

ENDORSED
FILED
ALAMEDA COUNTY

DEC 30 2010

CLERK OF THE SUPERIOR COURT

By ERICA BAKER Deputy

1 Michael Freund SBN 99687
2 Law Office of Michael Freund
3 1915 Addison Street
4 Berkeley, CA 94704
5 Telephone: (510) 540-1992
6 Facsimile: (510) 540-5543

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. *AB*

10553800

13 **Plaintiff,**

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF
AND CIVIL PENALTIES**

14 v.

15
16 **SYMMETRY CORPORATION and**
17 **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
23 I

24 **INTRODUCTION**

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 complaint seeks injunctive and declaratory relief and civil penalties to

1 remedy Symmetry Corporation's ("Symmetry") failure to warn users of certain products sold by
2 the company that they are exposed to lead, a chemical known to the State of California to cause
3 cancer, 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.
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10 **II**
PARTIES

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 Symmetry 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 Botanicals Male Balance; Botanicals BotanaCleanse Formula 1; and Botanicals BotanaCleanse
19 Formula 2 ("Covered Products"). Symmetry is a company that employs ten or more persons.
20

21 4. Defendants Does I-100, are named herein under fictitious names, as their true names and
22 capacities are unknown to Plaintiff. ERC is informed and believes, and thereon alleges, that each
23 of said Does is responsible, in some actionable manner, for the events and happenings hereinafter
24 referred to, either through said Defendant's conduct, or through the conduct of its agents, servants or
25 employees, or in some other manner, causing the harms alleged by ERC in this complaint. When
26 said true names and capacities of Does are ascertained, ERC will seek leave to amend this complaint
27 to set forth the same.
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III

JURISDICTION AND VENUE

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

6. ERC has performed any and all conditions precedent to the filing of a legal action pursuant to Proposition 65 by serving by mail a Notice of Violation, dated June 29, 2009 to the Attorney General of the State of California, the state's District Attorneys, the appropriate City Attorney's and to Symmetry. A true and correct copy of these Notices is attached herein as Exhibit A. More than 60 days have passed since these Notices were mailed and no public enforcement entity has filed a complaint in this case.

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

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

1 product exposures. A “consumer product exposure is an exposure which results from a person’s
2 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer
3 good, or any exposure that results from receiving a consumer service.” 27 CCR Section 25601 (b).
4

5 11. Whenever a clear and reasonable warning is required under Health & Safety Code Section
6 25249.6, the “method employed to transmit the warning must be reasonably calculated considering
7 the alternative methods available under the circumstances, to make the warning message available
8 prior to exposure.” 27 CCR Section 25601. The warning requirement may be satisfied by a
9 warning that appears on a product’s label or other labeling, shelf labeling, signs, a system of signs,
10 public advertising identifying the system and toll-free information services, or any other, system,
11 that provides clear and reasonable warnings. *Id.*, Section 25603.1 (a) – (d).
12

13 12. Proposition 65 establishes a procedure by which the State is to develop a list of
14 chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code
15 Section 25249.8. There is no duty to provide a clear and reasonable warning until 12-months after
16 the chemical was published on the State list. *Id.*, Section 25249.10 (b). Lead was listed as a
17 chemical known to the State of California to cause developmental toxicity and male and female
18 reproductive toxicity on February 27, 1987. Lead was listed as a chemical known to the State of
19 California to cause cancer on October 1, 1992. Title 27, Cal. Code Regs., Section 27001.
20

21 13. Proposition 65 may be enforced by any person in the public interest who provides notice
22 sixty days before filing suit to both the violator and designated law enforcement officials. The
23 failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed
24 pursuant to Health & Safety Code Section 25249.7 (c).
25

26 14. Proposition 65 provides that any person “violating or threatening to violate” Proposition 65
27 may be enjoined in any court of competent jurisdiction. Health & Safety Code Section 25249.7 (a).
28

1 To “threaten to violate” means “to create a condition in which there is a substantial probability that a
2 violation will occur.” Id., Section 25249.11 (e). Furthermore, violators are subject to a civil penalty
3 of up to \$2,500 per day for each violation. Id., Section 25249.7 (b).
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V

STATEMENT OF FACTS

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

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

17. Symmetry has failed to provide consumers of the Covered Products with a clear and reasonable warning that they are being exposed to a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

FIRST CAUSE OF ACTION

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

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

19. By committing the acts alleged above, Symmetry has, in the course of doing business, knowingly and intentionally exposed users of the Covered Products to lead, a chemical known to the State of California to cause cancer, birth defects and other reproductive harm without first giving

1 clear and reasonable warning to such individuals, within the meaning of Health & Safety Code
2 Section 25249.6.

3
4 20. Said violations render each Defendant liable for civil penalties up to \$2,500 (two
5 thousand, five hundred dollars) per day, for each violation.

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

8
9 **SECOND CAUSE OF ACTION**

10 **(Declaratory Relief)**

11 22. ERC refers to paragraphs 1-21, inclusive, and incorporates them herein by this reference.

12 23. There exists an actual controversy relating to the legal rights and duties of the parties, within
13 the meaning of Code of Civil Procedure Section 1060, between Plaintiff and Defendant concerning:

14 a) whether Symmetry has exposed individuals to a chemical known to the State of California
15 to cause cancer, birth defects and other reproductive harm without providing clear and reasonable
16 warning.
17

18 **VI**

19 **PRAYER**

20 WHEREFORE Plaintiff prays for relief as follows:

21
22 1. On the First Cause of Action, for civil penalties for each and every violation according to
23 proof;

24 2. On the First Cause of Action, and pursuant to Health & Safety Code Section 25249.7 (a), for
25 such temporary restraining orders, preliminary and permanent injunctive orders, or other orders,
26 prohibiting Symmetry from exposing persons to lead without providing clear and reasonable
27 warning;
28

1 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil
2 Procedure Section 1060 declaring:

3 a. that Symmetry has exposed individuals to a chemical known to the State of California to
4 cause, birth defects and other reproductive harm without providing clear and reasonable warning;
5
6 and

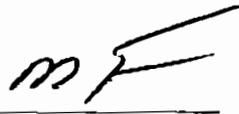
7 4. On all Causes of Action, for reasonable attorneys' fees pursuant to Section 1021.5 of the Code
8 of Civil Procedure or the substantial benefit theory;

9 5. For costs of suit herein; and

10 6. For such other relief as the Court may deem just and proper.
11

12 Dated: October 22, 2010

13 By

14 

15 _____
16 Michael Freund
17 Attorney for Environmental Research Center
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MICHAEL FREUND
ATTORNEY AT LAW
1915 ADDISON STREET
BERKELEY, CALIFORNIA 94704-1101

TEL 510/540-1992
FAX 510/540-5543
EMAIL FREUND1@AOL.COM

June 29, 2010

Re: Notice of Violation Against Symmetry Corporation for Violation of California Health & Safety Code Section 25249.6

Dear Prosecutors:

I represent the Environmental Research Center ("ERC"), a non-profit California corporation whose mission is to safeguard the public from health hazards that impact families, workers and the environment. ERC is dedicated to reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and encouraging corporate responsibility. ERC is located at 5694 Mission Center Road, # 199, San Diego, CA 92108. Through this Notice of Violation, ERC seeks to reduce exposure to the public from lead contained in the named products manufactured and distributed by Symmetry Corporation.

This letter constitutes notification that Symmetry Corporation, located at 420 S. Hillview Drive, Milpitas, CA 95035 has violated the warning requirement of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with section 25249.5 of the Health and Safety Code).

In particular, this company has manufactured and distributed products which have exposed and continue to expose numerous individuals within California to lead. Lead was listed pursuant to Proposition 65 as a chemical known to cause developmental toxicity, and male and female reproductive toxicity on February 27, 1987. Lead was listed pursuant to Proposition 65 as a carcinogen on October 1, 1992. The time period of these violations commenced one year after the listed dates above. The primary route of exposure has been oral through ingestion.

Symmetry Corporation is exposing people to lead from the following products: Symmetry Botanicals Male Balance; Symmetry Botanicals New Attitude Energy Tonic; Symmetry Botanicals Botanacleanse Formula One; and Symmetry Botanicals Botanacleanse Formula Two; and Symmetry Botanicals Botanacleanse Formula Three.

Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to certain listed chemicals. Symmetry Corporation is in violation of Proposition 65 because the company failed to provide a warning to persons using their products that they are being exposed to lead. (22 C.C.R. section 12601.) While in the course of doing business, the company is knowingly and intentionally exposing people to lead, without first providing clear and reasonable warning. (Health and Safety Code section 25249.6.) The method of warning should be a warning that appears on the product's label. 22 C.C.R. section 12601 (b)(1) (A).

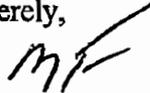
Proposition 65 requires that notice and intent to sue be given to a violator 60-days before the

suit is filed. With this letter, ERC gives notice of the alleged violation to the noticed party and the appropriate governmental authorities. This notice covers all violations of Proposition 65 that are currently known to ERC from 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, and referenced as Appendix A, has been provided to the noticed party.

Based on the allegations set forth in this Notice, ERC intends to file a citizen enforcement action against Symmetry Corporation unless the company agrees in an enforceable written instrument to: (1) reformulate these products so as to eliminate further lead exposures; and (2) pay an appropriate civil penalty. Consistent with the public interest goals of Proposition 65 and my client's objectives in pursuing this Notice, ERC will focus its efforts in seeking a constructive resolution of this matter. Such resolution will avoid both further unwarned consumer exposures to lead and expensive and time-consuming litigation.

If you have any questions, please contact my office at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to be 'MF' with a long horizontal stroke extending to the right.

Michael Freund

cc: Chris Heptinstall, ERC
Karen Evans, ERC

CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7 (d)

I, Michael Freund hereby declare:

1. This Certificate of Merit accompanies the Notice of Violation in which it is alleged that the party identified in the Notice has violated Health and Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am the attorney for the noticing party Environmental Research Center ("ERC"). ERC is dedicated to reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and encouraging corporate responsibility. The Notice of Violation alleges that the party identified has exposed persons in California to lead from products that it manufactures and distributes. Please refer to the Notice of Violation for additional details regarding the alleged violations.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action. In particular, I have consulted with the laboratory that conducted the testing to determine the concentration of lead in the products identified in the Notice of Violation and I have relied on the testing results. The testing was conducted by a reputable testing laboratory with substantial experience in testing for lead. These facts, studies or other data derived through this investigation overwhelmingly demonstrate that the party identified in the Notice of Violation exposes persons to lead through oral exposure (ingestion).
4. Based on my consultation with the laboratory, the results of the laboratory testing, as well as published studies on lead, it is clear that there is sufficient evidence that human

exposures exist from exposure to the products from the noticed party. Furthermore, as a result of the above, I have concluded that 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 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. The copy of this Certificate of Merit served on the California Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health & Safety Code Section 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: June 27, 2010



Michael Freund
Attorney for Environmental Research Center

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Alameda. I am over the age of eighteen years and not a party to the within entitled action; my business address is 1915 Addison Street, Berkeley, California 94704. On June 29, 2010 I served the within:

Notice of Violation and Certificate of Merit (Supporting documentation pursuant to 11 CCR section 3102 sent to Attorney General only)

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box in Oakland, California to said parties addressed as follows:

See Attached Service List

I, Michael Freund, declare under penalty of perjury that the foregoing is true and correct.

Executed on June 29, 2010 at Berkeley, California.



Michael Freund

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

District Attorney of Glenn County
PO Box 430
Willows, CA 95988

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

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

District Attorney of Kings County
1400 West Lacey
Hanford, CA 93239

District Attorney of Mono County
PO Box 617
Bridgeport, CA 93517

District Attorney of Contra Costa
County
627 Ferry Street
Martinez, CA 94553

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

District Attorney of Mariposa County
PO Box 730
Mariposa, CA 95338

District Attorney of Alpine County
PO Box 248
Markleeville, CA 96120

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

District Attorney of Monterey County
230 Church Street, Bdg. 2
Salinas, CA 93901

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

District Attorney of Imperial County
939 Main Street
El Centro, CA 92243

District Attorney of Mendocino County
PO Box 1000
Ukiah, CA 95482

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

District Attorney of Lassen County
220 S. Lassen St., Ste 8
Susanville, CA 96130

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

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

District Attorney of Inyo County
PO Drawer D
Independence, CA 93526

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

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

District Attorney of Los Angeles County
210 W. Temple Street, Room 345
Los Angeles, CA 90012

District Attorney of Nevada County
110 Union Street
Nevada City, CA 95959-2503

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

District Attorney of Madera County
209 West Yosemite Ave.
Madera, CA 93637

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

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

District Attorney of Kern County
1215 Truxtun Ave.
Bakersfield, CA 93301

District Attorney of Modoc County
204 S. Court Street
Alturas, CA 96101-4020

District Attorney of Placer County
2501 North Lake Blvd.
Tahoe City, CA 96145

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

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

District Attorney of San Bernardino Cty
316 N. Mountain View Ave.
San Bernardino, CA 92415

District Attorney of Sierra County
Courthouse, PO Box 457
Donieville, CA 95936

District Attorney of Ventura County
800 South Victoria Ave.
Ventura, CA 93009

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

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

District Attorney of Tehama County
PO Box 519
Red Bluff, CA 96080

District Attorney of San Diego County
330 West Broadway, Suite 1320
San Diego, 92101

District Attorney of Siskiyou County
PO Box 986
Yreka, CA 96097

District Attorney of Yolo County
301 Second Street
Woodland, CA 95695

District Attorney of Riverside County
4075 Main Street
Riverside, CA 92501

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

District Attorney of Trinity County
PO Box 310
11 Court Street
Weaverville, CA 96093

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

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

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

District Attorney of Sacramento County
901 "G" Street
Sacramento, CA 95814

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

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

District Attorney of San Joaquin County
PO Box 990
Stockton, CA 95201

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

District Attorney of Tuolumne County
423 No. Washington Street
Sonora, CA 95370

District attorney of San Luis Obispo
County
1050 Monterey St., Room 450
San Luis Obispo, CA 93408

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

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

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

District Attorney of Stanislaus County
800 11th Street, Room 200
PO Box 442
Modesto, CA 95353

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

San Diego City Attorney's Office
1200 3rd Ave. # 1620
San Diego, CA 92101

San Francisco City Attorney's Office
City Hall, Room 234
San Francisco, CA 94102

California Attorney General's Office
Attn: Proposition 65 Coordinator
1515 Clay Street, Suite 2000
PO Box 70550
Oakland, CA 94612

Karen A. Evans, General Counsel
Environmental Research Center
Law Office of Karen A. Evans.
4218 Biona Place
San Diego, CA 92116

Rudy Revak, President
Symmetry Corporation
420 S. Hillview Drive
Milpitas, CA 95035