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Ryan Hoffman SBN 283297
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Attorney for Plaintiff Environmental Research Center

ENDORSED
FILED
ALAMEDA COUNTY

Oct 31, 2013
CLERK OF THE SUPERIOR COURT
Anita Dhir

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

**ENVIRONMENTAL RESEARCH CENTER,
a California non-profit corporation**

Case No. **RG13703466**

Plaintiff,

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF AND
CIVIL PENALTIES**

v.

**VICTUS, INC. and DOES 1-100,
and DOES 1-100,**

[Miscellaneous Civil Complaint (42)]
Proposition 65, Health & Safety Code
Section 25249.5 et seq.]

Defendants.

Plaintiff Environmental Research Center hereby alleges:

I

INTRODUCTION

1. Plaintiff Environmental Research Center (hereinafter "Plaintiff" or "ERC") brings this action as a private attorney general enforcer and in the public interest pursuant to Health & Safety Code Section 25249.7 (d). This complaint seeks injunctive and declaratory relief and civil penalties to remedy Defendant, Victus, Inc.'s (hereinafter "Victus") failure to warn consumers that they have

1 been exposed to lead from several of the company's nutritional health products. Lead is a chemical
2 known to the State of California to cause cancer, birth defects and other reproductive harm. Based
3 on the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Safety Code Section
4 25249.5 *et seq.*) also known as "Proposition 65," businesses with ten or more employees must
5 provide a "clear and reasonable warning" prior to exposing persons to these chemicals.
6

7 II

8 PARTIES

9 2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes, helping
10 safeguard the public from health hazards by bringing about a reduction in the use and misuse of
11 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and
12 encouraging corporate responsibility.
13

14 3. Defendant Victus is a business that manufactures, distributes and/or sells nutritional health
15 products that have exposed users to lead in the State of California within the relevant statute of
16 limitations period. These Covered Products are: Victus Inc. Enterex Powder Vanilla and Victus
17 Inc. Enterex Powder Strawberry. Victus is a company subject to Proposition 65 as it employs ten or
18 more persons.
19

20 4. Defendants Does I-100, are named herein under fictitious names, as their true names and
21 capacities are unknown to Plaintiff. ERC is informed and believes, and thereon alleges, that each of
22 said Does is responsible, in some actionable manner, for the events and happenings hereinafter
23 referred to, either through said Defendants' conduct, or through the conduct of its agents, servants or
24 employees, or in some other manner, causing the harms alleged by ERC in this complaint. When
25 said true names and capacities of Does are ascertained, ERC will seek leave to amend this complaint
26 to set forth the same.
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III

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to California Constitution Article VI, Section 10 because this case is a cause not given by statute to other trial courts.

6. The Complaint is based on allegations contained in a Notice of Violation dated May 17, 2013, served on the California Attorney General, other public enforcers and Victus. A true and correct copy of the Notice of Violation is attached hereto as Exhibit A. More than 60 days have passed since the Notice of Violation was mailed and no public enforcement entity has filed a complaint in this case.

7. This Court is the proper venue for the action because the causes of action have arisen in the County of Alameda where some of the violations of law have occurred. Furthermore, this Court is the proper venue under Code of Civil Procedure Section 395.5 and Health & Safety Code Section 25249.7.

IV

STATUTORY BACKGROUND

A. Proposition 65

8. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as "Proposition 65" by an overwhelming majority vote of the people in November of 1986.

9. The warning requirement of Proposition 65 is contained in Health & Safety Code Section 25249.6, which provides:

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

10. Implementing regulations for Proposition 65 provide that warnings are required for consumer product exposures. A "consumer product exposure is an exposure which results from a person's

1 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good,
2 or any exposure that results from receiving a consumer service.” 27 CCR Section 25601 (b).

3
4 11. Whenever a clear and reasonable warning is required under Health & Safety Code Section
5 25249.6, the “method employed to transmit the warning must be reasonably calculated considering
6 the alternative methods available under the circumstances, to make the warning message available
7 prior to exposure.” 27 CCR Section 25601. The warning requirement may be satisfied by a warning
8 that appears on a product’s label or other labeling, shelf labeling, signs, a system of signs, public
9 advertising identifying the system and toll-free information services, or any other, system, that
10 provides clear and reasonable warnings. Id., Section 25603.1 (a) – (d).

11
12 12. Proposition 65 establishes a procedure by which the State is to develop a list of chemicals
13 “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code Section
14 25249.8. There is no duty to provide a clear and reasonable warning until 12-months after the
15 chemical was published on the State list. Id., Section 25249.10 (b). Lead was listed as a chemical
16 known to the State of California to cause developmental toxicity and male and female reproductive
17 toxicity on February 27, 1987. Lead was listed as a chemical known to the State of California to
18 cause cancer on October 1, 1992. Title 27, Cal. Code Regs., Section 27001.

19
20 13. Proposition 65 may be enforced by any person in the public interest who provides notice
21 sixty days before filing suit to both the violator and designated law enforcement officials. The
22 failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed
23 pursuant to Health & Safety Code Section 25249.7 (c) and (d).

24
25 14. Proposition 65 provides that any person “violating or threatening to violate” Proposition 65
26 may be enjoined in any court of competent jurisdiction. Health & Safety Code Section 25249.7 (a).
27 To “threaten to violate” means “to create a condition in which there is a substantial probability that a
28

1 violation will occur.” Id., Section 25249.11 (e). Furthermore, violators are subject to a civil penalty
2 of up to \$2,500 per day for each violation. Id., Section 25249.7 (b).
3

4 V

5 **STATEMENT OF FACTS**

6 15. Victus has manufactured, distributed and/or sold the Covered Products containing lead
7 to the State of California. Consumers have been ingesting these products for many years, without
8 any knowledge of their exposure to lead, a very dangerous chemical.

9 16. For many years, Victus has knowingly and intentionally exposed numerous persons to lead,
10 without providing a Proposition 65 warning. Both prior to and subsequent to ERC’s Notice of
11 Violation, Victus has failed to provide a warning on the label of the Covered Products. On Victus
12 website, the homepage provides: “Victus’ Clinical Nutrition products are specially formulated to
13 nourish and improve the quality of life for people of all ages.” The website represents to the public
14 that the company “strives to make the world a healthier place by providing superior products and by
15 educating professionals and disseminating information that will ultimately improve the quality of
16 healthcare for patients around the world. Our goal is to continue to provide healthcare professionals
17 around the world with the highest quality of products in order to continue to improve the quality of
18 life of the patients we all serve.” While the website provides a nutritional description of the Covered
19 Products, there is no mention that the Covered Products contain lead. Victus has at all times relevant
20 hereto been aware that the Covered Products contain lead and that persons using these products have
21 been exposed to the chemical. Victus has been aware that lead is present in the Covered Products
22 and has failed to disclose the existence of this chemical to the public, who undoubtedly believed they
23 have been ingesting totally healthy and pure products.

24 17. Both prior and subsequent to ERC’s Notice of Violation, Victus failed to provide consumers
25 of the Covered Products with a clear and reasonable warning that they have been exposed to a
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1 chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

2
3 **FIRST CAUSE OF ACTION**

4 **(Violation of Section 25249.6 of the Health and Safety Code, Failure to Provide Clear**
5 **and Reasonable Warning under Proposition 65)**

6 18. ERC refers to paragraphs 1-17, inclusive, and incorporates them herein by this reference.

7 19. By committing the acts alleged above, Victus has, in the course of doing business,
8 knowingly and intentionally exposed users of the Covered Products to lead, a chemical known to the
9 State of California to cause cancer, birth defects and other reproductive harm without first giving
10 clear and reasonable warning to such individuals, within the meaning of Health & Safety Code
11 Section 25249.6.

12 20. Said violations render Victus liable for civil penalties up to \$2,500 (two thousand, five
13 hundred dollars) per day, for each violation.

14 **SECOND CAUSE OF ACTION**

15 **(Declaratory Relief)**

16 21. ERC refers to paragraphs 1-20, inclusive, and incorporates them herein by this reference.

17 22. There exists an actual controversy relating to the legal rights and duties of the parties, within
18 the meaning of Code of Civil Procedure Section 1060, between ERC and Victus concerning:
19

20 a) whether Victus has exposed individuals to a chemical known to the State of California to
21 cause cancer, birth defects and other reproductive harm without providing clear and reasonable
22 warning.
23

24 **VI**

25 **PRAYER**

26 WHEREFORE ERC prays for relief as follows:

27 1. On the First Cause of Action, for civil penalties for each and every violation according to
28 proof;

1
2 2. On the First Cause of Action, and pursuant to Health & Safety Code Section 25249.7 (a), for
3 such temporary restraining orders, preliminary and permanent injunctive orders, or other orders,
4 prohibiting Victus from exposing persons to lead without providing clear and reasonable warning;

5 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil
6 Procedure Section 1060 declaring:

7 a. that Victus has exposed individuals to a chemical known to the State of California to cause,
8 birth defects and other reproductive harm without providing clear and reasonable warning; and

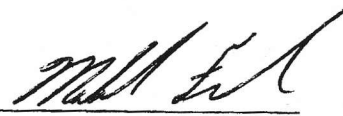
9 4. On all Causes of Action, for reasonable attorneys' fees pursuant to Section 1021.5 of the Code
10 of Civil Procedure or the substantial benefit theory;

11 5. For costs of suit herein; and

12 6. For such other relief as the Court may deem just and proper.

13 Dated: October 29, 2013

14
15
16 By



17 Michael Freund
18 Attorney for Environmental Research Center

EXHIBIT A

LAW OFFICE OF
MICHAEL FREUND

RYAN HOFFMAN
ATTORNEY AT LAW
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May 17, 2013

**NOTICE OF VIOLATIONS OF
CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET SEQ.
(PROPOSITION 65)**

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Environmental Research Center ("ERC"), 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. (619) 500-3090. ERC's Executive Director is Chris Heptinstall. ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

ERC has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), which is codified at California Health & Safety Code §25249.5 *et seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with these products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Health and Safety Code Section 25249.7(d), ERC intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

General Information about Proposition 65. A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with this letter served to the alleged Violator identified below.

Alleged Violator. The name of the company covered by this notice that violated Proposition 65 (hereinafter the "Violator") is:

Victus, Inc.

Consumer Products and Listed Chemicals. The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

Victus Inc. Enterex Powder Vanilla – Lead
Victus Inc. Enterex Powder Strawberry – Lead

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

Route of Exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to

May 17, 2013

Page 2


these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least May 17, 2010, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; and (2) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time consuming litigation.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



Ryan Hoffman

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Victus, Inc. and its Registered Agent for Service of Process only)

Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On May 17, 2013, I served the following documents: **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO
Victus, Inc.
4918 SW 74th Ct
Miami, FL 33155

Carlos Fernandez
(Victus, Inc.'s Registered
Agent for Service of Process)
4918 SW 74th CT.
Miami, FL 33155

On May 17, 2013, I electronically served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** on the following party by uploading a true and correct copy thereof on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Oakland, CA 94612-0550

On May 17, 2013, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Priority Mail.

Executed on May 17, 2013, in Fort Oglethorpe, Georgia.



Rebecca Turner-Smith