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OCT 20 2010

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

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

Case No. CV1005572

13
14 Plaintiff,)

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

15 v.)

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

(Other)

16
17 CUSTOM ACCESSORIES, INC.; J&B)
18 IMPORTERS, INC.; and Defendant DOES 1)
through 200, inclusive,)

19
20 Defendants.)

1 Plaintiff, the 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 and other
8 reproductive harm. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and/or use of Defendants' air pumps (the "Products").
10 Consumers, including children, in California are exposed to Lead when they touch or handle the
11 Products.

12 2. Under California's Safe Drinking Water and Toxic Enforcement Action of
13 1986, commonly known as "Proposition 65" (Health & Safety Code §§ 25249.5, *et seq.*), it is
14 unlawful for businesses to knowingly and intentionally expose any individuals in California to
15 chemicals known to the State to cause cancer, birth defects or other reproductive harm without
16 providing clear and reasonable warnings to such individuals prior to their exposure. Defendants
17 introduce Products contaminated with significant quantities of Lead into the California
18 marketplace, exposing consumers of their Products, many of whom are children, to Lead.

19 3. Despite the fact that Defendants expose children and other people who
20 come into contact with the Products to Lead, Defendants provide no warnings whatsoever about
21 the carcinogenic or reproductive hazards associated with these Lead exposures. Defendants'
22 conduct thus violates the 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 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
2 play and substantial justice.

3 12. Venue is proper in the Marin County Superior Court because one or more
4 of the violations arise in the County of Marin.

5 **BACKGROUND FACTS**

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

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

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

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

26 16. On October 1, 1992, the State of California officially listed lead and lead
27 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
28 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear

1 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
2 § 27001(c); Health & Safety Code § 25249.10(b).

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

14 18. There is no safe level of exposure to Lead and even minute amounts of
15 Lead exposure have been shown to permanently reduce mental capacity. Davis, J.M.,
16 Svendgaard, D.J., "Lead and Child Development," *Nature* 329:297-300, 1987. One study on the
17 effect of childhood Lead exposure declared that even the smallest detectable amount of blood
18 Lead levels in children can mean the difference between an A or B grade in school. Lanphear,
19 B.P., Dietrich, K., Auinger, P., Cox, C., "Subclinical Lead Toxicity in U.S. Children and
20 Adolescents," *Neurodevelopmental Disabilities II Platform*, 2000. Another study followed
21 children into adulthood and found a sevenfold increase in the risk for developing a reading
22 disability among children exposed to sufficient levels of Lead as toddlers. Needleman, H.L.,
23 Schell, A., Bellinger, D., Leviton, A., Allred, E.N., "The Long-Term Effects of Exposure to Low
24 Doses of Lead in Childhood: An 11-Year Follow-up Report," *New England Journal of Medicine*
25 322:83-88, 1990.

26 19. Lead exposures to pregnant women are also of particular concern in light
27 of evidence that even short term Lead exposures *in utero* may have long-term harmful effects.
28 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental

1 Development,” *Environmental Health Perspectives* 114:11, 2006; Schnaas, L., *et al.*, “Reduced
2 Intellectual Development in Children with Prenatal Lead Exposure,” *Environmental Health*
3 *Perspectives* 114:5, 2006.

4 20. Lead is found in the paint used on the Products and the polyvinyl chloride
5 (“PVC”) which is used on the pedal for some of the Products. Lead is used in the Products as a
6 stabilizer in the vinyl and as a chemical ingredient in the paint and other coloring agents used in
7 the Products.

8 21. Defendants’ Products contain sufficient quantities of Lead such that
9 individuals, including children, who touch and/or handle the Products are exposed to Lead
10 through the average use of the Products. The route of exposure for the violations is ingestion via
11 hand-to-mouth contact and dermal absorption directly through the skin. Consumer exposures to
12 Lead from the Products occur when consumers use or otherwise touch and handle the Products.
13 These exposures occur in homes, workplaces and everywhere else throughout California where
14 the Products are used, touched or handled.

15 22. No clear and reasonable warning is provided with the Products regarding
16 the carcinogenic or reproductive hazards of Lead.

17 23. Any private party acting in the public interest has standing to enforce
18 violations of Proposition 65 provided that such person has supplied the requisite public enforcers
19 with a valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting
20 the action within such time. Health & Safety Code § 25249.7(d).

21 24. More than sixty days prior to naming each Defendant in this lawsuit, CEH
22 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,
23 the District Attorneys of every county in California, the City Attorneys of every California city
24 with a population greater than 750,000 and to each of the named Defendants. In compliance
25 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
26 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
27 time period during which violations occurred; (4) specific descriptions of the violations,
28 including (a) the routes of exposure to Lead from the Products, and (b) the specific type of

1 products sold and used in violation of Proposition 65; and (5) the name of the specific
2 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

3 25. CEH also sent a Certificate of Merit for each Notice to the California
4 Attorney General, the District Attorneys of every county in California, the City Attorneys of
5 every California city with a population greater than 750,000 and to the named Defendants. In
6 compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each of the
7 Certificates certified that CEH's counsel: (1) has consulted with one or more persons with
8 relevant and appropriate experience or expertise who reviewed facts, studies or other data
9 regarding the exposures to Lead alleged in each of the Notices; and (2) based on the information
10 obtained through such consultations, believes that there is a reasonable and meritorious case for
11 a citizen enforcement action based on the facts alleged in each of the Notices. In compliance
12 with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each of the Certificates served
13 on the Attorney General included factual information – provided on a confidential basis –
14 sufficient to establish the basis for the Certificate, including the identity of the person(s)
15 consulted by CEH's counsel and the facts, studies or other data reviewed by such persons.

16 26. None of the public prosecutors with the authority to prosecute violations
17 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
18 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each
19 of CEH's Notices.

20 27. Defendants both know and intend that individuals will touch and/or handle
21 the Products, thus exposing them to Lead.

22 28. Under Proposition 65, an exposure is "knowing" where the party
23 responsible for such exposure has:

24 knowledge of the fact that a[n] . . . exposure to a chemical listed
25 pursuant to [Health and Safety Code § 25249.8(a)] is occurring.
26 No knowledge that the . . . exposure is unlawful is required.

27 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
28 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,

1 § 12201).

2 29. As companies that manufacture, import, distribute and/or sell the Products
3 for use in the California marketplace, Defendants know or should know that the Products contain
4 Lead and that individuals who use the Products will be exposed to Lead. The Lead exposures to
5 consumers who use the Products are a natural and foreseeable consequence of Defendants'
6 placing the Products into the stream of commerce.

7 30. Defendants have been informed of the Lead in their Products by CEH's
8 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

9 31. Nevertheless, Defendants continue to expose consumers in California to
10 Lead without prior clear and reasonable warnings regarding the carcinogenic and/or reproductive
11 hazards of Lead.

12 32. CEH has engaged in good-faith efforts to resolve the claims alleged herein
13 prior to filing this Complaint.

14 33. Any person "violating or threatening to violate" Proposition 65 may be
15 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
16 violate" is defined to mean "to create a condition in which there is a substantial probability that a
17 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
18 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

19 **FIRST CAUSE OF ACTION**

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

21 34. CEH realleges and incorporates by reference as if specifically set forth
22 herein Paragraphs 1 through 33, inclusive.

23 35. By placing the Products into the stream of commerce, each Defendant is a
24 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

25 36. Lead is a chemical listed by the State of California as known to cause
26 cancer and birth defects or other reproductive harm.

27 37. Defendants know that average use of the Products will expose users of the
28 Products to Lead. Defendants intend that the Products be used in a manner that results in users

1 of the Products being exposed to Lead contained in the Products.

2 38. Defendants have failed, and continue to fail, to provide prior clear and
3 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead contained
4 in the Products to users of the Products.

5 39. By committing the acts alleged above, Defendants have at all times
6 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
7 individuals to Lead without first giving clear and reasonable warnings to such individuals
8 regarding the carcinogenicity and reproductive toxicity of Lead. By offering the Products for
9 sale and/or use in California without a clear and reasonable warning regarding the Lead in the
10 Products, Defendants also have, and continue to threaten to violate Proposition 65.

11 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.

12 **PRAYER FOR RELIEF**

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

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

17 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
18 preliminarily and permanently enjoin Defendants from offering the Products for sale in
19 California without providing prior clear and reasonable warnings, as CEH shall specify in further
20 application to the Court;

21 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
22 Defendants to take action to stop ongoing unwarned exposures to Lead resulting from the
23 manufacture, distribution, sale and/or use of Products sold by Defendants, as CEH shall specify
24 in further application to the Court;

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

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

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Dated: October 20, 2010

Respectfully submitted,

LEXINGTON LAW GROUP



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Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH