

COPY

FILED

JUL 27 2011

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

1 ANDREW L. PACKARD (State Bar No. 168690)
2 HALLIE B. ALBERT (State Bar No. 258737)
3 ERIK M. ROPER (State Bar No. 259756)
4 Law Offices of Andrew L. Packard
5 100 Petaluma Blvd. N Ste 301
6 Petaluma, CA 94952
7 Tel. (707) 763-7227
8 Fax. (707) 763-9227
9 E-mail: Andrew@PackardLawOffices.com

6 Attorneys for Plaintiff
7 Environmental Research Center

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11
12 Environmental Research Center, a non-profit)
13 California corporation,)

13 Plaintiff,)

14 v.)

15 Taiwan Nefful Co. Ltd., a corporation, and)
16 Japan Nefful Co. Ltd, a corporation,)

17 Defendants.)

Case No. CIV 1103738

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.5, *et seq.*;

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

21 **INTRODUCTION**

22 1. This action seeks to remedy Defendant's continuing failure to warn thousands
23 of consumers in California that they are being exposed to lead, a substance known to the State
24 of California to cause cancer, birth defects and other reproductive harm. Defendants
25 manufacture, package, distribute, market, and/or sell in California an herbal product containing
26 lead (collectively referred to hereinafter as the "PRODUCT").

1 2. Lead and lead compounds (hereinafter, the "LISTED CHEMICALS") are
2 substances known to the State¹ of California to cause cancer, birth defects and other
3 reproductive 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 sales 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
18 to bring its business practices into compliance with Proposition 65 by providing a clear and
19 reasonable warning to each individual who has been and who in the future may be exposed to
20 LISTED CHEMICALS from the use of the PRODUCT. Plaintiff also seeks an order
21 compelling Defendants to identify and locate each individual person who in the past has
22 purchased the PRODUCT, and to provide to each such purchaser a clear and reasonable
23 warning that the use of the PRODUCT will cause exposures to the LISTED CHEMICALS.
24
25
26

¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
2 Regulations (“CCR”) §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

3 20. On October 1, 1992, the State of California officially listed the chemicals lead
4 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became
5 subject to the warning requirement one year later and were therefore subject to the "clear and
6 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR §
7 25000, *et seq.*; H&S Code §25249.6, *et seq.*)

8 21. Plaintiff is informed and believes, and based on such information and belief
9 alleges the PRODUCT has been distributed and/or sold to individuals in California without
10 clear and reasonable warning since at least July 27, 2008. The PRODUCT continues to be
11 distributed and sold in California without the requisite warning information.

12 22. As a proximate result of acts by Defendants, as persons in the course of doing
13 business within the meaning of Health & Safety Code §25249.11, individuals throughout the
14 State of California, including in the County of Marin, have been exposed to the LISTED
15 CHEMICALS without clear and reasonable warning. The individuals subject to the violative
16 exposures include normal and foreseeable users of the PRODUCT, as well as all other persons
17 exposed to the PRODUCT.

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

21 24. Individuals using or handling the PRODUCT are exposed to the LISTED
22 CHEMICALS in excess of the “maximum allowable daily” and “no significant risk ” levels
23 determined by the State of California, as applicable, within the meaning of H&S Code
24 §25249.10(c).

25 25. At all times relevant to this action, Defendants have, in the course of doing
26 business, failed to provide individuals using and/or handling the PRODUCT with a clear and
reasonable warning that the PRODUCT exposes individuals to the LISTED CHEMICALS.

1 studies, or other data reviewed by those persons, pursuant to H&S Code
2 §25249.7(h) (2).

3 29. The appropriate public enforcement agencies have failed to commence and
4 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants
5 based on the allegations herein.

6 30. By committing the acts alleged in this Complaint, Defendants at all times relevant
7 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the
8 course of doing business, knowingly and intentionally exposing individuals who use or handle
9 the PRODUCT set forth in the First Notice to the LISTED CHEMICALS, without first providing
10 a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6 and
11 25249.11(f).

12 31. By the above-described acts, Defendants have violated H&S Code § 25249.6
13 and is therefore subject to an injunction ordering Defendants to stop violating Proposition 65,
14 to provide warnings to all present and future customers and to provide warnings to Defendants'
15 past customers who purchased or used the PRODUCT without receiving a clear and reasonable
16 warning.

17 32. An action for injunctive relief under Proposition 65 is specifically authorized by
18 Health & Safety Code §25249.7(a).

19 33. Continuing commission by Defendants, of the acts alleged above will
20 irreparably harm the citizens of the State of California, for which harm they have no plain,
21 speedy, or adequate remedy at law.

22 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

23 **SECOND CAUSE OF ACTION**

24 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning
25 those PRODUCT described in Plaintiff's April 4, 2011 60-Day Notice of Violation)**

26 34. Plaintiff realleges and incorporates by reference Paragraphs 1 through 33,
inclusive, as if specifically set forth herein.

35. On April 4, 2011, Plaintiff sent 60-Day Notices of Proposition 65 violations to

1 the requisite public enforcement agencies and to Defendants ("First Notice"). The First Notice
2 was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
3 and the statute's implementing regulations regarding the notice of the violations to be given to
4 certain public enforcement agencies and to the violator. The notice given included, *inter alia*,
5 the following information: the name, address, and telephone number of the noticing individual;
6 the name of the alleged violator; the statute violated; the approximate time period during which
7 violations occurred; and descriptions of the violations, including the chemicals involved, the
8 routes of toxic exposure, and the specific products or type of products causing the violations,
9 and was issued as follows:

- 10 a. Defendants and the California Attorney General were provided copies of
11 the First Notice by Certified Mail.
- 12 b. Defendants were provided a copy of a document entitled "The Safe
13 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
14 Summary," which is also known as Appendix A to Title 27 of CCR
15 §25903.
- 16 c. The California Attorney General was provided with a Certificate of Merit
17 by the attorney for the noticing party, stating that there is a reasonable
18 and meritorious case for this action, and attaching factual information
19 sufficient to establish a basis for the certificate, including the identify of
20 the persons consulted with and relied on by the certifier, and the facts
21 studies, or other data reviewed by those persons, pursuant to H&S Code
22 §25249.7(h) (2).

23 36. The appropriate public enforcement agencies have failed to commence and
24 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants
25 based on the allegations herein.

26 37. By committing the acts alleged in this Complaint, Defendants at all times relevant
to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the

1 course of doing business, knowingly and intentionally exposing individuals who use or handle
2 the PRODUCT set forth in the First Notice to the LISTED CHEMICALS, without first providing
3 a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6 and
4 25249.11(f).

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

8 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

9 **THE NEED FOR INJUNCTIVE RELIEF**

10 39. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 38,
11 as if set forth below.

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

17 **PRAYER FOR RELIEF**

18 Wherefore, Plaintiff accordingly prays for the following relief:

19 A. a preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),
20 enjoining Defendants, their agents, employees, assigns and all persons acting in concert or
21 participating with Defendants, from distributing or selling the PRODUCT in California without
22 first providing a clear and reasonable warning, within the meaning of Proposition 65, that the
23 users and/or handlers of the PRODUCT are exposed to the LISTED CHEMICALS.

24 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling Defendants
25 to identify and locate each individual who has purchased the PRODUCT since July 27, 2008,
26 and to provide a warning to such person that the use of the Products will expose the user to
chemicals known to cause cancer, birth defects, and other reproductive harm.

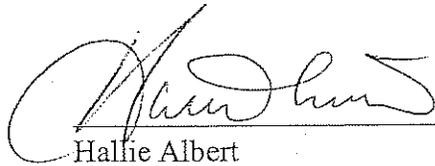
1 C. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
2 against Defendants in the amount of \$2,500 per day for each violation of Proposition 65;

3 D. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
4 California Code of Civil Procedure §1021.5, as Plaintiff shall specify in further application to
5 the Court; and,

6 E. such other and further relief as may be just and proper.

7 DATED: July 27, 2011

LAW OFFICES OF ANDREW L. PACKARD

8
9
10 

11 Hallie Albert
12 Attorneys for Plaintiff
13 Environmental Research Center
14
15
16
17
18
19
20
21
22
23
24
25
26