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FILED
ALAMEDA COUNTY
2011 FEB -1 AM 11:17
CLERK OF THE SUPERIOR COURT
BY DEBORAH L. LEE, CLERK

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4 Berkeley, CA 94704
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7 Attorney for Plaintiff Environmental Research Center

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ALAMEDA**

11 **ENVIRONMENTAL RESEARCH CENTER,**
12 a California non-profit corporation

Case No. RG10545713

13 **Plaintiff,**

**FIRST AMENDED COMPLAINT FOR
14 INJUNCTIVE RELIEF AND CIVIL
15 PENALTIES**

16 **v.**

17 **THE HIMALAYA DRUG COMPANY**
and DOES 1-100

[Miscellaneous Civil Complaint (42)]
Proposition 65, Health & Safety Code
Section 25249.5 et seq.]

18 **Defendants.**

19 _____/

20
21 Plaintiff Environmental Research Center hereby alleges:

22 **I**

23 **INTRODUCTION**

24
25
26 1. Plaintiff Environmental Research Center (hereinafter "Plaintiff" or "ERC") brings this
27 action as a private attorney general and in the public interest pursuant to Health & Safety Code
28 Section 25249.7 (d). This amended complaint seeks injunctive relief and civil penalties to remedy

1 The Himalaya Drug Company's ("Himalaya") failure to warn users of certain products sold by the
2 company that they are exposed to lead, a chemical known to the State of California to cause cancer,
3 birth defects and other reproductive harm. Based on the Safe Drinking Water and Toxic
4 Enforcement Act of 1986 (Health & Safety Code Section 25249.5 et seq) also known as
5 "Proposition 65," businesses with ten or more employees must provide a "clear and reasonable
6 warning" prior to exposing persons to these chemicals.
7

8 II

9 PARTIES

10
11 2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes, helping
12 safeguard the public from health hazards by bringing about a reduction in the use and misuse of
13 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and
14 encouraging corporate responsibility.
15

16 3. Defendant Himalaya is a business entity that manufactures, distributes and/or sells nutritional
17 products that expose users of these products to lead in the State of California. These products are
18 Himalaya Herbal Healthcare Organic Chyavanprash; Himalaya Herbal Healthcare Mind Care Jr.;
19 Himalaya Herbal Healthcare HeartCare; The Himalaya Drug Company Himalaya Herbal
20 Healthcare - LeanCare 60 Capsules; The Himalaya Drug Company Himalaya Pure Herbs Guggul -
21 Cholesterol Support 60 Vegetarian Capsules; The Himalaya Drug Company Himalaya Herbal
22 Healthcare GlucoCare for Natural Blood Glucose Health 180 Vegetarian Capsules; and The
23 Himalaya Drug Company Himalaya Herbal Healthcare Veincare - 60 Vegetarian Capsules.
24 ("Covered Products"). Himalaya is a company that employs ten or more persons.
25

26 4. Defendants Does I-100, are named herein under fictitious names, as their true names and
27 capacities are unknown to Plaintiff. ERC is informed and believes, and thereon alleges, that each
28

1 of said Does is responsible, in some actionable manner, for the events and happenings hereinafter
2 referred to, either through said Defendant's conduct, or through the conduct of its agents, servants or
3 employees, or in some other manner, causing the harms alleged by ERC in this complaint. When
4 said true names and capacities of Does are ascertained, ERC will seek leave to amend this complaint
5 to set forth the same.
6

7 III

8 JURISDICTION AND VENUE

9
10 5. This Court has jurisdiction pursuant to California Constitution Article VI, Section 10 because
11 this case is a cause not given by statute to other trial courts.

12 6. ERC has performed any and all conditions precedent to the filing of a legal action pursuant to
13 Proposition 65 by serving by mail a Notice of Violation, dated November 23, 2010 to the Attorney
14 General of the State of California, the state's District Attorneys, the appropriate City Attorney's
15 and to Himalaya. A true and correct copy of the Notice of Violation is attached herein as Exhibit
16 A. More than 60 days have passed since this Notice of Violation was mailed and no public
17 enforcement entity has filed a complaint in this case.
18

19 7. This Court is the proper venue for the action because the causes of action have arisen in the
20 County of Alameda where some of the violations of law have occurred. Furthermore, this Court is
21 the proper venue under Code of Civil Procedure Section 395.5 and Health & Safety Code Section
22 25249.7.
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IV

STATUTORY BACKGROUND

A. Proposition 65

8. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as “Proposition 65” by an overwhelming majority vote of the people in November of 1986.

9. The warning requirement of Proposition 65 is contained in Health & Safety Code Section 25249.6, which provides:

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

10. Implementing regulations for Proposition 65 provide that warnings are required for consumer product exposures. A “consumer product exposure is an exposure which results from a person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.” 27 CCR Section 25601 (b).

11. Whenever a clear and reasonable warning is required under Health & Safety Code Section 25249.6, the “method employed to transmit the warning must be reasonably calculated considering the alternative methods available under the circumstances, to make the warning message available prior to exposure.” 27 CCR Section 25601. The warning requirement may be satisfied by a warning that appears on a product’s label or other labeling, shelf labeling, signs, a system of signs, public advertising identifying the system and toll-free information services, or any other, system, that provides clear and reasonable warnings. *Id.*, Section 25603.1 (a)–(d).

12. Proposition 65 establishes a procedure by which the State is to develop a list of chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code Section 25249.8. There is no duty to provide a clear and reasonable warning until 12-months after

1 the chemical was published on the State list. Id., Section 25249.10(b). Lead was listed as a
2 chemical known to the State of California to cause developmental toxicity and male and female
3 reproductive toxicity on February 27, 1987. Lead was listed as a chemical known to the State of
4 California to cause cancer on October 1, 1992. Title 27, Cal. Code Regs., Section 27001.
5

6 13. Proposition 65 may be enforced by any person in the public interest who provides notice
7 sixty days before filing suit to both the violator and designated law enforcement officials. The
8 failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed
9 pursuant to Health & Safety Code Section 25249.7 (c).
10

11 14. Proposition 65 provides that any person “violating or threatening to violate” Proposition 65
12 may be enjoined in any court of competent jurisdiction. Health & Safety Code Section 25249.7 (a).
13 To “threaten to violate” means “to create a condition in which there is a substantial probability that a
14 violation will occur.” Id., Section 25249.11 (e). Furthermore, violators are subject to a civil penalty
15 of up to \$2,500 per day for each violation. Id., Section 25249.7 (b).
16

17 V

18 STATEMENT OF FACTS

19 15. Defendant Himalaya manufactures, distributes and/or sells the Covered Products to the
20 State of California. These products contain lead.
21

22 16. Himalaya has knowingly and intentionally exposed numerous persons to lead, without
23 providing a Proposition 65 warning. The company has at all times relevant hereto been aware that
24 the Covered Products contain lead and that persons using these products are exposed to the
25 chemical. Himalaya markets the Covered Products with knowledge that consumers are being
26 exposed to lead during normal use of the products.
27

28 17. Himalaya has failed to provide consumers of the Covered Products with a clear and

1 reasonable warning that they are being exposed to a chemical known to the State of California to
2 cause cancer, birth defects and other reproductive harm.

3
4 **FIRST CAUSE OF ACTION**

5 **(Violation of Section 25249.6 of the Health and Safety Code, Failure to Provide Clear**
6 **and Reasonable Warning under Proposition 65)**

7 18. Himalaya refers to paragraphs 1-17, inclusive, and incorporates them herein by this
8 reference.

9 19. By committing the acts alleged above, Himalaya has, in the course of doing business,
10 knowingly and intentionally exposed users of the Covered Products to lead, a chemical known to
11 the State of California to cause cancer, birth defects and other reproductive harm without first giving
12 clear and reasonable warning to such individuals, within the meaning of Health & Safety Code
13 Section 25249.6.
14

15 20. Said violations render each Defendant liable for civil penalties up to \$2,500 (two
16 thousand, five hundred dollars) per day, for each violation.

17 21. Himalaya's continued violation of the law will irreparably harm ERC and the public
18 interest in whose behalf Plaintiff brings this action, for which there is no adequate remedy at law.
19

20 **VI**

21 **PRAYER**

22 WHEREFORE Plaintiff prays for relief as follows:

23 1. On the First Cause of Action, for civil penalties for each and every violation according to
24 proof;
25

26 2. On the First Cause of Action, and pursuant to Health & Safety Code Section 25249.7 (a), for
27 such temporary restraining orders, preliminary and permanent injunctive orders, or other orders,
28

1 prohibiting Himalaya from exposing persons to lead without providing clear and reasonable
2 warning;

3 3. For reasonable attorneys' fees pursuant to Section 1021.5 of the Code of Civil Procedure or
4 the substantial benefit theory;

5 4. For costs of suit herein; and

6 5. For such other relief as the Court may deem just and proper.

7 Dated: February 1, 2011

8
9 By

10 

11 _____
12 Michael Freund
13 Attorney for Environmental Research Center
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Environmental Research Center

5694 Mission Center Road #199
San Diego, CA 92108
619.309.4194

November 23, 2010

VIA CERTIFIED MAIL

Current President or CEO
The Himalaya Drug Company
10440 Westoffice Dr
Houston, TX 77042

The Corporation Trust Company
(The Himalaya Drug Company's Registered
Agent for Service of Process)
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550

VIA PRIORITY MAIL

District Attorneys of All California Counties
and Select City Attorneys
(See Attached Certificate of Service)

Re: Notice of Violations of California Health & Safety Code Section 25249.5 *et seq.*

Dear Addressees:

I am the Executive Director of the Environmental Research Center ("ERC") in connection with this Notice of Violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986, which is codified at California Health & Safety Code Section 25249.5 *et seq.* and also referred to as Proposition 65.

ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

EXHIBIT A

The name of the Company covered by this Notice that violated Proposition 65 is:

The Himalaya Drug Company

The products that are the subject of this Notice and the chemical in those products identified as exceeding allowable levels are:

Organic Chyavanprash - Lead

Mind Care Jr. - Lead

HeartCare - Lead

**The Himalaya Drug Company Himalaya Herbal Healthcare –
LeanCare 60 Capsules - Lead**

**The Himalaya Drug Company Himalaya Pure Herbs Guggul –
Cholesterol Support 60 Vegetarian Capsules - Lead**

**The Himalaya Drug Company Himalaya Herbal Healthcare GlucoCare for –
Natural Blood Glucose Health 180 Vegetarian Capsules - Lead**

**The Himalaya Drug Company Himalaya Herbal Healthcare Veincare –
60 Vegetarian Capsules - Lead**

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead as chemical known to cause cancer.

This letter is a Notice to The Himalaya Drug Company and the appropriate governmental authorities of the Proposition 65 violations concerning the listed products. This Notice covers all violations of Proposition 65 involving The Himalaya Drug Company currently known to ERC from the information now available. ERC may continue to investigate other products that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, has been provided to the Noticed Company with a copy of this letter.

The Himalaya Drug Company has manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemicals. The primary route of exposure to these chemicals has been through ingestion, but may have also occurred through inhalation and/or dermal contact. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product's label. The Himalaya Drug Company violated Proposition 65 because the Company has failed to provide an appropriate warning to persons using these products that they are being exposed to the identified chemical.

Pursuant to Section 25249.7(d) of the statute, ERC intends to file a citizen enforcement action sixty days after effective service of this Notice unless The Himalaya Drug Company agrees in an enforceable written instrument to: (1) reformulate the listed products so as to eliminate further exposures to the identified chemicals; and (2) pay an appropriate civil penalty. Consistent with the public interest goals of Proposition 65 and ERC's objectives in pursuing this Notice, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemicals and expensive and time consuming litigation.

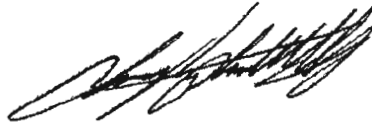
Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

November 23, 2010

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Please direct all questions concerning this notice to ERC's attorney, Michael Freund, address: 1915 Addison Street, Berkeley, California, 94704-1101, telephone no.: 510-540-1992, e-mail: Freund1@aol.com.

Sincerely,



Chris Heptinstall, Executive Director
Environmental Research Center

cc: Karen Evans

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to The Himalaya Drug Company and its Registered Agent for Service of Process only)

Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

Re: Environmental Research Center's Notice of Proposition 65 Violations by The Himalaya Drug Company

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached sixty-day Notice in which it is alleged the party identified in the Notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am an attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the Notice.
4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.
5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this Certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.



Dated: November 23, 2010

Michael Freund
Attorney for Environmental Research Center

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742

On November 23, 2010, I served the following documents:

NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"

On the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Current President or CEO
The Himalaya Drug Company
10440 Westoffice Dr
Houston, TX 77042

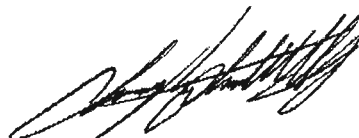
The Corporation Trust Company
(The Himalaya Drug Company's Registered
Agent for Service of Process)
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

On November 23, 2010, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, CA 94612-0550

On November 23, 2010, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties **on the Service List attached hereto**, and depositing it with the U.S. Postal Service for delivery by Priority Mail.

Executed on November 23, 2010, in Fort Oglethorpe, Georgia.



Chris Heptinstall

Service List

District Attorney, Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612

District Attorney, Alpine County
P.O. Box 248
Markleeville, CA 96120

District Attorney, Amador County
708 Court Street, #202
Jackson, CA 95642

District Attorney, Butte County
25 County Center Drive
Oroville, CA 95965

District Attorney, Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

District Attorney, Colusa County
547 Market Street
Colusa, CA 95932

District Attorney, Contra Costa County
900 Ward Street
Martinez, CA 94553

District Attorney, Del Norte County
450 H Street, Ste. 171
Crescent City, CA 95531

District Attorney, El Dorado County
515 Main Street
Placerville, CA 95667

District Attorney, Fresno County
2220 Tulare Street, #1000
Fresno, CA 93721

District Attorney, Glenn County
Post Office Box 430
Willows, CA 95988

District Attorney, Humboldt County
825 5th Street
Eureka, CA 95501

District Attorney, Imperial County
939 West Main Street, Ste 102
El Centro, CA 92243

District Attorney, Inyo County
230 W. Line Street
Bishop, CA 93514

District Attorney, Kern County
1215 Truxtun Avenue
Bakersfield, CA 93301

District Attorney, Kings County
1400 West Lacey Boulevard
Hanford, CA 93230

District Attorney, Lake County
255 N. Forbes Street
Lakeport, CA 95453

District Attorney, Lassen County
220 South Lassen Street, Ste. 8
Susanville, CA 96130

District Attorney, Los Angeles County
210 West Temple Street, Rm 345
Los Angeles, CA 90012

District Attorney, Madera County
209 West Yosemite Avenue
Madera, CA 93637

District Attorney, Marin County
3501 Civic Center, Room 130
San Rafael, CA 94903

District Attorney, Mariposa County
Post Office Box 730
Mariposa, CA 95338

District Attorney, Mendocino County
Post Office Box 1000
Ukiah, CA 95482

District Attorney, Merced County
2222 M Street
Merced, CA 95340

District Attorney, Modoc County
204 S Court Street, Room 202
Alturas, CA 96101-4020

District Attorney, Mono County
Post Office Box 617
Bridgeport, CA 93517

District Attorney, Monterey County
230 Church Street, Bldg 2
Salinas, CA 93901

District Attorney, Napa County
931 Parkway Mall
Napa, CA 94559

District Attorney, Nevada County
110 Union Street
Nevada City, CA 95959

District Attorney, Orange County
401 Civic Center Drive West
Santa Ana, CA 92701

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

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District Attorney, Placer County
10810 Justice Center Drive, Ste 240
Roseville, CA 95678

District Attorney, Plumas County
520 Main Street, Room 404
Quincy, CA 95971

District Attorney, Riverside County
4075 Main Street, 1st Floor
Riverside, CA 92501

District Attorney, Sacramento County
901 "G" Street
Sacramento, CA 9581

District Attorney, San Benito County
419 Fourth Street, 2nd Floor
Hollister, CA 95023

District Attorney, San Bernardino County
316 N. Mountain View Avenue
San Bernardino, CA 92415-0004

District Attorney, San Diego County
330 West Broadway, Room 1300
San Diego, CA 92101

District Attorney, San Francisco County
850 Bryant Street, Room 325
San Francisco, CA 94103

District Attorney, San Joaquin County
Post Office Box 990
Stockton, CA 95201

District Attorney, San Luis Obispo County
1050 Monterey Street, Room 450
San Luis Obispo, CA 93408

District Attorney, San Mateo County
400 County Ctr., 3rd Floor
Redwood City, CA 94063

District Attorney, Santa Barbara County
1105 Santa Barbara Street
Santa Barbara, CA 93101

District Attorney, Santa Clara County
70 West Hedding Street
San Jose, CA 95110

District Attorney, Santa Cruz County
701 Ocean Street, Room 200
Santa Cruz, CA 95060

District Attorney, Shasta County
1525 Court Street, Third Floor
Redding, CA 96001-1632

District Attorney, Sierra County
PO Box 457
Downieville, CA 95936

District Attorney, Siskiyou County
Post Office Box 986
Yreka, CA 96097

District Attorney, Solano County
675 Texas Street, Ste 4500
Fairfield, CA 94533

District Attorney, Sonoma County
600 Administration Drive, Room 212J
Santa Rosa, CA 95403

District Attorney, Stanislaus County
832 12th Street, Ste 300
Modesto, CA 95353

District Attorney, Sutter County
446 Second Street
Yuba City, CA 95991

District Attorney, Tehama County
Post Office Box 519
Red Bluff, CA 96080

District Attorney, Trinity County
Post Office Box 310
Weaverville, CA 96093

District Attorney, Tulare County
221 S. Mooney Avenue, Room 224
Visalia, CA 93291

District Attorney, Tuolumne County
423 N. Washington Street
Sonora, CA 95370

District Attorney, Ventura County
800 South Victoria Avenue
Ventura, CA 93009

District Attorney, Yolo County
301 2nd Street
Woodland, CA 95695

District Attorney, Yuba County
215 Fifth Street
Marysville, CA 95901

Los Angeles City Attorney's Office
City Hall East
200 N. Main Street, Rm 800
Los Angeles, CA 90012

San Diego City Attorney's Office
1200 3rd Avenue, Ste 1620
San Diego, CA 92101

San Francisco City Attorney's Office
City Hall, Room 234
1 Drive Carlton B Goodlett Place
San Francisco, CA 94102

San Jose City Attorney's Office
200 East Santa Clara Street
San Jose, CA 95113