

1 ANDREW L. PACKARD (State Bar No. 168690)
HALLIE B. ALBERT (State Bar No. 258737)
2 ERIK M. ROPER (State Bar No. 259756)
Law Offices of Andrew L. Packard
3 100 Petaluma Blvd. N Ste 301
Petaluma, CA 94952
4 Tel. (707) 763-7227
Fax. (707) 763-9227
5 E-mail: Andrew@PackardLawOffices.com

FILED

DEC 07 2010

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: D. Taylor, Deputy

6 Attorneys for Plaintiff
Environmental Research Center
7
8
9

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

12 ENVIRONMENTAL RESEARCH CENTER,) Case No. 10-04707
13 a non-profit California corporation,)
14 Plaintiff,) **FIRST AMENDED COMPLAINT FOR**
15 v.) **INJUNCTIVE RELIEF AND CIVIL**
16 MIRALUS, INC., a corporation,) **PENALTIES**
17 Defendant.) Health & Safety Code §25249.5, *et seq.*;
18)

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

21 **INTRODUCTION**

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

1 Noticed PRODUCTS”, or collectively as the “PRODUCTS.”).

2 2. Lead and lead compounds (hereinafter, the “LISTED CHEMICALS”) are
3 substances known to the State¹ of California to cause cancer, birth defects and other
4 reproductive harm.

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

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

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

26 _____
¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 inclusive, as if specifically set forth herein.

2 26. On June 29, 2010, Plaintiff sent a 60-Day Notice of Proposition 65 violations to
3 the requisite public enforcement agencies and to Defendant ("First Notice"). The First Notice
4 was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
5 and the statute's implementing regulations regarding the notice of the violations to be given to
6 certain public enforcement agencies and to the violator. The notice given included, *inter alia*,
7 the following information: the name, address, and telephone number of the noticing individual;
8 the name of the alleged violator; the statute violated; the approximate time period during which
9 violations occurred; and descriptions of the violations, including the chemicals involved, the
10 routes of toxic exposure, and the specific products or type of products causing the violations,
11 and was issued as follows:

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

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

1 the name of the alleged violator; the statute violated; the approximate time period during which
2 violations occurred; and descriptions of the violations, including the chemicals involved, the
3 routes of toxic exposure, and the specific products or type of products causing the violations,
4 and was issued as follows:

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

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

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

36. By the above-described acts, Defendant is liable, pursuant to H&S Code

1 §25249.7(b), for a civil penalty of \$2,500 per day per violation for each unlawful exposure to a
2 LISTED CHEMICAL from the PRODUCTS.

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

4 **THIRD CAUSE OF ACTION**

5 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, et seq. concerning**
6 **those PRODUCTS described in Plaintiff's September 13, 2010 60-Day Notice of**
7 **Violation)**

8 37. Plaintiff realleges and incorporates by reference Paragraphs 1 through 36,
9 inclusive, as if specifically set forth herein.

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

- 20 a. Defendant and the California Attorney General were provided copies of
21 the Second Notice by Certified Mail.
- 22 b. Defendant was provided a copy of a document entitled "The Safe
23 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
24 Summary," which is also known as Appendix A to Title 27 of CCR
25 §25903.
- 26 c. The California Attorney General was provided with a Certificate of Merit
by the attorney for the noticing party, stating that there is a reasonable
and meritorious case for this action, and attaching factual information

1 sufficient to establish a basis for the certificate, including the identity of
2 the persons consulted with and relied on by the certifier, and the facts
3 studies, or other data reviewed by those persons, pursuant to H&S Code
4 §25249.7(h) (2).

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

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

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

19 42. An action for injunctive relief under Proposition 65 is specifically authorized by
20 Health & Safety Code §25249.7(a).

21 43. Continuing commission by Defendant, of the acts alleged above will irreparably
22 harm the citizens of the State of California, for which harm they have no plain, speedy, or
23 adequate remedy at law.

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

25 **FOURTH CAUSE OF ACTION**
26 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning
those PRODUCTS described in Plaintiff's September 13, 2010 60-Day Notice of
Violation)**

1 44. Plaintiff realleges and incorporates by reference Paragraphs 1 through 43,
2 inclusive, as if specifically set forth herein.

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

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

26 46. The appropriate public enforcement agencies have failed to commence and
diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendant

1 based on the allegations herein.

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

8 48. By the above-described acts, Defendant is liable, pursuant to H&S Code
9 §25249.7(b), for a civil penalty of \$2,500 per day per violation for each unlawful exposure to a
10 LISTED CHEMICAL from the PRODUCTS.

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

12 **THE NEED FOR INJUNCTIVE RELIEF**

13 49. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 48,
14 as if set forth below.

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

20 **PRAYER FOR RELIEF**

21 Wherefore, Plaintiff accordingly prays for the following relief:

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

B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling Defendant

1 to identify and locate each individual who has purchased the First Noticed PRODUCTS since
2 September 7, 2007, and the Second Noticed since December 7, 2007, and to provide a warning
3 to such person that the use of the Products will expose the user to chemicals known to cause
4 cancer, birth defects, and other reproductive harm.

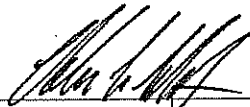
5 C. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
6 against Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

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

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

11 DATED: December 7, 2010

LAW OFFICES OF ANDREW L. PACKARD

12
13
14 

15 _____
16 Andrew L. Packard
17 Attorneys for Plaintiff
18 Environmental Research Center
19
20
21
22
23
24
25
26