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CENTER FOR ENVIRONMENTAL HEALTH

FILED

MAR 27 2013

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

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN

CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)
Plaintiff,)
v.)
MARKWORT SPORTING GOODS)
COMPANY; and DOES 1 through 200,)
inclusive,)
Defendants.)

Case No. CIV 1301329
**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: (1) baseballs; and (2) baseball or other sports belts
10 used in athletic uniforms (collectively, the "Products"). Consumers, including children, are
11 exposed to Lead when they use, touch or handle Defendants' 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 children, to Lead.

18 3. Despite the fact that Defendants expose children and other consumers to
19 Lead, Defendants provide no warnings whatsoever about the carcinogenic or reproductive
20 hazards associated with Lead exposure. Defendants' conduct thus violates the warning provision
21 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 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
2 cases have resulted in significant public benefit, including the reformulation of thousands of
3 products to remove toxic chemicals and to make them safer. CEH also provides information to
4 Californians about the health risks associated with exposure to hazardous substances, where
5 manufacturers and other responsible parties fail to do so.

6 5. Defendant MARKWORT SPORTING GOODS COMPANY is a person in
7 the course of doing business within the meaning of Health & Safety Code § 25249.11. Markwort
8 Sporting Goods Company manufactures, distributes and/or sells the Products for sale and use in
9 California.

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

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

15 8. The defendant identified in paragraph 5 and DOES 1 through 200 are
16 collectively referred to herein as "Defendants."

17 **JURISDICTION AND VENUE**

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

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

28 11. Venue is proper in the Marin County Superior Court because one or more of

1 the violations arise in the County of Marin.

2 **BACKGROUND FACTS**

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

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

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

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

24 15. On October 1, 1992, the State of California officially listed lead and lead
25 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
26 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
27 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
28 § 27001(c); Health & Safety Code § 25249.10(b).

16. Young children are especially susceptible to the toxic effects of Lead.

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

10 17. There is no safe level of exposure to Lead and even minute amounts of
11 Lead exposure have been proven harmful to children and adults. Studies have repeatedly
12 concluded that concentrations of Lead in children's blood previously deemed acceptable can
13 have adverse health effects. *See, e.g.,* Canfield, R.L., *et al.*, "Intellectual Impairment in Children
14 with Blood Lead Concentrations below 10 ug per Deciliter," *New England Journal of Medicine*
15 348:16, 2003. Another recent study found that childhood Lead exposure predicts intellectual
16 functioning in early adulthood in that adult IQ levels are inversely associated with blood Lead
17 concentrations from childhood. Mazumdar, M., *et al.*, "Low-Level Environmental Lead
18 Exposure in Childhood and Adult Intellectual Function: A Follow-Up Study," *Environmental*
19 *Health* 10:24, 2011; *see also* Lanphear, B.P., *et al.*, "Subclinical Lead Toxicity in U.S. Children
20 and Adolescents," *Neurodevelopmental Disabilities II Platform*, 2000 (concluded that even the
21 smallest detectable amount of blood Lead levels in children can mean the difference between an
22 A or B grade in school).

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

1 19. Defendants' Products contain sufficient quantities of Lead such that
2 consumers, including children, who use, touch or handle the Products are exposed to Lead
3 through the average use of the Products. The routes of exposure for the violations are ingestion
4 via hand-to-mouth contact after consumers touch or handle the Products; dermal absorption
5 directly through the skin when consumers touch or handle the Products; and direct ingestion
6 when consumers (including children) place the Products in their mouths. These exposures occur
7 in homes, workplaces and everywhere else throughout California where these Products are used,
8 touch or handled.

9 20. No clear and reasonable warning is provided with the Products regarding
10 the carcinogenic or reproductive hazards of Lead.

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

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

25 23. CEH also sent a Certificate of Merit for each Notice to the California
26 Attorney General, the District Attorneys of every county in California, the City Attorneys of
27 every California city with a population greater than 750,000 and to each of the named
28 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each

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

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

14 25. Defendants both know and intend that individuals, including children, will
15 use, touch or handle the Products, thus exposing them to Lead.

16 26. Under Proposition 65, an exposure is "knowing" where the party
17 responsible for such exposure has:

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

21 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
22 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
23 § 12201).

24 27. Defendants have been informed of the Lead in their Products by the 60-
25 Day Notices of Violation and accompanying Certificate of Merit served on them by CEH.

26 28. Defendants also have constructive knowledge that their Products contain
27 Lead due to the widespread media coverage concerning the problem of Lead in consumer
28 products in general and in children's products in particular. The use of Lead in children's

1 products has been further publicized with the passage of the federal Consumer Product Safety
2 Improvement Act (“CPSIA”) in 2008. Although the CPSIA sets strict Lead content limits for all
3 children’s products, Defendants continue to manufacture, distribute, and/or sell the Products with
4 substantial quantities of Lead, quantities that far exceed the limits imposed by the CPSIA.

5 29. 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 30. Nevertheless, Defendants continue to expose consumers, including
11 children, to Lead without prior clear and reasonable warnings regarding the carcinogenic or
12 reproductive hazards of Lead.

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

15 32. 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 33. CEH realleges and incorporates by reference as if specifically set forth
23 herein Paragraphs 1 through 32, inclusive.

24 34. 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 35. Lead is a chemical listed by the State of California as known to cause
27 cancer, birth defects and other reproductive harm.

28 36. 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 37. 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 38. 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

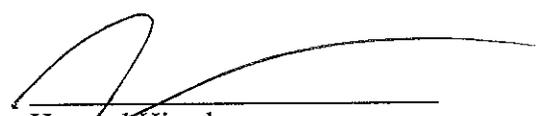
25 5. That the Court grant such other and further relief as may be just and
26 proper.

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Dated: March 27, 2013

Respectfully submitted,
LEXINGTON LAW GROUP



Howard Hirsch
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH