

ENDORSED
FILED
Superior Court of California
County of San Francisco

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CLERK OF THE COURT
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN FRANCISCO**

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

13 Plaintiff,

14 v.

15 OLYMPIAN LABS, INC., and DOES 1-
16 100, inclusive,

17 Defendants.

Case No. CGC-10-505663

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

[Health & Safety Code §25249.5, *et seq.*]

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

20 **INTRODUCTION**

21 1. This action seeks to remedy Defendants' continuing failure to warn consumers in
22 California that they are being exposed to lead, a substance known to the State of California to
23 cause cancer, birth defects and other reproductive harm. Defendants manufacture, package,
24 distribute, market, and/or sell in California certain products containing lead (referred to
25 hereinafter as the "PRODUCTS").
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1 2. Lead and lead compounds (hereinafter, the “LISTED CHEMICALS”) are
2 substances known to the State of California¹ to cause cancer, birth defects and other reproductive
3 harm.

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

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

13 5. Plaintiff seeks injunctive relief enjoining Defendants from the continued
14 manufacturing, packaging, distributing, marketing and/or selling of the PRODUCTS in
15 California without provision of clear and reasonable warnings regarding the risks of cancer, birth
16 defects and other reproductive harm posed by exposure to the LISTED CHEMICALS through
17 the use and/or handling of the PRODUCTS. Plaintiff seeks an injunctive order compelling
18 Defendants to bring their business practices into compliance with Proposition 65 by providing a
19 clear and reasonable warning to each individual who may be exposed to LISTED CHEMICALS
20 from the use and/or handling of the PRODUCTS.

21 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to
22 remedy Defendants’ failure to provide clear and reasonable warnings regarding exposures to the
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26 ¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 LISTED CHEMICALS.

2 **JURISDICTION AND VENUE**

3 7. This Court has jurisdiction over this action pursuant to California Constitution
4 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except
5 those given by statute to other trial courts.” The statute under which this action is brought does
6 not specify any other basis for jurisdiction.

7 8. This Court has jurisdiction over Defendants because, based on information and
8 belief, Defendants are businesses having sufficient minimum contacts with California, or
9 otherwise intentionally availing themselves of the California market through the marketing,
10 distribution and/or sale of the PRODUCTS in the State of California to render the exercise of
11 jurisdiction over them by the California courts consistent with traditional notions of fair play and
12 substantial justice.

13 9. This Court is the proper venue for this action because the Defendants have
14 violated California law in the County of San Francisco. Furthermore, this Court is the proper
15 venue under Code of Civil Procedure §395.5 and H&S Code §25249.7(a), which provides that
16 any person who violates or threatens to violate H&S Code §§25249.5 or 25249.6 may be
17 enjoined in any court of competent jurisdiction.
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20 **PARTIES**

21 10. Plaintiff Environmental Research Center (“ERC”) is a non-profit corporation
22 organized under California’s Non-Profit Benefit Corporation Law. ERC is dedicated to, among
23 other causes, reducing the use and misuse of hazardous and toxic substances, consumer
24 protection, worker safety and corporate responsibility.

25 11. ERC is a person within the meaning of H&S Code §25118 and brings this
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1 enforcement action in the public interest pursuant to H&S Code §25249.7(d).

2 12. Defendant OLYMPIAN LABS, INC. is a corporation and a person within the
3 meaning of H&S Code §25249.11(a). Defendant OLYMPIAN LABS, INC. manufactures,
4 packages, distributes, markets and/or sells the PRODUCTS for sale or use in California.

5 13. Defendants Does 1-100 are named herein under fictitious names, as their true
6 names and capacities are unknown to Plaintiff. ERC is informed and believes, and thereon
7 alleges, that each of said Does manufactures, packages, distributes, markets and/or sells the
8 PRODUCTS for sale or use in California, and/or is responsible, in some actionable manner, for
9 the events and happenings referred to herein, either through its conduct or through the conduct of
10 its agents, servants or employees, or in some other manner, causing the harms alleged herein.
11 Plaintiff will seek leave to amend this Complaint to set forth the true names and capacities of
12 Does when ascertained.
13

14 **STATUTORY BACKGROUND**

15 14. The People of the State of California have declared in Proposition 65 their right
16 “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
17 reproductive harm.” (Section 1(b) of Initiative Measure, Proposition 65).

18 15. To effect this goal, Proposition 65 requires that individuals be provided with a
19 “clear and reasonable warning” before being exposed to substances listed by the State of
20 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
21 part:
22

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

16. Proposition 65 provides that any person “violating or threatening to violate” the

1 statute may be enjoined in any court of competent jurisdiction. (H&S Code §25249.7(a).) The
2 phrase “threatening to violate” is defined to mean creating “a condition in which there is a
3 substantial probability that a violation will occur.” (H&S Code §25249.11(e).) Violators are
4 liable for civil penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S
5 Code §25249.7(b).)

6 **FACTUAL BACKGROUND**

7 17. On February 27, 1987, the State of California officially listed the chemical lead as
8 a chemical known to cause developmental and reproductive toxicity. Lead became subject to the
9 warning requirement one year later and was therefore subject to the “clear and reasonable”
10 warning requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
11 Regulations (“CCR”) §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

12 18. On October 1, 1992, the State of California officially listed the chemicals lead and
13 lead compounds as chemicals known to cause cancer. Lead and lead compounds became subject
14 to the warning requirement one year later and were therefore subject to the “clear and
15 reasonable” warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR
16 §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

17 19. Plaintiff is informed and believes, and based on such information and belief,
18 alleges the PRODUCTS have been marketed, distributed and/or sold to individuals in California
19 without clear and reasonable warning before, on, and after September 4, 2010. The PRODUCTS
20 continue to be marketed, distributed and sold in California without the requisite warning
21 information.

22 20. As a proximate result of acts by Defendants, as persons in the course of doing
23 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of
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1 California, including in the County of San Francisco, have been exposed to the LISTED
2 CHEMICALS without clear and reasonable warning. The individuals subject to exposures to the
3 LISTED CHEMICALS include normal and foreseeable users of the PRODUCTS, as well as all
4 other persons exposed to the PRODUCTS.

5 21. At all times relevant to this action, Defendants have knowingly and intentionally
6 exposed the users and/or handlers of the PRODUCTS to the LISTED CHEMICALS without first
7 giving a clear and reasonable warning to such individuals.

8 22. Individuals using or handling the PRODUCTS are exposed to the LISTED
9 CHEMICALS in excess of the "maximum allowable daily" and "no significant risk" levels
10 determined by the State of California, as applicable.

11 23. At all times relevant to this action, Defendants have, in the course of doing
12 business, failed to provide individuals using and/or handling the PRODUCTS with a clear and
13 reasonable warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.

14 24. The PRODUCTS continue to be marketed, distributed, and sold in California
15 without the requisite clear and reasonable warning.
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17 **FIRST CAUSE OF ACTION**

18 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, et seq. concerning the**
19 **PRODUCTS described in Plaintiff's September 4, 2010 and October 22, 2010 60-Day**
20 **Notices of Violations)**

21 25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,
22 inclusive, as if specifically set forth herein.

23 26. On September 4, 2010 and October 22, 2010, Plaintiff sent 60-Day Notices of
24 Proposition 65 violations to the requisite public enforcement agencies and to Defendant
25 OLYMPIAN LABS, INC. ("Notices of Violations"). The Notices of Violations were issued
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1 pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
2 statute's implementing regulations regarding the notice of violations to be given to certain public
3 enforcement agencies and to the violator. The Notices of Violations were issued as follows:

- 4 a. Defendant OLYMPIAN LABS, INC. and the California Attorney
5 General were provided copies of the Notices of Violations by Certified
6 Mail.
- 7 b. Defendant OLYMPIAN LABS, INC. was provided, with each of the
8 Notices of Violations, a copy of a document entitled "The Safe Drinking
9 Water and Toxic Enforcement Act of 1986 (Proposition 65): A
10 Summary," which is also known as Appendix A to Title 27 of CCR
11 §25903.
- 12 c. The California Attorney General was provided, with each of the Notices of
13 Violations, a Certificate of a Merit by the noticing party or the attorney for
14 the noticing party, stating that there is a reasonable and meritorious cause
15 for this action, and attaching factual information sufficient to establish a
16 basis for the certificate, including the identity of the persons consulted
17 with and relied on by the certifier, and the facts, studies, or other data
18 reviewed by those persons, pursuant to H&S Code §25249.7(h)(2).
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21 27. The appropriate public enforcement agencies have failed to commence and
22 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants
23 based on the allegations herein.

24 28. By committing the acts alleged in this Complaint, Defendants at all times relevant
25 to this action, and continuing through the present, have violated H&S Code §25249.6 by, in the
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1 course of doing business, knowingly and intentionally exposing individuals who use or handle
2 the PRODUCTS set forth in the Notices of Violations to the LISTED CHEMICALS, without
3 first providing a clear and reasonable warning to such individuals pursuant to H&S Code §§
4 25249.6 and 25249.11(f).

5 29. By the above-described acts, Defendants have violated H&S Code §25249.6 and
6 are therefore subject to an injunction ordering Defendants to stop violating Proposition 65, and to
7 provide required warnings to consumers and other individuals who will purchase, use and/or
8 handle the PRODUCTS.

9 30. An action for injunctive relief under Proposition 65 is specifically authorized by
10 Health & Safety Code §25249.7(a).

11 31. Continuing commission by Defendants of the acts alleged above will irreparably
12 harm the citizens of the State of California, for which harm they have no plain, speedy, or
13 adequate remedy at law.

14 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

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16 **SECOND CAUSE OF ACTION**

17 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning the**
18 **PRODUCTS described in Plaintiff's September 4, 2010 and October 22, 2010 60-Day**
19 **Notices of Violations)**

20 32. Plaintiff realleges and incorporates by reference Paragraphs 1 through 31,
21 inclusive, as if specifically set forth herein.

22 33. On September 4, 2010 and October 22, 2010, Plaintiff sent 60-Day Notices of
23 Proposition 65 violations to the requisite public enforcement agencies and to Defendant
24 OLYMPIAN LABS, INC. ("Notices of Violations"). The Notices of Violations were issued
25 pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
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1 statute's implementing regulations regarding the notice of the violations to be given to certain
2 public enforcement agencies and to the violator. The Notices of Violations were issued as
3 follows:

- 4 a. Defendant OLYMPIAN LABS, INC. and the California Attorney
5 General were provided copies of the Notices of Violations by Certified
6 Mail.
- 7 b. Defendant OLYMPIAN LABS, INC. was provided, with each of the
8 Notices of Violations, a copy of a document entitled "The Safe Drinking
9 Water and Toxic Enforcement Act of 1986 (Proposition 65): A
10 Summary," which is also known as Appendix A to Title 27 of CCR
11 §25903.
- 12 c. The California Attorney General was provided, with each of the
13 Notices of Violations, a Certificate of Merit by the noticing party or
14 the attorney for the noticing party, stating that there is a reasonable and
15 meritorious cause for this action, and attaching factual information
16 sufficient to establish a basis for the certificate, including the identity of
17 the persons consulted with and relied on by the certifier, and the facts,
18 studies, or other data reviewed by those persons, pursuant to H&S Code
19 §25249.7(h)(2).
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22 34. The appropriate public enforcement agencies have failed to commence and
23 diligently prosecute a cause of action under H&S Code §2524935, *et seq.* against Defendants
24 based on the allegations herein.

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

6 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
7 §25249.7(b), for a civil penalty of \$2,500 per day per violation for each unlawful exposure to a
8 LISTED CHEMICAL from the PRODUCTS.

9 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

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11 **THE NEED FOR INJUNCTIVE RELIEF**

12 37. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 36, as
13 if set forth below.

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

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20 **PRAYER FOR RELIEF**

21 Wherefore, Plaintiff prays for the following relief:

22 A. A preliminary and permanent injunction enjoining Defendants, their agents,
23 employees, assigns and all persons acting in concert or participating with Defendants; from
24 manufacturing, packaging, distributing, marketing and/or selling the PRODUCTS for sale or use
25 in California without first providing a clear and reasonable warning, within the meaning of
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1 Proposition 65, that the users and/or handlers of the PRODUCTS are exposed to the LISTED
2 CHEMICALS.

3 B. An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
4 against Defendants in the amount of \$2,500 per day for each violation of Proposition 65;

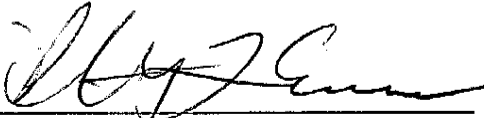
5 C. An award to Plaintiff of its reasonable attorney fees pursuant to California Code
6 of Civil Procedure §1021.5 or the substantial benefit theory;

7 D. An award of costs of suit herein; and

8 E. Such other and further relief as may be just and proper.
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11 Dated: January 4, 2010

LAW OFFICE OF PHILIP T. EMMONS

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13 By: 

14 Philip T. Emmons, Esq.
15 Attorney for Plaintiff
16 Environmental Research Center
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