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ENDORSED
FILED
ALAMEDA COUNTY

SEP 1 1 2015

CLERK OF THE SUPERIOR COURT
By R. De Jesus, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH, a non-profit corporation, Plaintiff, vs. MIDWEST AIR TECHNOLOGIES, INC.; THE HOME DEPOT, INC.; HOME DEPOT U.S.A., INC.; and DOES 1 through 200, inclusive, Defendants.	Case No. RG 15785401 **COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES** Health & Safety Code § 25249.6, *et seq.* (Other)

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Plaintiff Center for Environmental Health, in the public interest, based on information and belief and investigation of counsel, except for information based on knowledge, hereby makes the following allegations:

INTRODUCTION

1. This Complaint seeks to remedy Defendants' continuing failure to warn individuals in California that they are being exposed to lead and lead compounds (collectively, "Lead"), chemicals known to the State of California to cause cancer and birth defects and other reproductive harm. Such exposures have occurred, and continue to occur, through the manufacture, distribution, sale, and use of Defendants' galvanized steel chain link fence framework and gates (the "Products"). Consumers and users are exposed to Lead when they use, touch, or handle the Products.

2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California to chemicals known to the State to cause cancer, birth defects, or other reproductive harm without providing clear and reasonable warnings to individuals prior to their exposure. Defendants introduce Products contaminated with significant quantities of Lead into the California marketplace, exposing consumers and users of their Products to Lead.

3. Despite the fact that Defendants expose consumers and users to Lead, Defendants provide no warnings whatsoever about the carcinogenic or reproductive hazards associated with Lead exposure. Defendants' conduct thus violates the warning provision of Proposition 65. Health & Safety Code § 25249.6.

PARTIES

4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a non-profit corporation dedicated to protecting the public from environmental health hazards and toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the State of California. CEH is a "person" within the meaning of Health & Safety Code § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health & Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has

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prosecuted a large number of Proposition 65 cases in the public interest. These cases have resulted in significant public benefit, including the reformulation of thousands of products to remove toxic chemicals and to make them safer. CEH also provides information to Californians about the health risks associated with exposure to hazardous substances, where manufacturers and other responsible parties fail to do so.

5. Defendant MIDWEST AIR TECHNOLOGIES, INC. is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. MIDWEST AIR TECHNOLOGIES, INC. manufactures, distributes, and/or sells the Products for sale and use in California.

6. Defendant THE HOME DEPOT, INC. is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. THE HOME DEPOT, INC. manufactures, distributes, and/or sells the Products for sale and use in California.

7. Defendant HOME DEPOT U.S.A., INC. is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. HOME DEPOT U.S.A., INC. manufactures, distributes, and/or sells the Products for sale and use in California.

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

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

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

JURISDICTION AND VENUE

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

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

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

BACKGROUND FACTS

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

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

> 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 . . .

16. On February 27, 1987, the State of California officially listed lead as a chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive toxicant under three subcategories: "developmental reproductive toxicity," which means harm to the developing fetus, "female reproductive toxicity," which means harm to the female reproductive system, and "male reproductive toxicity," which means harm to the male reproductive system. 27 California Code of Regulations ("C.C.R.") § 27001(c). On February 27, 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead became

subject to the clear and reasonable warning requirement regarding reproductive toxicants under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

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

18. There is no safe level of exposure to Lead and even minute amounts of Lead exposure have been proven harmful to children and adults. *See, e.g.*, http://water.epa.gov/drink/contaminants/basicinformation/lead.cfm. Lead in blood, even at very low levels, has been found to be correlated with all causes of mortality, including cancer and cardiovascular disease. *See, e.g.*, Menke, A., *et al.*, "Blood Lead Below 0.48 μmol/L (10 μg/dL) and Mortality Among US Adults," *Circulation* 114:13, 2009; Schober, S., *et al.*, "Blood Lead Levels and Death from All Causes, Cardiovascular Disease, and Cancer," *Environmental Health Perspectives* 114:10, 2006; Cheung, M., "Blood Lead Concentration Correlates with All Cause, All Cancer and Lung Cancer Mortality in Adults," *Asian Pacific Journal of Cancer Prevention* 14, 2013.

19. Lead exposures for pregnant women are also of particular concern in light of evidence that even short term lead exposures in utero may have long-term harmful effects. Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, Lourdes, *et al.*, "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental Health Perspectives* 114:5, 2006. In times of physiological stress, such as pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

20. Lead is found on the surface of the Products. Defendants' Products contain sufficient quantities of Lead such that consumers, installers, and users, including pregnant women, who touch or handle the Products are exposed to Lead through the average use of the Products. The routes of exposure for the violations are ingestion via hand-to-mouth contact after

consumers, installers, or users touch or handle the Products, and dermal absorption directly through the skin when consumers, installers, or users touch or handle the Products. These exposures occur outside homes, schools, and everywhere else throughout California where these Products are handled or used.

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

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

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

24. CEH also sent a Certificate of Merit for each Notice to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to each of the named Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that CEH's counsel: (1) has consulted with one or more persons with relevant and appropriate experience or expertise who reviewed facts, studies, or other data regarding the exposures to Lead alleged in each Notice; and (2) based on the information obtained through such consultations, believes that there is a reasonable and meritorious case for a citizen enforcement

action based on the facts alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney General included factual information – provided on a confidential basis – sufficient to establish the basis for the Certificate, including the identity of the person(s) consulted by CEH's counsel and the facts, studies, or other data reviewed by such persons.

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

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

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

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

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

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

29. Defendants know or should know that Lead in often used in the process of galvanizing steel. Defendants also have constructive knowledge that their Products contain Lead due to the widespread media coverage concerning the problem of Lead in consumer products in general.

30. As companies that manufacture, import, distribute, and/or sell the Products for use in the California marketplace, Defendants know or should know that the Products contain Lead and that individuals who use the Products will be exposed to Lead. The Lead exposures to

consumers who use the Products are a natural and foreseeable consequence of Defendants' placing the Products into the stream of commerce.

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

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

33. Any person "violating or threatening to violate" Proposition 65 may be enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is defined to mean "to create a condition in which there is a substantial probability that a violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not to exceed $2,500 per day for each violation of Proposition 65.

FIRST CAUSE OF ACTION

(Violations of the Health & Safety Code § 25249.6)

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

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

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

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

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

39. By committing the acts alleged above, Defendants have at all times relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing

individuals to Lead without first giving clear and reasonable warnings to such individuals regarding the carcinogenicity and reproductive toxicity of Lead.

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

PRAYER FOR RELIEF

Wherefore, CEH prays for judgment against Defendants as follows:

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

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

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

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

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

Dated: September 11, 2015

Respectfully submitted,

LEXINGTON LAW GROUP

Joseph Mann
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

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