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CENTER FOR ENVIRONMENTAL HEALTH
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11

12 CENTER FOR ENVIRONMENTAL)
HEALTH, a non-profit corporation,)
13)
Plaintiff,)
14)
v.)
15 BEIERSDORF, INC.; and DOES 1 through 50,)
16 inclusive,)
17 Defendants.)
18)

Case No. **RG16837579**
**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**
Health & Safety Code §25249.6, *et seq.*
(Other)

ENDORSE
FILED
ALAMEDA COUNTY

NOV - 2 2016

CLERK OF THE SUPERIOR COURT
By: ERICA BAKER, 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' topical skin care products containing
10 zinc oxide as an active ingredient (the "Products"). The Products are used primarily to treat
11 diaper rash and other skin irritations and are intended to be applied directly to the irritated skin.
12 Consumers, including pregnant women and children, are exposed to Lead through ordinary use
13 of the Products.

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

21 3. Despite the fact that Defendants expose pregnant women, children and
22 other individuals who come into contact with the Products to Lead, Defendants provide no
23 warnings whatsoever about the carcinogenic or reproductive hazards associated with these Lead
24 exposures. Defendants' conduct thus violates the warning provision of Proposition 65. Health
25 & Safety Code §25249.6.

26 **PARTIES**

27 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
28 non-profit corporation dedicated to protecting the public from environmental health hazards and

1 Products in California or by having such other contacts with California so as to render the
2 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
3 play and substantial justice.

4 11. Venue is proper in the Alameda Superior Court because one or more of
5 the
6 violations arise in the County of Alameda.

7 **BACKGROUND FACTS**

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

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

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

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

28 15. On October 1, 1992, the State of California officially listed lead and lead

1 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
2 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
3 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
4 §27001(c); Health & Safety Code §25249.10(b).

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

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

1 18. Defendants' Products contain sufficient quantities of Lead such that
2 individuals, including pregnant women and children, who use the Products as intended are
3 exposed to a significant amount of Lead. The Products contain Lead. The Products are used
4 primarily to treat diaper rash and other skin irritations and are intended to be applied directly to
5 the irritated and sometimes broken skin. The routes of exposure for the violations include
6 dermal absorption and ingestion through hand to mouth contact by consumers when the Products
7 are applied to the skin.

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

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

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

1 such consultations, believes that there is a reasonable and meritorious case for a citizen
2 enforcement action based on the facts alleged in each Notice. In compliance with Health &
3 Safety Code §25249.7(d) and 11 C.C.R. §3102, each Certificate served on the Attorney General
4 included factual information – provided on a confidential basis – sufficient to establish the basis
5 for the Certificate, including the identity of the person(s) consulted by CEH’s counsel and the
6 facts, studies or other data reviewed by such persons.

7 22. None of the public prosecutors with the authority to prosecute violations
8 of Proposition 65 has commenced or is diligently prosecuting a cause of action against
9 Defendants under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in the
10 Notices.

11 23. Defendants both know and intend that consumers in California will use the
12 Products, thus exposing them to Lead.

13 24. Under Proposition 65, an exposure is “knowing” where the party
14 responsible for such exposure has:

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

18 27 C.C.R. §25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
19 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
20 §12201).

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

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

25 27. Defendants also have constructive knowledge that their Products contain
26 Lead due to the widespread media coverage concerning the problem of Lead in zinc oxide-
27 containing products in general and the Products in particular.

28 28. As companies that manufacture, import, distribute and/or sell the Products

1 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of
2 their Products.

3 37. By committing the acts alleged above, Defendants have at all times
4 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
5 individuals to Lead without first giving clear and reasonable warnings to such individuals
6 regarding the carcinogenicity and reproductive toxicity of Lead..

7 **PRAYER FOR RELIEF**

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

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

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

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

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

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

23
24 Dated: November 2, 2016

Respectfully submitted,

25 LEXINGTON LAW GROUP

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27 Mark N. Todzo
28 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH