

1 LEXINGTON LAW GROUP
Eric S. Somers, State Bar No. 139050
2 Howard Hirsch, State Bar No. 213209
Victoria Hartanto, State Bar No. 259833
3 503 Divisadero Street
San Francisco, CA 94117
4 Telephone: (415) 913-7800
Facsimile: (415) 759-4112
5 esomers@lexlawgroup.com
hhirsch@lexlawgroup.com
6 vhartanto@lexlawgroup.com

7 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH
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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF MARIN
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14 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)
15)
16 Plaintiff,)
17)
18 v.)
19 JC PENNEY CORPORATION, INC.;)
MARSHALLS OF MA, INC.; MARSHALLS)
OF CA, LLC; THE TIMBERLAND)
20 COMPANY; TIMBERLAND LLC and)
Defendant DOES 1 through 200, inclusive,)
21)
22 Defendants.)
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Case No. CIV 13 01373
**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**
Health & Safety Code §25249.6, *et seq.*
(Other)

FILED
MAR 29 2013
KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Dale, Deputy

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/or use of Defendants' gloves made with leather, vinyl or
10 imitation leather materials (the "Products"). Consumers, including pregnant women and
11 children, are exposed to Lead when they use, touch 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 people who come into contact with the Products to Lead, Defendants provide no warnings
21 whatsoever about the carcinogenic or reproductive hazards associated with these Lead exposures.
22 Defendants' conduct thus violates the warning provision of Proposition 65. Health & Safety
23 Code §25249.6.

24 **PARTIES**

25 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
26 non-profit corporation dedicated to protecting the public from environmental health hazards and
27 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
28 State of California. CEH is a "person" within the meaning of Health & Safety Code

1 §25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
2 Safety Code §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
3 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
4 cases have resulted in significant public benefit, including the reformulation of thousands of
5 products to remove toxic chemicals and to make them safer. CEH also provides information to
6 Californians about the health risks associated with exposure to hazardous substances, where
7 manufacturers and other responsible parties fail to do so.

8 5. Defendant JC PENNEY CORPORATION, INC. is a person in the course
9 of doing business within the meaning of Health & Safety Code §25249.11. JC Penney
10 Corporation, Inc. manufactures, distributes and/or sells the Products for sale or use in California.

11 6. Defendant MARSHALLS OF MA, INC. is a person in the course of doing
12 business within the meaning of Health & Safety Code §25249.11. Marshalls of MA, Inc.
13 manufactures, distributes and/or sells the Products for sale or use in California.

14 7. Defendant MARSHALLS OF CA, LLC is a person in the course of doing
15 business within the meaning of Health & Safety Code §25249.11. Marshalls of CA, LLC
16 manufactures, distributes and/or sells the Products for sale or use in California.

17 8. Defendant THE TIMBERLAND COMPANY is a person in the course of
18 doing business within the meaning of Health & Safety Code §25249.11. The Timberland
19 Company manufactures, distributes and/or sells the Products for sale or use in California.

20 9. Defendant TIMBERLAND LLC is a person in the course of doing
21 business within the meaning of Health & Safety Code §25249.11. Timberland LLC
22 manufactures, distributes and/or sells the Products for sale or use in California.

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

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

28 12. The defendants identified in paragraphs 5 through 9 and DOES 1 through

1 200 are collectively referred to herein as “Defendants.”

2 **JURISDICTION AND VENUE**

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

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

13 15. Venue is proper in the Marin Superior Court because one or more of the
14 violations arise in the County of Marin.

15 **BACKGROUND FACTS**

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

19 17. To effectuate this goal, Proposition 65 prohibits exposing people to
20 chemicals listed by the State of California as known to cause cancer, birth defects or other
21 reproductive harm without a “clear and reasonable warning” unless the business responsible for
22 the exposure can prove that it fits within a statutory exemption. Health & Safety Code §25249.6
23 states, in pertinent part:

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

27 18. On February 27, 1987, the State of California officially listed lead as a
28 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive

1 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
2 the developing fetus, “female reproductive toxicity,” which means harm to the female
3 reproductive system, and “male reproductive toxicity,” which means harm to the male
4 reproductive system. 27 Cal. Code Regs. (“C.C.R.”) §27001(c). On February 27, 1988, one year
5 after it was listed as a chemical known to cause reproductive toxicity, lead became subject to the
6 clear and reasonable warning requirement regarding reproductive toxicants under Proposition 65.
7 *Ibid.*; Health & Safety Code §25249.10(b).

8 19. On October 1, 1992, the State of California officially listed lead and lead
9 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
10 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
11 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
12 §27001(c); Health & Safety Code §25249.10(b).

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

23 21. There is no safe level of exposure to Lead and even minute amounts of
24 Lead exposure have been proven harmful to children and adults. Studies have repeatedly
25 concluded that concentrations of Lead in children’s blood previously deemed acceptable can
26 have adverse health effects. *See, e.g.,* Canfield, R.L., *et al.*, “Intellectual Impairment in Children
27 with Blood Lead Concentrations below 10 ug per Deciliter,” *New England Journal of Medicine*
28 348:16, 2003. Another study on the effect of childhood Lead exposure declared that even the

1 smallest detectable amount of blood Lead levels in children can mean the difference between an
2 A or B grade in school. Lanphear, B.P., Dietrich, K., Auinger, P., Cox, C., "Subclinical Lead
3 Toxicity in U.S. Children and Adolescents," *Neurodevelopmental Disabilities II Platform*, 2000.
4 A recent study found that childhood Lead exposure actually predicts intellectual functioning in
5 early adulthood in that adult IQ levels are inversely associated with blood Lead concentrations
6 from childhood. Mazumdar, M., Bellinger, D.C., Gregas, M., Abanilla, K., Bacic, J.,
7 Needleman, H.L., "Low-Level Environmental Lead Exposure in Childhood and Adult
8 Intellectual Function: A Follow-Up Study," *Environmental Health* 10:24, 2011.

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

15 23. Defendants' Products contain sufficient quantities of Lead such that
16 consumers, including pregnant women and children, who use, touch and/or handle the Products
17 are exposed to Lead through the average use of the Products. The route of exposure for the
18 violations is direct ingestion when consumers place their hands in their mouths while wearing the
19 Products or otherwise place the Products in their mouths; ingestion via hand-to-mouth contact
20 after consumers touch, wear or handle the Products or items that have been in contact with the
21 Products; and dermal absorption directly through the skin when consumers wear, take on or off,
22 touch or handle the Products. These exposures occur in homes, workplaces and everywhere else
23 throughout California where the Products are worn, touched or handled.

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

26 25. 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 26. 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 named Defendant. In compliance with Health
6 & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each Notice included the following
7 information: (1) the name and address of each violator; (2) the statute violated; (3) the time
8 period during which violations occurred; (4) specific descriptions of the violations, including (a)
9 the routes of exposure to Lead from the Products, and (b) the specific type of products sold and
10 used in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed
11 chemical that is the subject of the violations described in each Notice.

12 27. 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 named Defendant. In
15 compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each Certificate
16 certified that CEH’s counsel: (1) has consulted with one or more persons with relevant and
17 appropriate experience or expertise who reviewed facts, studies or other data regarding the
18 exposures to Lead alleged in each Notice; and (2) based on the information obtained through
19 such consultations, believes that there is a reasonable and meritorious case for a citizen
20 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 General
22 included factual information – provided on a confidential basis – sufficient to establish the basis
23 for the Certificate, including the identity of the person(s) consulted by CEH’s counsel and the
24 facts, studies or other data reviewed by such persons.

25 28. 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 the
28 Notice.

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

3 30. 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 31. 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 32. 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 fashion accessories such as the Products in particular.

16 33. Defendants also have constructive knowledge that their Products contain
17 Lead due to the widespread media coverage concerning the problem of Lead in products made of
18 vinyl. The use of Lead in products made from vinyl has been further publicized with the passage
19 of the federal Consumer Product Safety Improvement Act (“CPSIA”) in 2008.

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

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

25 36. Any person “violating or threatening to violate” Proposition 65 may be
26 enjoined in any court of competent jurisdiction. Health & Safety Code §25249.7. “Threaten to
27 violate” is defined to mean “to create a condition in which there is a substantial probability that a
28 violation will occur.” Health & Safety Code §25249.11(e). Proposition 65 provides for civil

1 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

2 **FIRST CAUSE OF ACTION**

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

4 37. CEH realleges and incorporates by reference as if specifically set forth
5 herein Paragraphs 1 through 36, inclusive.

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

8 39. Lead is a chemical listed by the State of California as known to cause
9 cancer and birth defects or other reproductive harm.

10 40. Defendants know that average use of the Products will expose users of the
11 Products to Lead. Defendants intend that the Products be used in a manner that results in users
12 of the Products being exposed to Lead contained in the Products.

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

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

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

21 **PRAYER FOR RELIEF**

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

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

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

1 application to the Court;

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

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

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

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10 Dated: March 29, 2013

Respectfully submitted,

11 LEXINGTON LAW GROUP

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15 Howard Hirsch
16 Attorneys for Plaintiff
17 CENTER FOR ENVIRONMENTAL HEALTH
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