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SAN FRANCISCO COUNTY
SUPERIOR COURT

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CASE MANAGEMENT CONFERENCE SET

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6 Environmental Research Center

APR 29 2011 9:00 AM

DEPARTMENT 212

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

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

12 Plaintiff,

13 v.

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

16 Defendants.

Case No.

CGC-10-505663

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 a certain product containing lead (referred to
25 hereinafter as the "PRODUCT").
26

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 PRODUCT 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 PRODUCT 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 PRODUCT in California
15 without provision of clear and reasonable warnings regarding the risks of cancer, birth defects
16 and other reproductive harm posed by exposure to the LISTED CHEMICALS through the use
17 and/or handling of the PRODUCT. Plaintiff seeks an injunctive order compelling Defendants to
18 bring their business practices into compliance with Proposition 65 by providing a clear and
19 reasonable warning to each individual who may be exposed to LISTED CHEMICALS from the
20 use and/or handling of the PRODUCT.
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22

23 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to
24 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 PRODUCT 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.
18
19

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 PRODUCT 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 PRODUCT 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

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

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
such individual....

26 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

13 18. On October 1, 1992, the State of California officially listed the chemicals lead and
14 lead compounds as chemicals known to cause cancer. Lead and lead compounds became subject
15 to the warning requirement one year later and were therefore subject to the “clear and
16 reasonable” warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR
17 §25000, *et seq.*; H&S Code §25249.5, *et seq.*)
18

19 19. Plaintiff is informed and believes, and based on such information and belief,
20 alleges the PRODUCT has been marketed, distributed and/or sold to individuals in California
21 without clear and reasonable warning before, on, and after September 4, 2010. The PRODUCT
22 continues to be marketed, distributed and sold in California without the requisite warning
23 information.

24 20. As a proximate result of acts by Defendants, as persons in the course of doing
25 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of
26

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 PRODUCT, as well as all
4 other persons exposed to the PRODUCT.

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

8 22. Individuals using or handling the PRODUCT 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 PRODUCT with a clear and
13 reasonable warning that the PRODUCT exposes individuals to the LISTED CHEMICALS.
14

15 24. The PRODUCT continues to be marketed, distributed, and sold in California
16 without the requisite clear and reasonable warning.

17 **FIRST CAUSE OF ACTION**

18 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning the**
19 **PRODUCT described in Plaintiff’s September 4, 2010 60-Day Notice of Violations)**

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

22 26. On September 4, 2010, Plaintiff sent a 60-Day Notice of Proposition 65 violations
23 to the requisite public enforcement agencies and to Defendant OLYMPIAN LABS, INC. (“First
24 Notice”). The First Notice was issued pursuant to, and in compliance with, the requirements of
25 H&S Code §25249.7(d) and the statute’s implementing regulations regarding the notice of the
26

1 violations to be given to certain public enforcement agencies and to the violator. The notice was
2 issued as follows:

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

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

21 28. By committing the acts alleged in this Complaint, Defendants at all times relevant
22 to this action, and continuing through the present, have 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 PRODUCT set forth in the First Notice to the LISTED CHEMICALS, without first providing
25 a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6 and
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1 25249.11(f).

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

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

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

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

12
13 **SECOND CAUSE OF ACTION**

14 **(Civil Penalties for Violations of Health and Safety Code §25249.5, *et seq.* concerning the**
15 **PRODUCT described in Plaintiff's September 4, 2010 60-Day Notice of Violations)**

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

18 33. On September 4, 2010, Plaintiff sent a 60-Day Notice of Proposition 65 violations
19 to the requisite public enforcement agencies and to Defendant OLYMPIAN LABS, INC. ("First
20 Notice"). The First Notice was issued pursuant to, and in compliance with, the requirements of
21 H&S Code §25249.7(d) and the statute's implementing regulations regarding the notice of the
22 violations to be given to certain public enforcement agencies and to the violator. The notice was
23 issued as follows:

- 24
25 a. Defendant OLYMPIAN LABS, INC. and the California Attorney
26 General were provided copies of the First Notice by Certified Mail.

1 b. Defendant OLYMPIAN LABS, INC. was provided a copy of a
2 document entitled "The Safe Drinking Water and Toxic Enforcement
3 Act of 1986 (Proposition 65): A Summary," which is also known as
4 Appendix A to Title 27 of CCR §25903.

5 c. The California Attorney General was provided with a Certificate of
6 Merit by the noticing party or the attorney for the noticing party,
7 stating that there is a reasonable and meritorious cause for this action,
8 and attaching factual information sufficient to establish a basis for
9 the certificate, including the identity of the persons consulted with and
10 relied on by the certifier, and the facts, studies, or other data reviewed
11 by those persons, pursuant to H&S Code §25249.7(h)(2).
12

13 34. The appropriate public enforcement agencies have failed to commence and
14 diligently prosecute a cause of action under H&S Code §2524935, *et seq.* against Defendants
15 based on the allegations herein.

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

23 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
24 §25249.7(b), for a civil penalty of \$2,500 per day per violation for each unlawful exposure to a
25 LISTED CHEMICAL from the PRODUCT.
26

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

2 **THE NEED FOR INJUNCTIVE RELIEF**

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

5 38. By committing the acts alleged in this Complaint, Defendants have caused
6 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
7 of equitable relief, Defendants will continue to create a substantial risk of irreparable injury by
8 continuing to cause consumers to be involuntarily and unwittingly exposed to the LISTED
9 CHEMICALS through the use and/or handling of the PRODUCT.
10

11 **PRAYER FOR RELIEF**

12 Wherefore, Plaintiff prays for the following relief:

13 A. A preliminary and permanent injunction enjoining Defendants, their agents,
14 employees, assigns and all persons acting in concert or participating with Defendants, from
15 manufacturing, packaging, distributing, marketing and/or selling the PRODUCT for sale or use
16 in California without first providing a clear and reasonable warning, within the meaning of
17 Proposition 65, that the users and/or handlers of the PRODUCT are exposed to the LISTED
18 CHEMICALS.
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20 B. An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
21 against Defendants in the amount of \$2,500 per day for each violation of Proposition 65;

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

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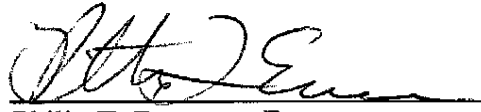
1 D. An award of costs of suit herein; and

2 E. Such other and further relief as may be just and proper.

3
4 Dated: November 29, 2010

LAW OFFICE OF PHILIP T. EMMONS

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6 By:



Philip T. Emmons, Esq.

Attorney for Plaintiff

Environmental Research Center

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