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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

21 LILA WASHINGTON; LAURA
22 WASHINGTON; RYAN and KRISTIN
23 BRANDT, husband and wife; KENNETH and
24 CASANDRA BARRETT, husband and wife, on
25 behalf of themselves and all others similarly
26 situated ,

27 Plaintiffs,

28 v.

LUMBER LIQUIDATORS, INC., a Delaware
corporation,

Defendant.

No. 15-cv-01475-JST

**NOTICE OF MOTION AND
MOTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing Date: May 14, 2015

Time: 2:00 p.m.

Judge: Hon. Jon S. Tigar

MOTION FOR PRELIMINARY INJUNCTION

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NOTICE OF MOTION AND MOTION

TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on May 14, 2015 at 2:00 p.m. or as soon thereafter as the matter may be heard in the United States District Court, Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Jon S. Tigar, in Courtroom 9, 19th Floor, Plaintiffs will, and hereby move, the Court for a Preliminary Injunction prohibiting Lumber Liquidators from representing that home air testing kits are an effective method of detecting the level of formaldehyde in their homes and to require Lumber Liquidators to advise inquiring customers to retain a qualified professional trained in environmental science, industrial hygiene, or toxicology to perform proper testing and design an appropriate remediation plan.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, accompanying declaration of Elisabeth Black, CIH, and Kristin Brandt, and on such other written and oral argument as may be presented to the Court.

DATED: April 8, 2015

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 1, 2015, 60 Minutes reported that Chinese-manufactured composite wood flooring products Defendant Lumber Liquidators Inc. sold showed dangerous levels of formaldehyde. The news story immediately caused Lumber Liquidators' stock price to plunge and put the company in crisis.¹ In response, Lumber Liquidators sought to publicly discredit the testing methods the laboratories used by claiming that it was improper for the laboratories to remove the laminate cover before testing the composite core of the flooring. To help gainsay the laboratory test results, Lumber Liquidators began offering free do-it-yourself air testing kits upon request to customers whose records confirm that they bought certain flooring products from Lumber Liquidators.

Unlike the laboratory tests, the do-it-yourself testing kits Lumber Liquidators is offering do not comply with accepted industry standards, are inherently unreliable, and are likely to under-report the amount of formaldehyde present. Thousands of Lumber Liquidators customers are terrified that their floors contain dangerous levels of formaldehyde that can cause cancer and other ailments. Many are turning to Lumber Liquidators for information. Rather than providing effective testing and remedial measures, Lumber Liquidators is responding with a public relations campaign. The results of this campaign will potentially be catastrophic. Prompt action to remove the source and reduce the potential exposure is required when high levels of formaldehyde are present. Lumber Liquidators' public relations inspired "air tests" will falsely lead some to believe that their floors are safe, and to forego effective measures to reduce the health risks the floors pose. These people will continue to be exposed to potentially dangerous levels of a carcinogenic chemical.

Plaintiffs seek preliminary injunctive relief to prevent Lumber Liquidators from representing that its do-it-yourself testing kits accurately measure formaldehyde levels. Plaintiffs have a substantial likelihood of prevailing on the merits of their case. Every package of Lumber Liquidators' composite flooring states that it is compliant with CARB standards regarding formaldehyde. Competent testing

¹ See, e.g., Rachel Abrams and Aaron M. Kessler, *Lumber Liquidators Plunges After TV Report of Tainted Flooring*, NY Times, March 5, 2015 at B2 (available at <http://www.nytimes.com/2015/03/05/business/lumber-liquidators-plunges-after-tv-report-of-tainted-flooring.html?ref=topics>).

1 has shown that this is not true. The harm that will ensue if an injunction is not granted will be serious
2 and irreparable. Lumber Liquidators' tactic of using air testing kits that under-report the amount of
3 formaldehyde in the floors will cause people delay or forego the remedial measures they need to take
4 immediately and any delay in taking remedial measures can lead to calamitous results.

5 II. STATEMENT OF FACTS

6 A. Formaldehyde is a recognized carcinogen that poses acute dangers to human health

7 Health hazards related to formaldehyde exposure are well researched and documented.
8 Formaldehyde is known to cause respiratory irritation, headaches, coughing, dizziness, and nausea at
9 exposure levels as low as 0.1 parts per million ("ppm").² The California Office of Environmental Health
10 Hazard Assessment (OEHHA) considers safe levels of formaldehyde exposure in the air to not exceed
11 0.076 ppm for acute exposure, 0.027 ppm for 8-hour exposure, and 0.002 ppm for chronic exposure.³
12 Additional non-cancer health risks associated with exposure to formaldehyde inhalation include burning
13 to the eyes, upper respiratory tract pathology, neurologic and behavioral toxicity, reproductive
14 developmental toxicity, and immunological toxicity.⁴ More critical is the classification of formaldehyde
15 as a human and animal carcinogen. Leading research institutions into the causes of cancer and the
16 classification of carcinogens, have classified formaldehyde as "carcinogenic to humans" based on links
17 between formaldehyde exposure and nasopharyngeal cancer and all leukemias.⁵ Inhaling formaldehyde
18 poses a particular risk to infants, toddlers, asthmatics, the elderly, people who are immune
19 compromised, and people with respiratory ailments such as emphysema or COPD.⁶

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25 ² Declaration of Elisabeth Black, CIH ("Black Decl.") at ¶ 4.

26 ³ *Id.* at ¶ 5.

27 ⁴ *Id.*

28 ⁵ *See id.* at ¶¶ 8, 9 (citations omitted).

⁶ *Id.* at ¶ 14(i).

1 **B. Lumber Liquidators' Chinese-made composite flooring products were tested and shown**
2 **to contain dangerous levels of formaldehyde that far exceed CARB limits**

3 **1. CARB established formaldehyde emission limits for composite wood flooring**
4 **products**

5 Composite wood products “are among the highest emitting formaldehyde products used in
6 everyday applications” due to the concentration of formaldehyde in resins used to bond the wood pulp
7 or fibers that make up MDF.⁷ CARB issued regulations to regulate formaldehyde emissions from MDF
8 and other composite wood products.⁸ In 2009, the regulations became final, and set maximum
9 formaldehyde emission limits for MDF products to take effect in two phases. The CARB Phase 2
10 Emission Standard in effect as of January 1, 2011, dictates that products containing MDF can emit no
11 more than 0.11 parts per million (“ppm”) of formaldehyde, and no more than 0.13 ppm for Thin MDF
12 (defined as having a maximum thickness of 8mm).⁹ These limits apply to the level of formaldehyde in
13 the finished products, as opposed to the formaldehyde levels in the air surrounding the product.¹⁰

14 **2. CARB established protocols for testing compliance with formaldehyde limits**

15 The CARB Regulations specify test methods that may be used to determine whether products
16 meet the CARB limit. A composite wood product does not comply if it “is tested at any time after it is
17 manufactured, using either the compliance test method specified in section 93120.9 (a) or the
18 enforcement test method specified in section 93120.9 (b), and is found to exceed the applicable emission
19 standard specified in Table 1.”¹¹ The compliance test method specified in section 93120.9(a), in turn,
20 incorporates the method in ASTM D 6007-02, as promulgated by the America Society for Testing and
21 Materials - a detailed testing protocol that spells out how finished products that contain composite wood
22 products are to be tested for their formaldehyde content. The tests on which 60 minutes reported
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24 ⁷ See *id.*, ¶ 10.

25 ⁸ See Cal. Code Regs. tit. 17 § 93120 *et seq.* These regulations are also known as the Airborne
26 Toxic Control Measure (“ATCM”).

27 ⁹ *Id.* § 93120.2(a).

28 ¹⁰ Black Decl., ¶ 6.

¹¹ Cal. Code Regs., tit. 17, § 93120.2(a)(3). Table 1 sets out the formaldehyde limits in ppm as
stated in section II.B.1 *supra*.

1 followed the ASTM testing procedures.¹² 30 of 31 samples exceeded CARB limits. Complaint ¶ 8.¹³
2 The Laboratory test of the “Dream Home Ispiri America’s Mission Olive” Laminate Flooring that
3 Plaintiffs Kenneth and Casandra Barrett installed in their home showed that the composite core
4 contained 0.78 ppm of formaldehyde – more than 7 times the CARB limit.¹⁴

5 **3. Lumber Liquidators’ public response to the findings of excess formaldehyde is**
6 **inconsistent with CARB and with industry standards**

7 Lumber Liquidators responded to the 60 Minutes report by claiming that the laboratory tests
8 were improper because they first “deconstructed” the flooring tiles by first removing the laminate and
9 then testing the core. Lumber Liquidators likened removing the laminate to testing the emissions levels
10 on a car after removing the catalytic converter.¹⁵

11 The claim that deconstructive testing is improper is at odds with CARB’s “Standard Operating
12 Procedure” (“SOP”) and other pronouncements. The SOP details how finished products should be
13 prepared for testing and instructs the lab to remove the top layer of plastic laminate prior to putting the
14 sample in the test chamber.¹⁶ CARB has also explained that because the regulations measure emissions
15 from MDF core boards and not from finished products, laminate must be removed to test the
16 formaldehyde content in the actual core and compare it against CARB’s limits.¹⁷

17 **C. The air testing Lumber Liquidators is offering is not reliable**

18 Unlike CARB, Lumber Liquidators believes formaldehyde testing must be done on the finished
19 product only, and without removing the laminate coating. As a counterpoint to the laboratory testing,
20 Lumber Liquidators is encouraging customers to employ “proper testing” using a do-it-yourself air
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22 ¹² Black Decl., ¶¶ 23, 24.

23 ¹³ References to “Complaint” refer to the Complaint filed in *Washington et al. v. Lumber*
24 *Liquidators, Inc.*, Case No. 5:15-cv-01475 Dkt. No. 1.

25 ¹⁴ Black Decl., ¶ 23 Ex. F.

26 ¹⁵ <http://www.lumberliquidators.com/sustainability/health-and-safety/> (last visited, April 2,
2015); *see also Balero v. Lumber Liquidators*, Case No. 3:15-cv-01005, Defendant’s Motion to
Dismiss (Dkt. No. 12) at p. 1.

27 ¹⁶ *See* Black Decl., ¶ 22 Ex. C at p. 1.

28 ¹⁷ Black Decl., ¶¶ 22, 24.

1 testing kit it has sent to people's homes.¹⁸ The kits come with a simple set of instructions for taking air
2 samples that Lumber Liquidators describes as "idiot proof," and customers are then instructed to mail
3 the completed air sample to an "independent" third-party laboratory where the sample will be tested.¹⁹

4 Proper testing in a residential setting, however, is not a simple process that can be competently
5 accomplished using a one-size-fits-all kit. Competent hazard assessment requires a qualified
6 professional who is trained in environmental science, industrial hygiene, or toxicology should be
7 employed to design a sampling strategy and collect sample data that takes the unique variables of a
8 particular home into account so as to accurately measure the formaldehyde content in the home and
9 reliably assess the risk to the residents.²⁰

10 The accompanying Declaration of Elisabeth Black, an industrial hygienist with more than 25
11 years of experience evaluating chemical and physical hazards in the environment, industry, schools, and
12 homes details various factors that a competent professional would have to consider when conducting
13 proper air testing.²¹ Testing the air in a home requires a sampling strategy that is unique to that home
14 based on its structure, ventilation, and layout of the home, the climate where the home is located, the
15 residents and their personal habits, the weather and barometric pressure when air samples are taken, the
16 time of year, and other factors. A competent professional would consider these factors so as to represent
17 the worst case conditions when collecting air samples in order to protect for all conditions.²²

18 Lumber Liquidators' do-it-yourself testing kits do not adequately account for any of these
19 conditions and do not provide a method to obtain a valid or accurate air sample.²³ In fact, they appear to
20 be likely to result in under-reported findings and false negative findings. The instructions suggest that
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23 ¹⁸ See Rachel Abrams, *Lumber Liquidators Offers Flooring Customers Free Air Tests for*
24 *Formaldehyde*, NY Times March 13, 2015 at B4 (available at
<http://www.nytimes.com/2015/03/13/business/lumber-liquidators-offers-free-tests-of-flooring-for-formaldehyde.html>).

25 ¹⁹ Black Decl., ¶ 11; *see also* Brandt Decl., ¶¶ 9, 10.

26 ²⁰ Black Decl., ¶ 13.

27 ²¹ *Id.* at ¶¶ 13, 14.

28 ²² *Id.*

²³ *Id.* at ¶¶ 13, 14, 15.

1 users can use ceiling fans or air conditioning while testing, which is likely to result in lower readings.²⁴
2 In addition, the instructions direct that the air monitor be placed approximately four feet from the floor.
3 This would not provide a valid reading if an infant or toddler occupied the room being tested – as they
4 breathe air closer to the ground.²⁵ Moreover, Lumber Liquidators is sending out test kits during the
5 winter and spring months of March and April, when the results are likely to be lower than in the hotter
6 summer months. But Lumber Liquidators’ instructions do not account for the weather at all, and do not
7 alert users that results may be higher in a few months.²⁶

8 In short, the home testing kits Lumber Liquidators is touting as “proper testing” are anything but
9 proper and cannot be considered reliable. They are the cheapest possible way to test for formaldehyde
10 in the air, and come at the expense of collecting valuable data. These home testing kits will likely
11 provide false negatives – readings that indicate the home is safe when it is not.²⁷

12 Information CARB posted on its website regarding how air testing should be undertaken
13 similarly warns against do-it-yourself testing. Days after 60 Minutes reported on the formaldehyde
14 found in Lumber Liquidators’ flooring, CARB warned that “indoor air testing will not necessarily
15 indicate whether the flooring is emitting elevated levels of formaldehyde. It is possible to have flooring
16 properly tested for formaldehyde emissions, but these tests are difficult and expensive.”²⁸

17 **D. Lumber Liquidators continues to insist its products are safe and discourages consumers**
18 **from taking remedial measures**

19 The experience of Plaintiffs Ryan and Kristin Brandt is telling. The Brandts were expecting the
20 birth of their first child when they bought 370 square feet of “12 mm Dream Home St. James Bunet
21 Road Russett” laminate flooring from Lumber Liquidators. They planned to install the floors in the
22

23 ²⁴ *Id.* at ¶ 14 (e).

24 ²⁵ *Id.* at ¶ 14 (b).

25 ²⁶ *Id.* at ¶ 14 (f), (g).

26 ²⁷ *Id.* at ¶¶ 15, 16.

27 ²⁸ California Environmental Protection Agency – Air Resources Board; *Facts About Flooring*
28 *Made with Composite Wood Products*, March 3, 2015 (available at:
<http://www.arb.ca.gov/homepage.htm>; Background information on flooring made with composite
wood).

1 room they were setting up for their newborn and in one other room.²⁹ The Brandts relied on Lumber
2 Liquidators' representations regarding its compliance with California formaldehyde limits and fully
3 appreciated the significance of those representations.³⁰

4 On March 1, Ms. Brandt watched the 60 Minutes report telling of the dangerous levels of
5 formaldehyde found in Lumber Liquidators' flooring. The Brandts retained an independent technician
6 whose tests showed formaldehyde emissions of 1.63 ppm – almost 16 times the CARB limit, and at
7 levels that “pose a high risk for irreversible health issues.”³¹

8 When the Brandts called Lumber Liquidators to report the technician's findings, Lumber
9 Liquidators was dismissive of the findings and did not offer to replace or even remove the flooring. A
10 customer service representative claimed the independent test was not accurate, claimed that the tests
11 reported on 60 Minutes were also not accurate, and insisted that all Lumber Liquidators' products were
12 completely safe and that there was no reason to remove the floors.³²

13 After dismissing the findings of both the lab findings reported on 60 Minutes and of the
14 independent technician, the Lumber Liquidators' representative directed Ms. Brandt to instead use the
15 do-it-yourself air testing kit Lumber Liquidators would provide for “proper testing.”³³ The Brandts
16 were mailed the same kit that Industrial Hygienist, Elisabeth Black, evaluated and found unreliable.³⁴
17 The Brandts performed the air test and mailed the kit to the address provided. Several weeks have
18 passed and they have not yet received the results.

19 III. ARGUMENT

20 A. Legal Standard

21 Plaintiffs seeking a preliminary injunction must establish that they are: (1) likely to succeed on
22 the merits; (2) likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of
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24 ²⁹ Brandt Decl., ¶ 2.

25 ³⁰ *Id.*, ¶¶ 4, 5.

26 ³¹ *See id.*, ¶ 7; *see also* Cal. Code Regs. tit. 17 § 93120.2(a).

27 ³² Brandt Decl., ¶ 8.

28 ³³ *Id.*, ¶¶ 9-10

³⁴ Black Decl., ¶ 11.

1 equities tips in their favor; and (4) an injunction is in the public interest. *Sierra Forest Legacy v. Rey*,
2 577 F.3d 1015, 1021 (9th Cir. 2009); *Winter v. NRDC, Inc.*, 555 U.S. 7, 22-23 (2008).

3 “While the test ‘requires the plaintiff to make a showing on all four prongs,’ the showing need
4 not be equally strong” under each prong.³⁵ Instead, the factors are analyzed on a sliding scale: “serious
5 questions going to the merits, and a balance of hardship that tips sharply toward the plaintiff can support
6 issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of
7 irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v.*
8 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). The Ninth Circuit has articulated the standard by
9 noting that the party seeking a preliminary injunction must show: (1) a combination of probable success
10 on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the
11 balance of hardships tips in its favor. *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172,
12 174 (9th Cir. 1987). “These two formulations represent two points on a sliding scale in which the
13 required degree of irreparable harm increases as the probability of success decreases.” *Id.* (citing
14 *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985)).

15 **B. An injunction is necessary to eliminate the likelihood of irreparable harm**

16 There will be irreparable harm, or a very real likelihood of it, if the Court does not order the
17 requested injunction. The presence of high levels of formaldehyde in floors installed in homes can
18 cause serious injury and illness including cancer. When high levels of formaldehyde are present, people
19 must take prompt action to remove the source or to reduce the potential exposure.³⁶

20 A risk of ailments including cancer is more than sufficient to establish irreparable harm. A
21 tangible risk of death or bodily injury is obviously sufficient to serve as the basis for an injunction. *See*,
22 *e.g., Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (“Death is an irremedial and unfathomable
23 harm, and bodily injury is not far behind.”) (citation omitted); *Harris v. Bd. of Supervisors*, 366 F.3d
24 754, 766 (9th Cir. 2004) (accepting as irreparable harm “pain, infection, amputation, medical
25 complications, and death”); *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs.*, 181 F. Supp. 2d

27 ³⁵ *Norton v. Unknown Warden*, 2014 WL 1276564, at *2 (C.D. Cal. Mar. 26, 2014).

28 ³⁶ Black Decl., ¶ 17.

1 1111, 1129 (E.D. Cal. 2001) (recognizing risk of irreparable harm due to “dire threat to public health
2 and safety”); *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 26 (D. Mass. 2010) (recognizing that
3 subcellular injury and increased risk of cancer are obviously irreparable); *Barth v. Firestone Tire &
4 Rubber Co.*, 661 F. Supp. 193, 205 (N.D. Cal. 1987) (noting that “risk to human life constitutes the very
5 essence of irreparable harm”); *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 WL
6 2612345, at *41 (E.D.N.Y. Aug. 25, 2009) (“causing an increased risk of lung cancer in the City, if
7 proven, constitutes irreparable harm”).

8 Lumber Liquidators has chosen a public relations strategy of disputing the laboratory tests
9 showing high levels of formaldehyde in its flooring and attacking the propriety of those tests. To bolster
10 this strategy, it is insisting on alternative tests using do-it-yourself air testing kits. These kits do not pass
11 scientific muster. They are unreliable, and likely to show false-negative results. This poses a serious
12 risk. When high levels of formaldehyde are present, people must take remedial action without delay.
13 Those who believe Lumber Liquidators, and delay or forego the remedial measures they need to take,
14 increase their exposure to a dangerous and toxic substance and increase their risk of diseases that
15 include asthma and cancer. Lumber Liquidators may actually believe its public relations claims that
16 multiple laboratory tests were improper, and that do-it-yourself testing kits are a more accurate measure
17 of the formaldehyde in the home. But it cannot be allowed to stake the health of its customers on that
18 gambit by encouraging them to delay crucial action. As the *Barth* court recognized, “[p]ostponing or
19 foregoing action that, if taken now, might result in the saving of human life would constitute irreparable
20 harm in the eyes of this Court.” 661 F. Supp. at 205.

21 The likelihood of irreparable harm is high. Effective repair is not imminent. The Court should
22 not postpone taking immediate action to prevent Lumber Liquidators from causing people to be exposed
23 to any more toxic formaldehyde than they have already been.

24 **C. Plaintiffs will likely succeed on the merits, or at least have raised serious questions going**
25 **to the merits**

26 In order to satisfy the “likelihood of success on the merits” prong, a plaintiff can demonstrate
27 that she is likely to succeed on the merits; alternatively, a preliminary injunction is also “appropriate
28 when a plaintiff demonstrates ... that serious questions going to the merits were raised and the balance

1 of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies*, 632 F.3d at 1134-35. In
2 this case, Plaintiffs can demonstrate both that serious questions exist, and that they will likely succeed
3 on the merits of the claims at issue.

4 The claims underlying Plaintiffs' request for a preliminary injunction are brought pursuant to the
5 California UCL, CLRA, and the consumer protection statutes of Michigan and Florida. All of these
6 authorize courts to award injunctive relief.³⁷

7 Lumber Liquidators invokes CARB emissions standards and represents that its composite
8 laminate flooring products meet CARB standards for formaldehyde and are therefore safe. Lumber
9 Liquidators unequivocally states that though CARB only governs products sold in California, all of its
10 composite laminate flooring products meet CARB standards no matter where they are sold.³⁸ Indeed,
11 each box of Lumber Liquidators' composite flooring, including products that each Plaintiff purchased,
12 contains the legend "CARB ... CALIFORNIA 93120 Phase 2 Compliant Formaldehyde." Complaint,
13 ¶¶ 40, 63, 74, 87. Each Plaintiff relied on these representations and would not have purchased the floors
14 absent this or an equivalent representation. *Id.*, ¶¶ 64, 75, 88.

15 CARB regulations and their supporting documents clearly define California's legal limit for
16 formaldehyde emissions from the products Plaintiffs purchased as well as the proper methods for testing
17 these products. The Court will only need to apply the testing results to the regulations to determine
18 whether Lumber Liquidators products exceeded CARB limits and could not legally be sold in
19 California. The UCL provides a private right of action for Plaintiffs to enforce the CARB regulations.
20 *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) ("By proscribing
21 'any unlawful' business practice, '[the UCL] borrows violations of other laws and treats them as
22 unlawful practices' that the unfair competition law makes independently actionable.".)³⁹

23
24 ³⁷ Cal. Bus. & Prof. Code § 17203; Cal. Civ. Code § 1780(a); Mich. Comp. Laws Ann.
445.911(b); Fla. Stat. Ann. § 501.211.

25 ³⁸ Complaint, ¶¶ 23, 24 (citing Lumber Liquidators website
26 [http://www.lumberliquidators.com/11/flooring/ca-air-resources-board-regulations?Wt.ad-
GLOBALFOOTER_CaliRegCARB](http://www.lumberliquidators.com/11/flooring/ca-air-resources-board-regulations?Wt.ad-GLOBALFOOTER_CaliRegCARB)).

27 ³⁹ See also *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002) (holding that the UCL permits
28 violations of other laws to be treated as unfair competition that is independently actionable even if
the predicate law provides no private right of action); *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d
MOTION FOR PRELIMINARY INJUNCTION - 10 -

1 In addition to UCL claims based on Lumber Liquidators' regulatory violations, Plaintiffs will
2 prevail on claims under the UCL, the CLRA, and the consumer protection statutes of Florida and
3 Michigan because Lumber Liquidators misrepresented material facts about its products and omitted the
4 truth about their formaldehyde content. Leading consumers to believe that its products were CARB
5 compliant was deceptive. Under the UCL "a practice is prohibited as 'unfair' or 'deceptive' even if not
6 'unlawful' and vice versa." *State Farm Fire & Cas. Co. v. Superior Ct.*, 45 Cal. App. 4th 1093, 1102
7 (1996); *In re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009). Under the CLRA, representing that "goods
8 or services are of a particular standard, quality, or grade, ... if they are of another, includes a
9 proscription against a concealment of the characteristics, use, benefit, or quality of the goods contrary to
10 that represented." *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 37 (1975). *See also*
11 *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 186 (2010) (holding that failure to disclose the known
12 fact that a roof tile color composition would erode was sufficient to support a CLRA claim); *LiMandri*
13 *v. Judkins*, 52 Cal. App. 4th 326, 337 (1997) (noting that a defendant has a duty to disclose known facts
14 when the defendant has exclusive knowledge of material facts, or when defendant makes partial
15 representations about the product but also suppresses some material facts). Lumber Liquidators had a
16 duty to disclose the true formaldehyde content in its products and the true standards its Chinese Mills
17 employed, as these were facts that were solely in its possession. *See Falk v. GMC*, 496 F. Supp. 2d
18 1088, 1095 (N.D. Cal. 2007) (duty to disclose arises when the defendant had exclusive knowledge of
19 material facts not known to the plaintiff; when the defendant actively conceals a material fact from the
20 plaintiff; or when the defendant makes partial representations but also suppresses some material facts).
21 It similarly violated consumer protection statutes of Florida and Michigan.⁴⁰

22
23 1018, 1033 (N.D. Cal. 2010) ("The 'unlawful' practices prohibited by [the UCL] are any practices
24 forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-
made."); *K & N Eng'g, Inc. v. Spectre Performance*, 2011 WL 4387094, at *17 (C.D. Cal. Sept. 20,
2011) (summary judgment denied as to UCL claim based on CARB regulations).

25 ⁴⁰ Under Florida law, "unfair methods of competition, unconscionable acts or practices, and
26 unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared
27 unlawful." FLA. STAT. § 501.204(1). An "unfair" practice includes a practice that is "unscrupulous
28 or substantially injurious to consumers." *Samuels v. King Motor Co.*, 782 So. 2d 489, 499 (Fla. Ct.
App. 2001). A "deceptive" practice "is one that is 'likely to mislead' consumers." *Davis v.*
Powertel, Inc., 776 So. 2d 971, 974 (Fla. Ct. App. 2000). The Michigan CPA prohibits "[u]nfair,
MOTION FOR PRELIMINARY INJUNCTION - 11 -

1 Plaintiffs have more than demonstrated that they are likely to succeed on the merits. There can
2 be no doubt that they demonstrate that they raised serious questions going to the merits of their claims.

3 **D. The balance of equities tips sharply in favor of proscribing Lumber Liquidators from**
4 **representing that its air testing kits are accurate**

5 In balancing the equities, courts “must balance the competing claims of injury and must consider
6 the effect on each party of the granting or withholding of the requested relief.” *Winter v. NRDC*, 555
7 U.S. at 24. In so doing, the court looks to the possible harm that could befall the various parties. *See id.*

8 The Ninth Circuit has made it clear that when “faced with [] a conflict between financial
9 concerns and preventable human suffering, [there is] little difficulty concluding that the balance of
10 hardships tips decidedly in plaintiffs’ favor.” *Rodde v. Bonta*, 357 F. 3d 988, 999 (9th Cir. 2004)
11 (quotation marks omitted); *see also Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (the balance
12 of equities favored the plaintiffs because “the physical and emotional suffering shown by plaintiffs ... is
13 far more compelling than the possibility of some administrative inconvenience or monetary loss”); *see*
14 *also Rosado v. Alameida*, 349 F. Supp. 2d 1340, 1348 (S.D. Cal. 2004) (“When adjudicating a
15 preliminary injunction motion, the Ninth Circuit expects lower courts to protect physical harm to an
16 individual over monetary costs.”); *Nat’l Ass’n of Farmworkers Organizations v. Marshall*, 628 F.2d
17 604, 616 (D.C. Cir. 1980) (finding that irreparable harm to children exposed to chemicals far outweighs
18 any possible reduction in the price of produce that might result from denying preliminary relief).

19 In this case, the equities greatly favor injunctive relief. The relief Plaintiffs are asking for is
20 minimal – simply that Lumber Liquidators not represent or otherwise lead people to believe that the
21 home air testing kits it is offering can be used as a substitute for proper testing. This will cost Defendant
22 nothing more than forcing it to abandon a callous public relations campaign. On the other hand, if only
23 one additional person commissions a proper environmental test, learns of heightened formaldehyde

24 _____
25 unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce,” which
26 include: representing that goods are of a particular standard if they are of another; failing to reveal a
27 material fact, the omission of which tends to mislead or deceive the consumer; and failing to reveal
28 facts that are material in light of representations of fact made in a positive manner. MICH. COMP.
LAWS § 445.903(1); *Game On Ventures, Inc. v. Gen. RV Ctr., Inc.*, 587 F. Supp. 2d 831, 839 (E.D.
Mich. 2008) (noting that the MCPA is broader than common law torts of fraud as it prohibits “not
only ‘deceptive’ business practices but also those which are ‘unfair’ and ‘unconscionable.’”)

1 levels, and takes appropriate remedial measures as a result, the physical harm averted would far
2 outweigh the cost of Lumber Liquidators having to forego its public relations campaign.

3 **E. The requested relief is in the public interest**

4 When the impact of an injunction reaches beyond the parties, carrying with it a potential for
5 public consequences, the public interest will be relevant to whether the district court grants the
6 preliminary injunction. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002).

7 As Plaintiffs already made clear, the public interest will be served **only** if Lumber Liquidators is
8 enjoined from portraying its home testing kits as being a viable substitute to professional testing. There
9 are thousands of people throughout the country who are faced with the prospect that their homes are
10 filled with dangerous fumes. The public interest is served by encouraging them to commission proper
11 testing and to take the necessary remedial measures immediately. Ultimately these measures are
12 necessary to protect their lives and their health. The public interest is not served in protecting Lumber
13 Liquidators' right to a public relations campaign.

14 **IV. THE COURT SHOULD ORDER A NOMINAL BOND OR**
15 **WAIVE THE BOND ENTIRELY**

16 Federal Rule of Civil Procedure 65(c) requires that a movant for a preliminary injunction give
17 "security ... in such sum as the court deems proper" before any preliminary injunction issues. Fed. R.
18 Civ. P. 65(c). "Rule 65(c) invests the district court 'with discretion as to the amount of security
19 required, if any.'" *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (citing *Barahona-Gomez v.*
20 *Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999)).

21 To that end, there is a "long-standing precedent that requiring nominal bonds is perfectly proper
22 in public interest litigation." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005);
23 *see also Walker v. Pierce*, 665 F. Supp. 831, 843-44 (N.D. Cal. 1987) (waiving bond requirement for
24 class representative); *Barahona-Gomez v. Reno*, 167 F. 3d 1228, 1237 (9th Cir. 1999) (finding that
25 district court did not err in requiring class representative to post only a nominal bond of \$1,000).
26 Plaintiffs are consumers of modest means who obtained representation on a contingency basis.
27 Plaintiffs' status as proposed class representatives, their inability to absorb the expenses of large
28

1 commercial enterprises like Lumber Liquidators, and the strong public interest at issue all weigh in
2 favor of a minimal bond, or no bond at all.

3 **V. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court issue the proposed
5 preliminary injunction.

6
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 8, 2015, I electronically filed the foregoing document using the
3 CM/ECF system which will send notification of such filing to the email addresses registered in the
4 CM/ECF system, as denoted on the Electronic Mail Notice List. Copies were also manually served,
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