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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF SAN FRANCISCO**

17 ENVIRONMENTAL LAW FOUNDATION,
18 on behalf of the General Public,

19 Plaintiff,

20 vs.

21 ABBOTT LABORATORIES; BIOCHEM, a
22 brand of COUNTRY LIFE, LLC; BIO-
23 ENGINEERED SUPPLEMENTS &
24 NUTRITION, INC.; DYMATIZE
25 ENTERPRISES, INC.;
26 HEALTHWATCHERS, (DE) INC.;
27 OPTIMUM NUTRITION, INC.; VITAMIN
28 SHOPPE, INC.; and DOES 1 through 200,

Defendants.

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

AUG 26 2010

CLERK OF THE COURT

BY: PARAM NATT
Deputy Clerk

CASE MANAGEMENT CONFERENCE SET

JAN 28 2011 9⁰⁰ AM

DEPARTMENT 212

Case No. CGC-10-503002

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

**(Based on Violations of California Health
and Safety Code § 25249.6 et seq.)**

1 Plaintiff, ENVIRONMENTAL LAW FOUNDATION, by its attorneys, brings this action
2 on behalf of the General Public on information and belief, and investigation of counsel, except
3 those allegations which pertain to the named Plaintiff or to its attorneys which are alleged on
4 personal knowledge, and hereby alleges as follows:

5 **INTRODUCTION**

6 1. This action seeks to remedy Defendants' continuing failure to warn thousands of
7 individuals in California that they are being exposed to lead, a chemical known to the State of
8 California to cause cancer and/or reproductive toxicity, through the ingestion and use of
9 Defendants' protein supplements. Defendants manufacture, package, distribute, market and/or
10 sell protein supplements in the form of powders, liquids and ready to drink liquids, with whey as
11 the primary protein ingredient (hereinafter "PROTEIN SUPPLEMENTS").

12 2. There is no safe level of lead in the body, and children and fetuses are at greatest risk of
13 harmful effects from exposure to lead. (*See, e.g., Toxicological Profile for Lead, U.S.*
14 *Department of Health and Human Services, Public Health Service, Agency for Toxic Substances*
15 *and Disease Registry (2007) at 10 ("No safe blood lead level in children has been determined.");*
16 *24, 25 ("Most importantly, no threshold for the effects of lead on IQ has been determined."); 222*
17 *("Children and developing organisms in general, are more susceptible to lead toxicity than*
18 *adults."); 364). Fetuses exposed to lead in the womb may be born prematurely and have lower*
19 *weights at birth. Exposure in the womb and as an infant also slows mental development and*
20 *causes lower intelligence later in childhood.*

21 3. Infants are born with a lead body burden that reflects the burden of the mother. During
22 gestation, lead from the maternal skeleton is transferred across the placenta to the fetus.
23 Moreover, there is transfer of maternal blood lead load across the placenta to a developing fetus.
24 Additional lead exposure may occur during breast feeding. This means that maternal ongoing
25 exposure to lead during pregnancy, as well as lead stored in the mother's body from exposure
26 prior to conception, can result in exposure to the fetus or nursing neonate. *Id.* at 118, 223, 137 &
27 172 (internal citations omitted).

1 4. The American Academy of Pediatrics concurs that there is no “safe level” of lead for
2 children. [www.aap.org/advocacy/washing/News-Release_Press-Statements/01-05-08-EPA-
4 Lead.pdf](http://www.aap.org/advocacy/washing/News-Release_Press-Statements/01-05-08-EPA-
3 Lead.pdf).

5 5. On February 27, 1987, California Governor George Deukmejian declared lead a
6 reproductive toxin subject to Proposition 65. Proposition 65 requires that consumers must be
7 warned before they are exposed to chemicals/metals that cause birth defects and/or reproductive
8 harm. (The Safe Drinking Water and Toxic Enforcement Act, California Health and Safety Code
9 § 25249.5 *et seq.*, hereinafter referred to as “Proposition 65.” All section references not
10 otherwise identified refer to California Health and Safety Code).

11 6. Lead became subject to the warning requirement one year later and was therefore subject
12 to the “clear and reasonable” warning requirements of Proposition 65 beginning on February 27,
13 1988. (27 California Code of Regulations (“CCR”) § 25000, *et seq.*; § 25249.6 *et seq.*)

14 7. On October 1, 1992, the State of California officially listed “lead and lead compounds”
15 on the Governor’s list of chemicals known to cause cancer. Lead and lead compounds became
16 subject to the warning requirement one year later and were therefore subject to the “clear and
17 reasonable” warning requirements of Proposition 65 beginning on October 1, 1993 (27 CCR §
18 25000, *et seq.*; 25249.6 *et seq.*)

19 8. The ingestion of the PROTEIN SUPPLEMENTS causes exposures to lead at levels
20 requiring a “clear and reasonable warning” under Proposition 65, § 25249.6. Defendants have
21 failed to provide these health hazard warnings as required by Proposition 65.

22 9. Plaintiff seeks the following relief through this action:

- 23 a. to prohibit the manufacture, packaging, distribution, marketing, or sale of
24 PROTEIN SUPPLEMENTS in California by Defendants without providing
25 clear and reasonable warnings regarding the risks of cancer and/or
26 reproductive toxicity posed by exposure to lead through the ingestion and use
27 of Defendants’ PROTEIN SUPPLEMENTS;
- 28 b. to assess civil penalties in the amount of \$2,500 per day per violation to
remedy Defendants’ ongoing failure to provide clear and reasonable warnings
to thousands of individuals that are being exposed, and continue to be

1 exposed, to lead through the ingestion of Defendants' PROTEIN
2 SUPPLEMENTS; and

- 3 c. to compel Defendants to provide clear and reasonable warnings regarding the
4 risks posed by Defendants' PROTEIN SUPPLEMENTS required by
5 Proposition 65 to all past purchasers of the products in question.
6

7 **PARTIES**

8 10. Plaintiff ENVIRONMENTAL LAW FOUNDATION ("ELF") is a California nonprofit
9 organization founded on Earth Day in 1991, committed to the enforcement of environmental,
10 toxics, and community right-to-know laws. ELF has a longstanding interest in reducing health
11 hazards to the public posed by lead, and particularly to protect those with the least choice and
12 greatest vulnerability to toxic risks: children, inner city dwellers, and workers. ELF is dedicated
13 to the preservation and enhancement of human health and the environment, and has been
14 enforcing Proposition 65 and other laws that protect consumers, communities and the
15 environment for nearly twenty years. ELF brings this action pursuant to § 25249.7(d) in the
16 interest of the general public.

17 11. Defendant ABBOTT LABORATORIES, an Illinois corporation with its principal place
18 of business located at 100 Abbott Park Road, Abbott Park, Illinois 60064-3500 (hereinafter
19 "ABBOTT"), is a person in the course of doing business within the meaning of § 25249.11.
20 ABBOTT sells, manufactures, packages, distributes or markets PROTEIN SUPPLEMENTS for
21 sale or use in California that expose individuals to lead, including but not limited to EAS 100%
22 Whey Protein (23 g) and EAS Myoplex Lite Ready To Drink. These activities are currently
23 occurring or have occurred at times relevant to this Complaint.

24 12. Defendant BIOCHEM, a brand of COUNTRY LIFE, LLC, a New York Corporation with
25 its principal place of business located at 180 Motor Parkway, Hauppauge, NY 11788 (hereinafter
26 "BIOCHEM") is a person in the course of doing business within the meaning of § 25249.11.
27 BIOCHEM sells, manufactures, packages, distributes or markets PROTEIN SUPPLEMENTS for
28 sale or use in California that expose individuals to lead, including but not limited to BIOCHEM

1 SPORTS 100% Greens & Whey Powder. These activities are currently occurring or have
2 occurred at times relevant to this Complaint.

3 13. Defendant BIO-ENGINEERED SUPPLEMENTS & NUTRITION, INC., a Delaware
4 Corporation with its principal place of business located at 5901 Broken Sound Parkway, NW,
5 Suite 600, Boca Raton, FL 33487 (hereinafter “BSN”) is a person in the course of doing
6 business within the meaning of § 25249.11. BSN sells, manufactures, packages, distributes or
7 markets PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to lead,
8 including but not limited to BSN Core Series Lean Dessert Protein Shake and BSN Core Series
9 Syntha-6 Protein Beverage. These activities are currently occurring or have occurred at times
10 relevant to this Complaint.

11 14. Defendant DYMATIZE ENTERPRISES, INC., a Texas Corporation with its principal
12 place of business located at 13737 N. Stemmons Freeway, Farmers Branch, TX 75234
13 (hereinafter “DYMATIZE”) is a person in the course of doing business within the meaning of §
14 25249.11. DYMATIZE sells, manufactures, packages, distributes or markets PROTEIN
15 SUPPLEMENTS for sale or use in California that expose individuals to lead, including but not
16 limited to Dymatize Nutrition Elite Whey Protein Isolate. These activities are currently
17 occurring or have occurred at times relevant to this Complaint.

18 15. Defendant HEALTHWATCHERS (DE), INC., a Delaware Corporation with its principal
19 place of business located at 2100 Smithtown Avenue, Ronkonkoma, NY 11779 (hereinafter
20 “HEALTHWATCHERS”) is a person in the course of doing business within the meaning of §
21 25249.11. HEALTHWATCHERS sells, manufactures, packages, distributes or markets
22 PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to lead,
23 including but not limited to Body Fortress Super Advanced Whey Protein. These activities are
24 currently occurring or have occurred at times relevant to this Complaint.

25 16. Defendant OPTIMUM NUTRITION, INC., an Illinois Corporation with its principal
26 place of business located at 700 North Commerce Street, Aurora, IL 60504 (hereinafter
27 “OPTIMUM NUTRITION”) is a person in the course of doing business within the meaning of §
28 25249.11. OPTIMUM NUTRITION sells, manufactures, packages, distributes or markets
PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to lead,

1 including but not limited to various flavors of ON 100% Whey Protein (23 g). These activities
2 are currently occurring or have occurred at times relevant to this Complaint.

3 17. Defendant VITAMIN SHOPPE, INC., a Delaware Corporation with its principal place of
4 business located at 2101 91st Street, North Bergen, NJ 07047 (hereinafter “VITAMIN
5 SHOPPE”) is a person in the course of doing business within the meaning of § 25249.11.
6 VITAMIN SHOPPE sells, manufactures, packages, distributes or markets PROTEIN
7 SUPPLEMENTS for sale or use in California that expose individuals to lead, including but not
8 limited to The Vitamin Shoppe Body Building Whey Enhanced Protein and Body Tech, Whey
9 Tech. These activities are currently occurring or have occurred at times relevant to this
10 Complaint.

11 18. The true names and capacities of Defendants sued herein under California Code of Civil
12 Procedure § 474 as DOES 1 through 200, inclusive, are presently unknown to Plaintiff, who
13 therefore sues these Defendants by such fictitious names. Plaintiff will seek to amend this
14 Complaint and include these Doe Defendants’ true names and capacities when they are
15 ascertained. Each of the fictitiously named Defendants is a person in the course of doing
16 business within the meaning of § 25249.11. DOES 1 through 200 sell, manufacture, package,
17 distribute or market PROTEIN SUPPLEMENTS for sale or use in California that expose
18 individuals to lead.

19 19. Each of the Defendants herein has employed ten (10) or more persons at all times
20 relevant to this action.

21 JURISDICTION AND VENUE

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

25 21. This Court has jurisdiction over Defendants named herein because Defendants either are
26 located in this State or are foreign corporations authorized to do business in California and
27 registered with the California Secretary of State; or who do sufficient business in California,
28 have sufficient minimum contacts with California, or otherwise intentionally avail themselves of
the markets within California through the sale, promotion, marketing and distribution of their

1 products in California to render the exercise of jurisdiction by the California courts permissible
2 under traditional notions of fair play and substantial justice.

3 22. Venue is proper in this Court because the products at issue are promoted, available for
4 sale, sold and used in this County; a substantial portion of the transactions complained of herein
5 occurred here; contracts relating to the purchase of this product were entered into, made and
6 were to be performed in this County; and/or Defendants have received substantial compensation
7 from the sale of the product at issue in this County by doing business here.

8 23. On June 3, 2010 and June 16, 2010 ELF sent 60-Day Notices of Proposition 65 violations
9 to the requisite public enforcement agencies and to Defendants. These notices were issued
10 pursuant to, and in compliance with, the requirements of § 25249.7(d) and the statute's
11 implementing regulations regarding the notice of the violations to be given to certain public
12 enforcement agencies and to the violator. The notices given included, *inter alia*, the following
13 information: the name, address, and telephone number of the noticing individual; the name of the
14 alleged violator; the statute violated; the approximate time period during which violations
15 occurred; and descriptions of the violations, including the chemical involved, the routes of toxic
16 exposure, and the specific products and type of products causing the violations. The named
17 Defendants and the California Attorney General were provided copies of the 60-Day Notice by
18 mail. Additionally, the named Defendants were each provided with a copy of a document
19 entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
20 Summary," which is also known as Appendix A to Title 27 of CCR § 25903.

21 24. ELF also sent a Certificate of Merit for each of the Notices to the California Attorney
22 General, the District Attorneys of every county in California, the City Attorneys of every
23 California city with a population greater than 750,000, and to the named Defendants. In
24 compliance with § 25249.7(d) and 11 CCR § 3101, each of the Certificates certified that ELF's
25 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or
26 expertise who reviewed facts, studies or other data regarding the exposures to Lead alleged in
27 each of the Notices; and (2) based on the information obtained through such consultations,
28 believes that there is a reasonable and meritorious case for a citizen enforcement action based on
the facts alleged in each of the Notices. In compliance with § 25249.7(d) and 11 CCR § 3102,

1 each of the Certificates served on the Attorney General included factual information – provided
2 on a confidential basis – sufficient to establish the basis for the Certificate.

3 25. None of these public prosecutors has commenced and is diligently prosecuting an action
4 against the violations at issue herein, although the notice period provided in § 25249.7 has
5 elapsed since such notice was provided.

6 **STATUTORY AND REGULATORY BACKGROUND**

7 26. Proposition 65 is an initiative statute passed by a vote of the People in 1986.

8 27. Proposition 65 provides the circumstances under which persons must be warned before
9 they are exposed to chemicals/metals that cause cancer, birth defects, or other reproductive harm.
10 Section 25249.6 states the warning requirement:

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

14 28. An exposure to a chemical in a consumer product is one “which results from a person’s
15 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer
16 good, or any exposure that results from receiving a consumer service.” 27 CCR § 25601(b).

17 29. Proposition 65 establishes a procedure by which the Governor lists chemicals known to
18 the state to cause reproductive toxicity and/or cancer. *See* § 25249.8. Pursuant to this authority,
19 on February 27, 1987 lead was placed on the list of reproductive toxins. Lead is specifically
20 identified as a reproductive toxicant under three subcategories: “developmental reproductive
21 toxicity,” which means harm to the developing fetus; “female reproductive toxicity,” which
22 means harm to the female reproductive system; and “male reproductive toxicity,” which means
23 harm to the male reproductive system. 27 CCR § 27001(c).

24 30. The warning requirement under Proposition 65 for a given chemical goes into effect one
25 year after the Governor places that chemical on the list. § 25249.10(b). Therefore, lead became
26 subject to the clear and reasonable warning requirement regarding reproductive toxicants under
27 Proposition 65 on February 27, 1988.

28

1 31. On October 1, 1992, the State of California officially listed “lead and lead compounds” as
2 chemicals known to cause cancer. On October 1, 1993, one year after being so listed, lead and
3 lead compounds became subject to the clear and reasonable warning requirement regarding
4 carcinogens under Proposition 65. 27 CCR § 27001(b); § 25249.10(b).

5 **FACTS**

6 32. Defendants manufacture, sell, and/or distribute a variety of PROTEIN SUPPLEMENTS
7 labeled, marketed and intended for human consumption, including, but not limited to, those
8 listed in paragraphs 11 - 17, *supra*. These PROTEIN SUPPLEMENTS are manufactured,
9 distributed and/or sold in California for the purpose of distribution and retail sale in California.

10 33. The PROTEIN SUPPLEMENTS at issue in this Complaint contain lead which results in
11 human exposure to the lead upon its consumption.

12 34. Plaintiff is informed and believes and therefore alleges that one or more of the PROTEIN
13 SUPPLEMENTS have been sold to and/or ingested by individuals in California without clear
14 and reasonable warnings since at least June 3, 2009. The PROTEIN SUPPLEMENTS continue
15 to be offered for sale in California without the requisite warning information.

16 35. Under Proposition 65, an exposure is “knowing” where the party responsible for such
17 exposure has:

18 “knowledge of the fact that a discharge of, release of, or exposure to a chemical
19 listed pursuant to Section 25249.8(a) of the Act is occurring. No knowledge that
20 the discharge, release or exposure is unlawful is required.”

21 27 CCR § 25102(n). This knowledge may be actual or constructive. *See, e.g.*, Final Statement
22 of Reasons Revised (November 4, 1988) for former 22 CCR § 12201.

23 36. Plaintiff is informed and believes and thereon alleges that the Defendants knew, and/or
24 reasonably should have known, that the foreseeable use of their PROTEIN SUPPLEMENTS
25 results in exposure to lead, and that the levels of lead exceed the lead exposure levels which
26 trigger warning requirements under Proposition 65.

27 37. Defendants know and intend that individuals will ingest the PROTEIN SUPPLEMENTS,
28 thus exposing them to lead.

1 38. Nevertheless, and in violation of § 25249.6 *et seq.*, Defendants have not provided clear
2 and reasonable warnings to inform the public that their PROTEIN SUPPLEMENTS expose
3 consumers to lead, a chemical known to the State of California to cause cancer and reproductive
4 toxicity.

5 39. Defendants have, in the course of doing business, knowingly and intentionally exposed
6 individuals to a chemical known to the State of California to cause cancer and reproductive
7 toxicity without first providing a clear and reasonable warning as required by § 25249.6 and §
8 25249.11(f). As a direct result of Defendants' acts and omissions, the general public in
9 California is being regularly, unlawfully, and involuntarily exposed to lead, a known
10 reproductive toxin and carcinogen.

11 40. The PROTEIN SUPPLEMENTS continue to be offered for sale in California without a
12 clear and reasonable warning.

13 **FIRST CAUSE OF ACTION**

14 (Violations of California Health and Safety Code § 25249.6 *et seq.*)

15 (Against All Defendants)

16 41. Plaintiff incorporates by reference ¶¶ 1 through 40 as if fully set forth herein.

17 42. The People of the State of California have declared in Proposition 65 their right “[t]o be
18 informed about exposures to chemicals that cause cancer, birth defects and other reproductive
19 harm.” Proposition 65, Section 1(b) of the Initiative Measure.

20 43. To carry out those statutory purposes, Proposition 65 requires that a clear and reasonable
21 warning be given by persons who, in the course of doing business, knowingly and intentionally
22 expose any individual to a chemical known to the State of California to cause cancer and
23 reproductive harm.

24 44. Proposition 65 provides that any person “violating or threatening to violate” the statute
25 may be enjoined in any court of competent jurisdiction. § 25249.7. “Threaten to violate” is
26 defined to mean “to create a condition in which there is a substantial probability that a violation
27 will occur.” § 25249.11(e).

28 45. Violators of Proposition 65 are liable for civil penalties of up to \$2500.00 per day per
violation, recoverable in a civil action. § 25249.7(b).

1 46. Defendants have engaged and continue to engage in conduct which violates § 25249.6.
2 This conduct includes the manufacturing, packaging, distributing and selling of PROTEIN
3 SUPPLEMENTS the foreseeable use of which results in exposing the public to lead, known to
4 the State of California to cause reproductive toxicity and cancer, without first providing a clear
5 and reasonable warning pursuant to §§ 25249.6 and 25249.11(f). Defendants have, therefore, in
6 the course of doing business, knowingly and intentionally exposed individuals to a chemical
7 known to the State of California to cause reproductive toxicity and cancer without first providing
8 a clear and reasonable warning.

9 47. By the above-described acts, Defendants are liable, pursuant to § 25249.7(b), for a civil
10 penalty of up to \$2500 per day per individual exposure to lead through Defendants' PROTEIN
11 SUPPLEMENTS.

12 48. An action for injunctive relief under Proposition 65 is specifically authorized by §
13 25249.7(a).

14 49. Continuing commission by Defendants of the acts alleged above will irreparably harm the
15 citizens of the State of California, for which harm they have no plain, speedy, or adequate
16 remedy at law.

17 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

18 **THE NEED FOR INJUNCTIVE RELIEF**

19 50. By committing the acts alleged herein, the Defendants have caused irreparable harm for
20 which there is no plain, speedy or adequate remedy at law. In the absence of equitable relief, the
21 general public will continue to be involuntarily exposed to the lead contained in Defendants'
22 PROTEIN SUPPLEMENTS, creating a substantial risk of irreparable injury by:

- 23 a. continuing to cause consumers to be involuntarily and unwittingly exposed to
24 lead through the ingestion of the PROTEIN SUPPLEMENTS; and,
25 b. preventing consumers from distinguishing between products that cause
26 exposures to lead and similar products that do not cause such exposures.
27
28

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for the following relief:

- 3 A. a preliminary and permanent injunction, pursuant to § 25249.7(b), enjoining Defendants,
4 their agents, employees, assigns and all persons acting in concert or participating with
5 Defendants from importing, manufacturing, packaging, distributing, marketing or selling the
6 PROTEIN SUPPLEMENTS in California without first providing a clear and reasonable warning
7 that the users of the PROTEIN SUPPLEMENTS are exposed, within the meaning of Proposition
8 65, to lead;
- 9 B. an assessment of civil penalties, pursuant to § 25249.7(b), against each Defendant in the
10 amount of \$2500 per day for each violation of Proposition 65;
- 11 C. that Defendants be ordered to identify and locate each individual who purchased their
12 PROTEIN SUPPLEMENTS and to provide a warning to each person that the PROTEIN
13 SUPPLEMENTS have exposed, or will expose, that person to chemicals known to cause cancer
14 and reproductive harm;
- 15 D. that the Court, pursuant to § 25249.7(a), order Defendants to take any other action this
16 Court may deem necessary and proper;
- 17 E. an award to Plaintiff of its reasonably attorneys' fees and costs of suit pursuant to
18 California Code of Civil Procedure § 1021.5 as Plaintiff shall specify in further application to the
19 Court; and,
- 20 F. such other and further relief as may be just and proper.

21
22 DATED: August 26, 2010

BARON & BUDD, P.C.

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