

1 LEXINGTON LAW GROUP  
Eric S. Somers, State Bar No. 139050  
2 Howard Hirsch, State Bar No. 213209  
Lisa Burger, State Bar No. 239676  
3 1627 Irving Street  
San Francisco, CA 94122  
4 Telephone: (415) 759-4111  
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff  
6 CENTER FOR ENVIRONMENTAL HEALTH

**FILED**

**DEC 22 2010**

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

7  
8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

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

13 Plaintiff, )

14 v. )

15  
16 LANDS' END, INC. DBA LANDS' END )  
17 DIRECT MERCHANTS, INC.; and DOES 1 )  
through 200, inclusive, )

18 Defendants. )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

Case No. CIV 1006649

**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

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

(Other)

1 Plaintiff 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 use of Defendants' keychains (the "Products"). Individuals,  
10 including pregnant women and children, are exposed to Lead when they use, touch or otherwise  
11 come into contact with the Products.

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

19 3. Despite the fact that Defendants expose pregnant women, children and  
20 other individuals to Lead, Defendants provide no warnings whatsoever about the carcinogenic or  
21 reproductive hazards associated with Lead exposure. Defendants' conduct thus violates the  
22 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 Safety Code §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy  
2 group that has prosecuted a large number of Proposition 65 cases in the public interest. These  
3 cases have resulted in significant public benefit, including reformulation of thousands of  
4 products to remove toxic chemicals and to make them safer. CEH also provides information to  
5 Californians about the health risks associated with exposure to hazardous substances, where  
6 manufacturers and other responsible parties fail to do so.

7           5. Defendant LANDS' END, INC. DBA LANDS' END DIRECT  
8 MERCHANTS, INC. is a person in the course of doing business within the meaning of Health &  
9 Safety Code §25249.11. Lands' End, Inc. dba Lands' End Direct Merchants, Inc. manufactures,  
10 distributes and/or sells the Products for sale and use in California.

11           6. DOES 1 through 200 are each a person in the course of doing business  
12 within the meaning of Health & Safety Code §25249.11. DOES 1 through 200 manufacture,  
13 distribute and/or sell the Products for sale or use in California.

14           7. The true names of DOES 1 through 200 are unknown to CEH at this time.  
15 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

16           8. The defendant identified in paragraph 5 and DOES 1 through 200 are  
17 collectively referred to herein as "Defendants."

#### 18 JURISDICTION AND VENUE

19           9. The Court has jurisdiction over this action pursuant to Health & Safety  
20 Code §25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant  
21 to California Constitution Article VI, Section 10, because this case is a cause not given by statute  
22 to other trial courts.

23           10. This Court has jurisdiction over the Defendants because each is a business  
24 entity that does sufficient business, has sufficient minimum contacts in California or otherwise  
25 intentionally avails itself of the California market through the sale, marketing or use of the  
26 Products in California and/or by having such other contacts with California so as to render the  
27 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair  
28 play and substantial justice.

1 11. Venue is proper in the Marin Superior Court because one or more of the  
2 violations arise in the County of Marin.

3 **BACKGROUND FACTS**

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

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

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

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

24 15. On October 1, 1992, the State of California officially listed lead and lead  
25 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were  
26 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear  
27 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.  
28 §27001(c); Health & Safety Code §25249.10(b).

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

12           17.     There is no safe level of exposure to Lead and even minute amounts of  
13 Lead exposure have been proven harmful to children and adults. Studies have repeatedly  
14 concluded that concentrations of Lead in children's blood previously deemed acceptable can  
15 have adverse health effects. *See, e.g.,* Canfield, R.L., *et al.*, "Intellectual Impairment in Children  
16 with Blood Lead Concentrations below 10 ug per Deciliter," *New England Journal of Medicine*  
17 348:16, 2003. Another study on the effect of childhood Lead exposure declared that even the  
18 smallest detectable amount of blood Lead levels in children can mean the difference between an  
19 A or B grade in school. Lanphear, B.P., Dietrich, K., Auinger, P., Cox, C., "Subclinical Lead  
20 Toxicity in U.S. Children and Adolescents," *Neurodevelopmental Disabilities II Platform*, 2000.

21           18.     Lead exposures for pregnant women are also of particular concern in light  
22 of evidence that even short term lead exposures *in utero* may have long-term harmful effects.  
23 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental  
24 Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, Lourdes, *et al.*,  
25 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*  
26 *Health Perspectives* 114:5, 2006.

27           19.     Defendants' Products contain sufficient quantities of Lead such that  
28 individuals, including pregnant women and children, who handle the Products are exposed to

1 Lead through the average use of the Products. The routes of exposure for the violations are  
2 direct ingestion when individuals place the Products in their mouths; ingestion via hand-to-  
3 mouth contact after individuals touch or handle the Products; and dermal absorption directly  
4 through the skin when individuals touch or handle the Products. These exposures to Lead occur  
5 in homes, workplaces and everywhere else throughout California where the Products are  
6 touched, handled or used.

7           20. No clear and reasonable warning is provided with the Products regarding  
8 the carcinogenic or reproductive hazards of Lead.

9           21. Any person acting in the public interest has standing to enforce violations  
10 of Proposition 65 provided that such person has supplied the requisite public enforcers with a  
11 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the  
12 action within such time. Health & Safety Code §25249.7(d).

13           22. More than sixty days prior to naming each Defendant in this lawsuit, CEH  
14 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,  
15 the District Attorneys of every county in California, the City Attorneys of every California city  
16 with a population greater than 750,000 and to each of the named Defendants. In compliance  
17 with Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each Notice included the  
18 following information: (1) the name and address of the violators; (2) the statute violated; (3) the  
19 time period during which violations occurred; (4) specific descriptions of the violations,  
20 including (a) the routes of exposure to Lead from the Products, and (b) the specific type of  
21 Products sold and used in violation of Proposition 65; and (5) the name of the specific  
22 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

23           23. CEH also sent a Certificate of Merit for each Notice to the California  
24 Attorney General, the District Attorneys of every county in California, the City Attorneys of  
25 every California city with a population greater than 750,000 and to each of the named  
26 Defendants. In compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each  
27 Certificate certified that CEH's counsel: (1) has consulted with one or more persons with  
28 relevant and appropriate experience or expertise who reviewed facts, studies or other data

1 regarding the exposures to Lead alleged in each Notice; and (2) based on the information  
2 obtained through such consultations, believes that there is a reasonable and meritorious case for  
3 a citizen enforcement action based on the facts alleged in each Notice. In compliance with  
4 Health & Safety Code §25249.7(d) and 11 C.C.R. §3102, each Certificates served on the  
5 Attorney General included factual information – provided on a confidential basis – sufficient to  
6 establish the basis for the Certificate, including the identity of the person(s) consulted by CEH’s  
7 counsel and the facts, studies or other data reviewed by such persons.

8           24. None of the public prosecutors with the authority to prosecute violations  
9 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against  
10 Defendants under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in the  
11 Notice.

12           25. Defendants both know and intend that individuals, including pregnant  
13 women and children, will touch or handle the Products, thus exposing them to Lead.

14           26. Under Proposition 65, an exposure is “knowing” where the party  
15 responsible for such exposure has:

16                   knowledge of the fact that a[n] . . . exposure to a chemical listed  
17                   pursuant to [Health & Safety Code §25249.8(a)] is occurring. No  
18                   knowledge that the . . . exposure is unlawful is required.

19           27 C.C.R. §25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
20 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,  
21 §12201).

22           27. Defendants have been informed of the Lead in their Products by the 60-  
23 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

24           28. Defendants also have constructive knowledge that their Products contain  
25 Lead due to the widespread media coverage concerning the problem of Lead in consumer  
26 products.

27           29. As companies that manufacture, import, distribute and/or sell the Products  
28 for use in the California marketplace, Defendants know or should know that the Products contain

1 Lead and that individuals who use the Products will be exposed to Lead. The Lead exposures to  
2 consumers who use the Products are a natural and foreseeable consequence of Defendants'  
3 placing the Products into the stream of commerce.

4 30. Nevertheless, Defendants continue to expose individuals, including  
5 pregnant women and children, to Lead without prior clear and reasonable warnings regarding the  
6 carcinogenic or reproductive hazards of Lead.

7 31. CEH has engaged in good-faith efforts to resolve the claims alleged herein  
8 prior to filing this Complaint.

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

14 **FIRST CAUSE OF ACTION**

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

16 33. CEH realleges and incorporates by reference as if specifically set forth  
17 herein Paragraphs 1 through 32, inclusive.

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

20 35. Lead is a chemical listed by the State of California as known to cause  
21 cancer, birth defects and other reproductive harm.

22 36. Defendants know that average use of the Products will expose users of the  
23 Products to Lead. Defendants intend that the Products be used in a manner that results in  
24 exposures to Lead from the Products.

25 37. Defendants have failed, and continue to fail, to provide clear and  
26 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of  
27 the Products.

28 38. By committing the acts alleged above, Defendants have at all times



1 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing  
2 individuals to Lead without first giving clear and reasonable warnings to such individuals  
3 regarding the carcinogenicity and reproductive toxicity of Lead.

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

5 **PRAYER FOR RELIEF**

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

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

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

14 3. That the Court, pursuant to Health & Safety Code §25249.7(a), order  
15 Defendants to take action to stop ongoing unwarned exposures to Lead resulting from use of  
16 Products sold by Defendants, as CEH shall specify in further application to the Court;

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

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

21  
22 Dated: December 22, 2010

Respectfully submitted,

23 LEXINGTON LAW GROUP

24  
25 

26 Howard Hirsch  
27 Attorneys for Plaintiff  
28 CENTER FOR ENVIRONMENTAL HEALTH