

1 LEXINGTON LAW GROUP
Howard Hirsch, State Bar No. 213209
2 Lisa Burger, State Bar No. 239676
503 Divisadero Street
3 San Francisco, CA 94117
Telephone: (415) 913-7800
4 Facsimile: (415) 759-4112
hhirsch@lexlawgroup.com
5 lburger@lexlawgroup.com

6 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

FILED

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

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

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

14 Plaintiff,)

15 v.)

16 CARDINAL BRANDS, INC.; DCWV)
17 ACQUISITION CORPORATION; JO-ANN)
STORES, INC.; OFFICEMAX)
18 INCORPORATED; OFFICEMAX NORTH)
AMERICA, INC.; OVERSTOCK.COM, INC.;)
19 PIONEER PHOTO ALBUMS, INC.; and DOES)
1 through 200, inclusive,)

20 Defendants.)
21)
22)

Case No. CIV 1105699

**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' photo albums and scrapbooks (the
10 "Products"). Consumers, including pregnant women, 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, to
18 Lead.

19 3. Despite the fact that Defendants expose pregnant women and other
20 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 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
2 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
3 cases have resulted in significant public benefit, including the reformulation of thousands of
4 products to remove toxic chemicals and to make them safer. CEH also provides information to
5 Californians about the health risks associated with exposure to hazardous substances, where
6 manufacturers and other responsible parties fail to do so.

7 5. Defendant CARDINAL BRANDS, INC. is a person in the course of doing
8 business within the meaning of Health & Safety Code § 25249.11. Cardinal Brands, Inc.
9 manufactures, distributes and/or sells the Products for sale and use in California.

10 6. Defendant DCWV ACQUISITION CORPORATION is a person in the
11 course of doing business within the meaning of Health & Safety Code § 25249.11. DCWV
12 Acquisition Corporation manufactures, distributes and/or sells the Products for sale and use in
13 California.

14 7. Defendant JO-ANN STORES, INC. is a person in the course of doing
15 business within the meaning of Health & Safety Code § 25249.11. Joe-Ann Stores, Inc.
16 manufactures, distributes and/or sells the Products for sale and use in California.

17 8. Defendant OFFICEMAX INCORPORATED is a person in the course of
18 doing business within the meaning of Health & Safety Code § 25249.11. OfficeMax
19 Incorporated manufactures, distributes and/or sells the Products for sale and use in California.

20 9. Defendant OFFICEMAX NORTH AMERICA, INC. is a person in the
21 course of doing business within the meaning of Health & Safety Code § 25249.11. OfficeMax
22 North America, Inc. manufactures, distributes and/or sells the Products for sale and use in
23 California.

24 10. Defendant OVERSTOCK.COM, INC. is a person in the course of doing
25 business within the meaning of Health & Safety Code § 25249.11. Overstock.com, Inc.
26 manufactures, distributes and/or sells the Products for sale and use in California.

27 11. Defendant PIONEER PHOTO ALBUMS, INC. is a person in the course of
28 doing business within the meaning of Health & Safety Code § 25249.11. Pioneer Photo Albums,

1 Inc. manufactures, distributes and/or sells the Products for sale and use in California.

2 12. DOES 1 through 200 are each a person in the course of doing business
3 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 200 manufacture,
4 distribute and/or sell the Products for sale or use in California.

5 13. The true names of DOES 1 through 200 are unknown to CEH at this time.
6 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

7 14. The defendants identified in paragraphs 5 through 11 and DOES 1 through
8 200 are collectively referred to herein as "Defendants."

9 **JURISDICTION AND VENUE**

10 15. The Court has jurisdiction over this action pursuant to Health & Safety
11 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
12 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
13 to other trial courts.

14 16. This Court has jurisdiction over Defendants because each is a business
15 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
16 intentionally avails itself of the California market through the sale, marketing or use of the
17 Products in California and/or by having such other contacts with California so as to render the
18 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
19 play and substantial justice.

20 17. Venue is proper in the Marin County Superior Court because one or more of
21 the violations arise in the County of Marin.

22 **BACKGROUND FACTS**

23 18. The People of the State of California have declared by initiative under
24 Proposition 65 their right "[t]o be informed about exposures to chemicals that cause cancer, birth
25 defects, or other reproductive harm." Proposition 65, § 1(b).

26 19. To effectuate this goal, Proposition 65 prohibits exposing people to
27 chemicals listed by the State of California as known to cause cancer, birth defects or other
28 reproductive harm above certain levels without a "clear and reasonable warning" unless the

1 business responsible for the exposure can prove that it fits within a statutory exemption. Health
2 & Safety Code § 25249.6 states, in pertinent part:

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

6 20. On February 27, 1987, the State of California officially listed lead as a
7 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
8 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
9 the developing fetus, “female reproductive toxicity,” which means harm to the female
10 reproductive system, and “male reproductive toxicity,” which means harm to the male
11 reproductive system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On February 27,
12 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead
13 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
14 under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

15 21. On October 1, 1992, the State of California officially listed lead and lead
16 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
17 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
18 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
19 § 27001(c); Health & Safety Code § 25249.10(b).

20 22. Young children are especially susceptible to the toxic effects of Lead.
21 Children show a greater sensitivity to Lead’s effects than do adults. Adverse health impacts from
22 Lead exposure generally occur in children at lower blood Lead levels than in adults. Children
23 absorb and retain more Lead in proportion to their weight than do adults. Young children also
24 show a greater prevalence of iron deficiency, a condition that can increase gastrointestinal
25 absorption of Lead. The body accumulates Lead over a lifetime and releases it slowly, so even
26 small doses received in childhood, over time, can cause adverse health impacts, including but not
27 limited to reproductive toxicity, later in life. For example, in times of physiological stress, such
28 as pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby

1 increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

2 23. There is no safe level of exposure to Lead and even minute amounts of
3 Lead exposure have been proven harmful to children and adults. Studies have repeatedly
4 concluded that concentrations of Lead in children's blood previously deemed acceptable can
5 have adverse health effects. *See, e.g.,* Canfield, R.L., *et al.*, "Intellectual Impairment in Children
6 with Blood Lead Concentrations below 10 ug per Deciliter," *New England Journal of Medicine*
7 348:16, 2003. Another study on the effect of childhood Lead exposure declared that even the
8 smallest detectable amount of blood Lead levels in children can mean the difference between an
9 A or B grade in school. Lanphear, B.P., Dietrich, K., Auinger, P., Cox, C., "Subclinical Lead
10 Toxicity in U.S. Children and Adolescents," *Neurodevelopmental Disabilities II Platform*, 2000.

11 24. Lead exposures for pregnant women are also of particular concern in light
12 of evidence that even short term lead exposures *in utero* may have long-term harmful effects.
13 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
14 Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, Lourdes, *et al.*,
15 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
16 *Health Perspectives* 114:5, 2006.

17 25. Defendants' Products contain sufficient quantities of Lead such that
18 consumers, including pregnant women, who touch or handle the Products are exposed to Lead
19 through the average use of the Products. The routes of exposure for the violations are direct
20 ingestion when consumers place the Products in their mouths; ingestion via hand-to-mouth
21 contact after consumers touch or handle the Products; and dermal absorption directly through the
22 skin when consumers touch or handle the Products. These exposures occur in homes,
23 workplaces and everywhere else throughout California where these Products are handled or used.

24 26. No clear and reasonable warning is provided with the Products regarding
25 the carcinogenic or reproductive hazards of Lead.

26 27. Any person acting in the public interest has standing to enforce violations
27 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
28 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the

1 action within such time. Health & Safety Code § 25249.7(d).

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

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

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

1 31. Defendants both know and intend that individuals, including pregnant
2 women, will use, touch or handle the Products, thus exposing them to Lead.

3 32. Under Proposition 65, an exposure is “knowing” where the party
4 responsible for such exposure has:

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

8 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
9 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
10 § 12201).

11 33. Defendants have been informed of the Lead in their Products by the 60-
12 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

13 34. Defendants also have constructive knowledge that their Products contain
14 Lead due to the widespread media coverage concerning the problem of Lead in consumer
15 products in general and in products made of vinyl in particular.

16 35. As companies that manufacture, import, distribute and/or sell the Products
17 for use in the California marketplace, Defendants know or should know that the Products contain
18 Lead and that individuals who use the Products will be exposed to Lead. The Lead exposures to
19 consumers who use the Products are a natural and foreseeable consequence of Defendants’
20 placing the Products into the stream of commerce.

21 36. Nevertheless, Defendants continue to expose consumers, including
22 pregnant women, to Lead without prior clear and reasonable warnings regarding the carcinogenic
23 or reproductive hazards of Lead.

24 37. CEH has engaged in good-faith efforts to resolve the claims alleged herein
25 prior to filing this Complaint.

26 38. Any person “violating or threatening to violate” Proposition 65 may be
27 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to
28 violate” is defined to mean “to create a condition in which there is a substantial probability that a

1 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
2 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

3 **FIRST CAUSE OF ACTION**

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

5 39. CEH realleges and incorporates by reference as if specifically set forth
6 herein Paragraphs 1 through 38, inclusive.

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

9 41. Lead is a chemical listed by the State of California as known to cause
10 cancer, birth defects and other reproductive harm.

11 42. Defendants know that average use of the Products will expose users of the
12 Products to Lead. Defendants intend that the Products be used in a manner that results in
13 exposures to Lead from the Products.

14 43. Defendants have failed, and continue to fail, to provide clear and
15 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of
16 the Products.

17 44. By committing the acts alleged above, Defendants have at all times
18 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
19 individuals to Lead without first giving clear and reasonable warnings to such individuals
20 regarding the carcinogenicity and reproductive toxicity of Lead.

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

22 **PRAAYER FOR RELIEF**

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

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

27 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
28 preliminarily and permanently enjoin Defendants from offering the Products for sale in

1 California without providing prior clear and reasonable warnings, as CEH shall specify in further
2 application to the Court;

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

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

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

10

11 Dated: November 18, 2011

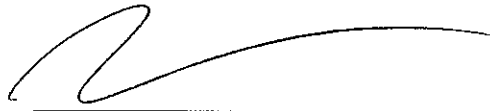
Respectfully submitted,

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LEXINGTON LAW GROUP

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Howard Hirsch

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Attorneys for Plaintiff

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CENTER FOR ENVIRONMENTAL HEALTH

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