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From: Lexington Law Group

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Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

Plaintiff,)

v.)

THE HERSHEY COMPANY;)
AMAZON.COM, INC.; CVS PHARMACY,)
INC.; FIRST INDO-AMERICAN CORP.;)
TANGERINE CONFECTIONERY LTD.; and)
DOES 2 through 200, inclusive,)

Defendants.)

FILED BY FAX
ALAMEDA COUNTY

November 25, 2014

CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy

CASE NUMBER:
RG14733545

Case No. RG-14733545

**SECOND AMENDED 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 information
2 and belief and investigation of counsel, except for information based on knowledge, hereby
3 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 consumption of Defendants' licorice flavored candy (the
10 "Products"). Consumers, including pregnant women and children, are exposed to Lead when
11 they consume 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 consumers to Lead, Defendants provide no warnings whatsoever about the carcinogenic or
21 reproductive hazards associated with Lead exposure. Defendants' conduct thus violates the
22 warning provision of Proposition 65. Health & Safety Code § 25249.6.

23 **PARTIES**

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

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 AMAZON.COM, INC. is a person in the course of doing
9 business within the meaning of Health & Safety Code § 25249.11. Amazon.com, Inc.
10 manufactures, distributes and/or sells the Products for sale and use in California.

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

14 7. Defendant FIRST INDO-AMERICAN CORP. is a person in the course of
15 doing business within the meaning of Health & Safety Code § 25249.11. First Indo-American
16 Corp. manufactures, distributes and/or sells the Products for sale and use in California.

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

20 9. Defendant TANGERINE CONFECTIONERY LTD. is a person in the
21 course of doing business within the meaning of Health & Safety Code § 25249.11. Tangerine
22 Confectionery Ltd. manufactures, distributes and/or sells the Products for sale and use in
23 California.

24 10. DOES 2 through 200 are each a person in the course of doing business
25 within the meaning of Health & Safety Code § 25249.11. DOES 2 through 200 manufacture,
26 distribute and/or sell the Products for sale or use in California.

27 11. The defendants identified in paragraphs 5 through 9 and DOES 2 through
28 200 are collectively referred to herein as “Defendants.”

1 18. On February 27, 1987, the State of California officially listed lead as a
2 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
3 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
4 the developing fetus, “female reproductive toxicity,” which means harm to the female
5 reproductive system, and “male reproductive toxicity,” which means harm to the male
6 reproductive system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On February 27,
7 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead
8 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
9 under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

10 19. On October 1, 1992, the State of California officially listed lead and lead
11 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
12 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
13 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
14 § 27001(c); Health & Safety Code § 25249.10(b).

15 20. There is no safe level of exposure to Lead and even minute amounts of
16 Lead have been proven harmful to children and adults. *See* Report of the Advisory Committee
17 on Childhood Lead Poisoning Prevention of the Centers For Disease Control and Prevention,
18 “Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention,” January
19 4, 2012. A study performed by the California Office of Environmental Health Hazard
20 Assessment determined that exposures to Lead even at levels previously considered safe have
21 now been shown to cause adverse health effects including reduced cognitive ability and
22 significant diminution of intellectual potential. Carlisle, *et al.*, “A Blood Lead Benchmark for
23 Assessing Risks from Childhood Lead Exposure,” *Journal of Environmental Science and Health*,
24 44, 2009. This conclusion is based on a meta study of 1,333 children who participated in seven
25 international studies. Lanphear, *et al.*, “Low-Level Environmental Lead Exposure and Children’s
26 Intellectual Function: An International Pooled Analysis,” *Environmental Health Perspectives*,
27 113:7, 2005.

28 21. 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 22. Lead exposures for pregnant women are also of particular concern in light
11 of evidence that even short term lead exposures *in utero* may have long-term harmful effects.
12 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
13 Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, Lourdes, *et al.*,
14 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
15 *Health Perspectives* 114:5, 2006. Increased lead exposure during pregnancy has also been shown
16 to cause increased risk of premature birth and increased blood pressure in both the mother during
17 pregnancy and the child after birth. Vigeh, *et al.*, "Blood Lead at Currently Acceptable Levels
18 May Cause Preterm Labour," *Occupational Environmental Medicine*, 68:231-234, 2010; Zhang,
19 *et al.*, "Association Between Prenatal Lead Exposure and Blood Pressure in Children,"
20 *Environmental Health Perspectives*, 120:3, 2012; Wells, *et al.*, "Low-Level Lead Exposure and
21 Elevations in Blood Pressure During Pregnancy," 119:5, 2011.

22 23. Defendants' Products contain sufficient quantities of Lead such that
23 consumers, including pregnant women and children, who consume the Products are exposed to a
24 significant amount of Lead. The primary route of exposure for the violations is direct ingestion
25 when consumers eat the Products. These exposures occur in homes, workplaces and everywhere
26 else throughout California where the products are consumed.

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

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

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

15 27. CEH also sent a Certificate of Merit for each Notice to the California
16 Attorney General, the District Attorneys of every county in California, the City Attorneys of
17 every California city with a population greater than 750,000 and to each of the named
18 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each
19 Certificate certified that CEH’s counsel: (1) has consulted with one or more persons with
20 relevant and appropriate experience or expertise who reviewed facts, studies or other data
21 regarding the exposures to Lead alleged in each Notice; and (2) based on the information
22 obtained through such consultations, believes that there is a reasonable and meritorious case for a
23 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health
24 & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney
25 General included factual information – provided on a confidential basis – sufficient to establish
26 the basis for the Certificate, including the identity of the person(s) consulted by CEH’s counsel
27 and the facts, studies or other data reviewed by such persons.

28 28. None of the public prosecutors with the authority to prosecute violations

1 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
2 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each
3 of CEH's Notices.

4 29. Defendants both know and intend that individuals, including pregnant
5 women and children, will consume the Products, thus exposing them to Lead.

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

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

11 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
12 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
13 § 12201).

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

16 32. Defendants also have constructive knowledge that their Products contain
17 Lead due to the widespread industry knowledge regarding Lead in both molasses and licorice
18 root.

19 33. As companies that manufacture, import, distribute and/or sell the Products
20 for use in the California marketplace, Defendants know or should know that the Products contain
21 Lead and that individuals who consume the Products will be exposed to Lead. The Lead
22 exposures to consumers who consume the Products are a natural and foreseeable consequence of
23 Defendants' placing the Products into the stream of commerce.

24 34. Nevertheless, Defendants continue to expose consumers, including
25 pregnant women and children, to Lead without prior clear and reasonable warnings regarding the
26 carcinogenic or reproductive hazards of Lead.

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

36. Any person "violating or threatening to violate" Proposition 65 may be

1 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to
2 violate” is defined to mean “to create a condition in which there is a substantial probability that a
3 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
4 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

5 **FIRST CAUSE OF ACTION**

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

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

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

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

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

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

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

23 **PRAYER FOR RELIEF**

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

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

28

1 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
2 preliminarily and permanently enjoin Defendants from offering the Products for sale in
3 California without either reformulating the Products such that no Proposition 65 warnings are
4 required or providing prior clear and reasonable warnings, as CEH shall specify in further
5 application to the Court;

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

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

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

13
14 Dated: November 25, 2014

Respectfully submitted,

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16 LEXINGTON LAW GROUP

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18 Eric Somers
19 Attorneys for Plaintiff
20 CENTER FOR ENVIRONMENTAL HEALTH
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