaintiff sent a 60-Day Notice of Proposition 65 violations to  
7 the requisite public enforcement agencies and to Defendant ("First Notice"). The First Notice  
8 was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)  
9 and the statute's implementing regulations regarding the notice of the violations to be given to  
10 certain public enforcement agencies and to the violator. The notice given included, *inter alia*,  
11 the following information: the name, address, and telephone number of the noticing individual;  
12 the name of the alleged violator; the statute violated; the approximate time period during which  
13 violations occurred; and descriptions of the violations, including the chemicals involved, the  
14 routes of toxic exposure, and the specific products or type of products causing the violations,  
and was issued as follows:

- 15 a. Defendant and the California Attorney General were provided copies of  
16 the First Notice by Certified Mail.
- 17 b. Defendant was provided a copy of a document entitled "The Safe  
18 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A  
19 Summary," which is also known as Appendix A to Title 27 of CCR  
20 §25903.
- 21 c. The California Attorney General was provided with a Certificate of Merit  
22 by the attorney for the noticing party, stating that there is a reasonable  
23 and meritorious case for this action, and attaching factual information  
24 sufficient to establish a basis for the certificate, including the identify of  
25 the persons consulted with and relied on by the certifier, and the facts  
26 studies, or other data reviewed by those persons, pursuant to H&S Code  
§25249.7(h) (2).

1           27.     The appropriate public enforcement agencies have failed to commence and  
2 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendant  
3 based on the allegations herein.

4           28.     By committing the acts alleged in this Complaint, Defendant at all times relevant  
5 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the  
6 course of doing business, knowingly and intentionally exposing individuals who use or handle  
7 the PRODUCTS set forth in the First Notice to the LISTED CHEMICALS, without first  
8 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6  
9 and 25249.11(f).

10           29.     By the above-described acts, Defendant has violated H&S Code § 25249.6 and  
11 is therefore subject to an injunction ordering Defendant to stop violating Proposition 65, to  
12 provide warnings to all present and future customers and to provide warnings to Defendant's  
13 past customers who purchased or used the PRODUCTS without receiving a clear and  
14 reasonable warning.

15           30.     An action for injunctive relief under Proposition 65 is specifically authorized by  
16 Health & Safety Code §25249.7(a).

17           31.     Continuing commission by Defendant, of the acts alleged above will irreparably  
18 harm the citizens of the State of California, for which harm they have no plain, speedy, or  
19 adequate remedy at law.

20           Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

21                               **SECOND CAUSE OF ACTION**

22           **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning  
23 those PRODUCTS described in Plaintiff's May 24, 2010 60-Day Notice of Violation)**

24           32.     Plaintiff realleges and incorporates by reference Paragraphs 1 through 31,  
25 inclusive, as if specifically set forth herein.

26           33.     On May 24, 2010, Plaintiff sent a 60-Day Notice of Proposition 65 violations to  
the requisite public enforcement agencies and to Defendant ("First Notice"). The First Notice  
was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)

1 and the statute's implementing regulations regarding the notice of the violations to be given to  
2 certain public enforcement agencies and to the violator. The notice given included, *inter alia*,  
3 the following information: the name, address, and telephone number of the noticing individual;  
4 the name of the alleged violator; the statute violated; the approximate time period during which  
5 violations occurred; and descriptions of the violations, including the chemicals involved, the  
6 routes of toxic exposure, and the specific products or type of products causing the violations,  
7 and was issued as follows:

- 8 a. Defendant and the California Attorney General were provided copies of  
9 the First Notice by Certified Mail.
- 10 b. Defendant was provided a copy of a document entitled "The Safe  
11 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A  
12 Summary," which is also known as Appendix A to Title 27 of CCR  
13 §25903.
- 14 c. The California Attorney General was provided with a Certificate of Merit  
15 by the attorney for the noticing party, stating that there is a reasonable  
16 and meritorious case for this action, and attaching factual information  
17 sufficient to establish a basis for the certificate, including the identify of  
18 the persons consulted with and relied on by the certifier, and the facts  
19 studies, or other data reviewed by those persons, pursuant to H&S Code  
20 §25249.7(h) (2).

21 34. The appropriate public enforcement agencies have failed to commence and  
22 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendant  
23 based on the allegations herein.

24 35. By committing the acts alleged in this Complaint, Defendant at all times relevant  
25 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the  
26 course of doing business, knowingly and intentionally exposing individuals who use or handle  
the PRODUCTS set forth in the First Notice to the LISTED CHEMICALS, without first



1 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6  
2 and 25249.11(f).

3 36. By the above-described acts, Defendant is liable, pursuant to H&S Code  
4 §25249.7(b), for a civil penalty of \$2,500 per day for each unlawful exposure to a LISTED  
5 CHEMICAL from the PRODUCTS.

6 Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

7 **THE NEED FOR INJUNCTIVE RELIEF**

8 37. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 36,  
9 as if set forth below.

10 38. By committing the acts alleged in this Complaint, Defendant has caused  
11 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence  
12 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by  
13 continuing to cause consumers to be involuntarily and unwittingly exposed to the LISTED  
14 CHEMICALS through the use and/or handling of the PRODUCTS.

15 **PRAYER FOR RELIEF**

16 Wherefore, Plaintiff accordingly prays for the following relief:

17 A. a preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),  
18 enjoining Defendant, its agents, employees, assigns and all persons acting in concert or  
19 participating with Defendant, from distributing or selling the PRODUCTS in California  
20 without first providing a clear and reasonable warning, within the meaning of Proposition 65,  
21 that the users and/or handlers of the PRODUCTS are exposed to the LISTED CHEMICALS.

22 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling Defendant  
23 to identify and locate each individual who has purchased the PRODUCTS since August 10,  
24 2007, and to provide a warning to such person that the use of the Products will expose the user  
25 to chemicals known to cause cancer, birth defects, and other reproductive harm.

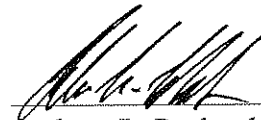
26 C. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),  
against Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

1 D. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to  
2 California Code of Civil Procedure §1021.5, as Plaintiff shall specify in further application to  
3 the Court; and,

4 E. such other and further relief as may be just and proper.

5 DATED: August 10, 2010

LAW OFFICES OF ANDREW L. PACKARD

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9 Andrew L. Packard  
10 Attorneys for Plaintiff  
11 Environmental Research Center  
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