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FILED

APR 25 2011

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

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

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

13 Plaintiff,)

14 v.)

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16 COSTCO WHOLESALE CORPORATION;)
FOAM LABS, INC.; ONE UP INNOVATIONS,)
17 INC.; and DOES 1 through 200, inclusive,)

18 Defendants.)
19
20

Case No. CIV 1102080

**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' beanbag chairs (the "Products").
10 Consumers, including pregnant women and children, are exposed to Lead when they use, touch
11 or handle 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 consumers 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 under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

2 17. On October 1, 1992, the State of California officially listed lead and lead
3 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
4 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
5 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
6 § 27001(c); Health & Safety Code § 25249.10(b).

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

17 19. There is no safe level of exposure to Lead and even minute amounts of
18 Lead exposure have been proven harmful to children and adults. Studies have repeatedly
19 concluded that concentrations of Lead in children's blood previously deemed acceptable can
20 have adverse health effects. *See, e.g.,* Canfield, R.L., *et al.*, "Intellectual Impairment in Children
21 with Blood Lead Concentrations below 10 ug per Deciliter," *New England Journal of Medicine*
22 348:16, 2003. Another study on the effect of childhood Lead exposure declared that even the
23 smallest detectable amount of blood Lead levels in children can mean the difference between an
24 A or B grade in school. Lanphear, B.P., Dietrich, K., Auinger, P., Cox, C., "Subclinical Lead
25 Toxicity in U.S. Children and Adolescents," *Neurodevelopmental Disabilities II Platform*, 2000.

26 20. Lead exposures for 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, Lourdes, *et al.*,
2 “Reduced Intellectual Development in Children with Prenatal Lead Exposure,” *Environmental*
3 *Health Perspectives* 114:5, 2006.

4 21. Defendants’ Products contain sufficient quantities of Lead such that
5 consumers, including pregnant women and children, who touch or handle the Products are
6 exposed to Lead through the average use of the Products. The routes of exposure for the
7 violations are direct ingestion when consumers place items that have been in contact with the
8 Products in their mouths; dermal absorption directly through the skin when consumers touch, use
9 or handle the Products; and ingestion via hand-to-mouth contact after consumers touch, use or
10 handle the Products or items that have been in contact with the Products. These exposures occur
11 in homes, workplaces and everywhere else throughout California where these Products are
12 touched, used or handled.

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

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

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

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

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

18 27. Defendants both know and intend that individuals, including pregnant
19 women and children, will use, touch or handle the Products, thus exposing them to Lead.

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

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

25 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
26 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
27 § 12201).

28 29. Defendants have been informed of the Lead in their Products by the 60-

1 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

2 30. Defendants also have constructive knowledge that their Products contain
3 Lead due to the widespread media coverage concerning the problem of Lead in consumer
4 products in general and in products made of vinyl in particular.

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

10 32. Nevertheless, Defendants continue to expose consumers, including
11 pregnant women and children, to Lead without prior clear and reasonable warnings regarding the
12 carcinogenic or reproductive hazards of Lead.

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

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

20 **FIRST CAUSE OF ACTION**

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

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

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

26 37. Lead is a chemical listed by the State of California as known to cause
27 cancer, birth defects and other reproductive harm.

28 38. Defendants know that average use of the Products will expose users of the

1 Products to Lead. Defendants intend that the Products be used in a manner that results in
2 exposures to Lead from the Products.

3 39. Defendants have failed, and continue to fail, to provide clear and
4 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of
5 the Products.

6 40. By committing the acts alleged above, Defendants have at all times
7 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
8 individuals to Lead without first giving clear and reasonable warnings to such individuals
9 regarding the carcinogenicity and reproductive toxicity of Lead.

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

11 **PRAYER FOR RELIEF**

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

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

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

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

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

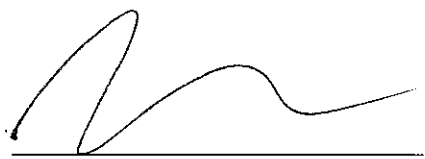
25 5. That the Court grant such other and further relief as may be just and
26 proper.

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Dated: April 25, 2011

Respectfully submitted,
LEXINGTON LAW GROUP



Howard Hirsch
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH