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FILED

JAN 18 2011

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: C. Lucchesi, Deputy

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

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13 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

14 Plaintiff,)

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16 v.)

17 99 CENTS ONLY STORES; KITTRICH)
18 CORPORATION; and Defendant DOES 1)
19 through 200, inclusive,)

20 Defendants.)
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Case No. CIV 1100300

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

(Other)

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 propoxur, a chemical known to the State
7 of California to cause cancer. Such exposures have occurred, and continue to occur, through the
8 manufacture, distribution, sale and/or use of Defendants' shelf paper made of or containing
9 insecticides (the "Products"). Consumers, including children, in California are exposed to
10 propoxur when they touch or handle the Products or items that have been stored on the Products.

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

18 3. Despite the fact that Defendants expose children and other people who
19 come into contact with the Products to propoxur, Defendants provide no warnings whatsoever
20 about the carcinogenic hazards associated with these propoxur exposures. Defendants' conduct
21 thus violates the warning provision of Proposition 65. Health & Safety Code § 25249.6.

22 PARTIES

23 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
24 non-profit corporation dedicated to protecting the public from environmental health hazards and
25 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
26 State of California. CEH is a "person" within the meaning of Health & Safety Code
27 § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
28 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy

1 play and substantial justice.

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

4 **BACKGROUND FACTS**

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

8 14. To effectuate this goal, Proposition 65 prohibits exposing people to
9 chemicals listed by the State of California as known to cause cancer without a “clear and
10 reasonable warning” unless the business responsible for the exposure can prove that it fits within
11 a statutory exemption. Health & 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 15. On August 11, 2006, the State of California officially listed propoxur as a
16 chemical known to cause cancer. 27 California Code of Regulations (“C.C.R.”) § 27001(b).
17 Propoxur became subject to the Proposition 65 “clear and reasonable” cancer warning one year
18 later beginning on August 11, 2007. *Ibid.*; Health & Safety Code § 25249.10(b).

19 16. Defendants’ Products contain sufficient quantities of propoxur such that
20 individuals, including children, who touch and/or handle the Products are exposed to propoxur
21 through the average use of the Products. The routes of exposure for the violations is direct
22 ingestion when consumers place items that have been stored on the Products in their mouths;
23 ingestion via hand-to-mouth contact after consumers touch or handle the Products or items that
24 have been stored on the Products; and dermal absorption directly through the skin when
25 consumers touch or handle the Products or items that have been stored on the Products. These
26 exposures to propoxur occur when consumers use, touch or otherwise handle the Products or
27 items that have been stored on the Products. These exposures occur in homes, workplaces and
28 everywhere else throughout California where the Products are used or handled.

1 17. No clear and reasonable warning is provided with the Products regarding
2 the carcinogenic hazards of propoxur.

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

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

17 20. CEH also sent a Certificate of Merit for each Notice to the California
18 Attorney General, the District Attorneys of every county in California, the City Attorneys of
19 every California city with a population greater than 750,000 and to each of the named
20 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each
21 Certificate certified that CEH's counsel: (1) has consulted with one or more persons with
22 relevant and appropriate experience or expertise who reviewed facts, studies or other data
23 regarding the exposures to propoxur alleged in each Notice; and (2) based on the information
24 obtained through such consultations, believes that there is a reasonable and meritorious case for
25 a citizen enforcement action based on the facts alleged in each Notice. In compliance with
26 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the
27 Attorney General included factual information – provided on a confidential basis – sufficient to
28 establish the basis for the Certificate, including the identity of the person(s) consulted by CEH's

1 counsel and the facts, studies or other data reviewed by such persons.

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

6 22. Defendants both know and intend that individuals will touch and/or handle
7 the Products, thus exposing them to propoxur.

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

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

13 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
14 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
15 § 12201).

16 24. Defendants both know and intend that the Products contain propoxur.
17 Propoxur is an intended ingredient that is also the active ingredient used on the shelf paper to kill
18 insects. The Products are treated with propoxur on both sides, thus ensuring that individuals will
19 be exposed to propoxur.

20 25. As companies that manufacture, import, distribute and/or sell the Products
21 for use in the California marketplace, Defendants know or should know that the Products contain
22 propoxur and that individuals who use the Products will be exposed to propoxur. The propoxur
23 exposures to consumers who use the Products are a natural and foreseeable consequence of
24 Defendants' placing the Products into the stream of commerce.

25 26. Defendants have been informed of the propoxur in their Products by
26 CEH's 60-Day Notice of Violation and accompanying Certificate of Merit served on them by
27 CEH.

28 27. Nevertheless, Defendants continue to expose consumers in California to

1 propoxur without prior clear and reasonable warnings regarding the carcinogenic hazards of
2 propoxur.

3 28. CEH has engaged in good-faith efforts to resolve the claims alleged herein
4 prior to filing this Complaint.

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

10 **FIRST CAUSE OF ACTION**

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

12 30. CEH realleges and incorporates by reference as if specifically set forth
13 herein Paragraphs 1 through 29, inclusive.

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

16 32. Propoxur is a chemical listed by the State of California as known to cause
17 cancer.

18 33. Defendants know that average use of the Products will expose users of the
19 Products to propoxur. Defendants intend that the Products be used in a manner that results in
20 users of the Products being exposed to propoxur contained in the Products.

21 34. Defendants have failed, and continue to fail, to provide prior clear and
22 reasonable warnings regarding the carcinogenic hazards of propoxur contained in the Products to
23 users of the Products.

24 35. By committing the acts alleged above, Defendants have at all times
25 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
26 individuals to propoxur without first giving clear and reasonable warnings to such individuals
27 regarding the carcinogenic hazards of propoxur. By offering the Products for sale and/or use in
28 California without a clear and reasonable warning regarding the propoxur in the Products,

1 Defendants also have, and continue to threaten to violate Proposition 65.

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

3 **PRAYER FOR RELIEF**

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

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

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

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

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

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

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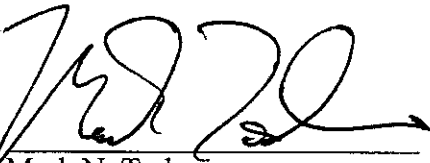
21 Dated: January 18, 2011

Respectfully submitted,

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LEXINGTON LAW GROUP

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Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

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