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

17 ENVIRONMENTAL LAW FOUNDATION,
 on behalf of the General Public,
 18 Plaintiff,
 19 vs.

20 CHAMPION NUTRITION, INC.; CHEMI-
 21 SOURCE, INC., doing business as
 METABOLIC RESPONSE MODIFIERS; ISS
 22 RESEARCH, LLC, doing business as
 INTEGRATED SPORTS SCIENCE;
 23 IDEASPHERE, INC., operating as ISI
 BRANDS, INC.; NATURAL ORGANICS
 24 LABORATORIES; THE ISOPURE
 COMPANY, LLC, doing business as
 25 NATURE'S BEST; VITAL
 PHARMACEUTICALS, INC.; LABRADA
 26 BODYBUILDING NUTRITION, INC., doing
 business as LABRADA NUTRITION; and
 27 DOES 1 through 200,
 28 Defendants.

**ENDORSED
 FILED**
 Superior Court of California
 County of San Francisco

DEC 17 2010

CLERK OF THE COURT
 BY: CAROLYN BALISTRERI
 Deputy Clerk

Case No.: CGC-10-505382

**FIRST AMENDED 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 a 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

1 to thousands of individuals that are being exposed, and continue to be
2 exposed, to lead through the ingestion of Defendants' PROTEIN
3 SUPPLEMENTS; and

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

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 CHAMPION NUTRITION, INC., a Florida corporation with its principal
18 place of business located at 1301 Sawgrass Corporate Parkway, Sunrise, FL 33323 (hereinafter
19 "CHAMPION NUTRITION"), is a person in the course of doing business within the meaning of
20 § 25249.11. CHAMPION NUTRITION sells, manufactures, packages, distributes or markets
21 PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to lead,
22 including but not limited to Champion Nutrition Heavyweight Gainer 900 Vanilla Shake. These
23 activities are currently occurring or have occurred at times relevant to this Complaint.

24 12. Defendant CHEMI-SOURCE, INC., doing business as METABOLIC RESPONSE
25 MODIFIERS, a California Corporation with its principal place of business located at 2665 Vista
26 Pacific Drive, Oceanside, CA 92056 (hereinafter "MRM") is a person in the course of doing
27 business within the meaning of § 25249.11. MRM sells, manufactures, packages, distributes or
28 markets PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to lead,

1 including but not limited to MRM All Natural Gainer French Vanilla. These activities are
2 currently occurring or have occurred at times relevant to this Complaint.

3 13. Defendant ISS RESEARCH, LLC, doing business as INTEGRATED SPORTS
4 SCIENCE, a North Carolina Corporation with its principal place of business located at 5400
5 W.T. Harris Blvd., Suite L, Charlotte, NC 28269 (hereinafter “ISS”) is a person in the course of
6 doing business within the meaning of § 25249.11. ISS sells, manufactures, packages, distributes
7 or markets PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to
8 lead, including but not limited to OhYeah! Total Protein System Vanilla Crème. These activities
9 are currently occurring or have occurred at times relevant to this Complaint.

10 14. Defendant IdeaSphere, Inc., operating as ISI Brands, Inc., a Delaware Corporation with
11 its principal place of business located at 600 East Quality Drive, American Fork, UT 84003
12 (hereinafter “ISI”) is a person in the course of doing business within the meaning of § 25249.11.
13 ISI sells, manufactures, packages, distributes or markets PROTEIN SUPPLEMENTS for sale or
14 use in California that expose individuals to lead, including but not limited to TWINLAB 100%
15 Whey Protein Fuel Vanilla Slam. These activities are currently occurring or have occurred at
16 times relevant to this Complaint.

17 15. Defendant THE ISOPURE COMPANY, LLC, doing business as NATURE’S BEST, a
18 Delaware Corporation with its principal place of business located at 195 Engineers Road,
19 Hauppauge, NY 11788 (hereinafter “ISOPURE”) is a person in the course of doing business
20 within the meaning of § 25249.11. ISOPURE sells, manufactures, packages, distributes or
21 markets PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to lead,
22 including but not limited to Nature’s Best Perfect Zero Carb Isopure Creamy Vanilla. These
23 activities are currently occurring or have occurred at times relevant to this Complaint.

24 16. Defendant NATURAL ORGANICS LABORATORIES, a New York Corporation with
25 its principal place of business located at 9500 New Horizons Boulevard, Amityville, NY 11701
26 (hereinafter “NATURAL ORGANICS”) is a person in the course of doing business within the
27 meaning of § 25249.11. NATURAL ORGANICS sells, manufactures, packages, distributes or
28 markets PROTEIN SUPPLEMENTS for sale or use in California that expose individuals to lead,

1 including but not limited to Nature’s Plus Spiru-Tein Whey High Protein Energy Meal Vanilla.
2 These activities are currently occurring or have occurred at times relevant to this Complaint.

3 17. Defendant VITAL PHARMACEUTICALS, INC., a Florida Corporation with its
4 principal place of business located at 1600 North Park Drive, Weston, FL 33326 (hereinafter
5 “VITAL PHARMACEUTICALS”) is a person in the course of doing business within the
6 meaning of § 25249.11. VITAL PHARMACEUTICALS sells, manufactures, packages,
7 distributes or markets PROTEIN SUPPLEMENTS for sale or use in California that expose
8 individuals to lead, including but not limited to VPX Protein Rush Vanilla Dream. These
9 activities are currently occurring or have occurred at times relevant to this Complaint.

10 18. Defendant LABRADA BODYBUILDING NUTRITION, INC., doing business as
11 LABRADA NUTRITION, a Texas Corporation with its principal place of business located at
12 333 Northpark Central Drive, Houston, TX 77073 (hereinafter “LABRADA”) is a person in the
13 course of doing business within the meaning of § 25249.11. LABRADA sells, manufactures,
14 packages, distributes or markets PROTEIN SUPPLEMENTS for sale or use in California that
15 expose individuals to lead, including but not limited to Lean Body Vanilla Ice Cream Hi-Protein
16 Milk Shake, Lean Body Bananas and Cream Hi-Protein Milk Shake, Lean Body Strawberries
17 and Cream Hi-Protein Milk Shake, Lean Body Mass 60 Muscle Builder Milk Shake Vanilla Ice
18 Cream, and Lean Body Mass 60 Muscle Builder Milk Shake Vanilla Ice Cream. These activities
19 are currently occurring or have occurred at times relevant to this Complaint.

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

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

3 **JURISDICTION AND VENUE**

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

7 22. This Court has jurisdiction over Defendants named herein because Defendants either are
8 located in this State or are foreign corporations authorized to do business in California and
9 registered with the California Secretary of State; or who do sufficient business in California,
10 have sufficient minimum contacts with California, or otherwise intentionally avail themselves of
11 the markets within California through the sale, promotion, marketing and distribution of their
12 products in California to render the exercise of jurisdiction by the California courts permissible
13 under traditional notions of fair play and substantial justice.

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

19 24. On August 6, 2010 and August 19, 2010 ELF sent 60-Day Notices of Proposition 65
20 violations to the requisite public enforcement agencies and to Defendants. These notices were
21 issued pursuant to, and in compliance with, the requirements of § 25249.7(d) and the statute's
22 implementing regulations regarding the notice of the violations to be given to certain public
23 enforcement agencies and to the violator. The notices given included, *inter alia*, the following
24 information: the name, address, and telephone number of the noticing individual; the name of the
25 alleged violator; the statute violated; the approximate time period during which violations
26 occurred; and descriptions of the violations, including the chemical involved, the routes of toxic
27 exposure, and the specific products and type of products causing the violations. The named
28 Defendants and the California Attorney General were provided copies of the 60-Day Notice by

1 mail. Additionally, the named Defendants were each provided with a copy of a document
2 entitled “The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
3 Summary,” which is also known as Appendix A to Title 27 of CCR § 25903.

4 25. ELF also sent a Certificate of Merit for each of the Notices to the California Attorney
5 General, the District Attorneys of every county in California, the City Attorneys of every
6 California city with a population greater than 750,000, and to the named Defendants. In
7 compliance with § 25249.7(d) and 11 CCR § 3101, each of the Certificates certified that ELF’s
8 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or
9 expertise who reviewed facts, studies or other data regarding the exposures to Lead alleged in
10 each of the Notices; and (2) based on the information obtained through such consultations,
11 believes that there is a reasonable and meritorious case for a citizen enforcement action based on
12 the facts alleged in each of the Notices. In compliance with § 25249.7(d) and 11 CCR § 3102,
13 each of the Certificates served on the Attorney General included factual information – provided
14 on a confidential basis – sufficient to establish the basis for the Certificate.

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

18 **STATUTORY AND REGULATORY BACKGROUND**

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

20 28. Proposition 65 provides the circumstances under which persons must be warned before
21 they are exposed to chemicals/metals that cause cancer, birth defects, or other reproductive harm.

22 Section 25249.6 states the warning requirement:

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

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

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

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

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

16 **FACTS**

17 33. Defendants manufacture, sell, and/or distribute a variety of PROTEIN SUPPLEMENTS
18 labeled, marketed and intended for human consumption, including, but not limited to, those
19 listed in paragraphs 11 - 18, *supra*. These PROTEIN SUPPLEMENTS are manufactured,
20 distributed and/or sold in California for the purpose of distribution and retail sale in California.

21 34. The PROTEIN SUPPLEMENTS at issue in this Complaint contain lead which results in
22 human exposure to the lead upon its consumption.

23 35. Plaintiff is informed and believes and therefore alleges that one or more of the PROTEIN
24 SUPPLEMENTS have been sold to and/or ingested by individuals in California without clear
25 and reasonable warnings since at least August 6, 2009. The PROTEIN SUPPLEMENTS
26 continue to be offered for sale in California without the requisite warning information.

27 36. Under Proposition 65, an exposure is “knowing” where the party responsible for such
28 exposure has:

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

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

6 37. Plaintiff is informed and believes and thereon alleges that the Defendants knew that the
7 foreseeable use of their PROTEIN SUPPLEMENTS results in exposure to lead, and that the
8 levels of lead exceed the lead exposure levels which trigger warning requirements under
9 Proposition 65.

10 38. Defendants know and intend that individuals will ingest the PROTEIN SUPPLEMENTS,
11 thus exposing them to lead.

12 39. Nevertheless, and in violation of § 25249.6 *et seq.*, Defendants have not provided clear
13 and reasonable warnings to inform the public that their PROTEIN SUPPLEMENTS expose
14 consumers to lead, a chemical known to the State of California to cause cancer and reproductive
15 toxicity.

16 40. Defendants have, in the course of doing business, knowingly and intentionally exposed
17 individuals to a chemical known to the State of California to cause cancer and reproductive
18 toxicity without first providing a clear and reasonable warning as required by § 25249.6 and §
19 25249.11(f). As a direct result of Defendants’ acts and omissions, the general public in
20 California is being regularly, unlawfully, and involuntarily exposed to lead, a known
21 reproductive toxin and carcinogen.

22 41. The PROTEIN SUPPLEMENTS continue to be offered for sale in California without a
23 clear and reasonable warning.

24 **FIRST CAUSE OF ACTION**

25 (Violations of California Health and Safety Code § 25249.6 *et seq.*)
26 (Against All Defendants)

27 42. Plaintiff incorporates by reference ¶¶ 1 through 41 as if fully set forth herein.
28

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

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

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

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

14 47. Defendants have engaged and continue to engage in conduct which violates § 25249.6.
15 This conduct includes the manufacturing, packaging, distributing and selling of PROTEIN
16 SUPPLEMENTS the foreseeable use of which results in exposing the public to lead, known to
17 the State of California to cause reproductive toxicity and cancer, without first providing a clear
18 and reasonable warning pursuant to §§ 25249.6 and 25249.11(f). Defendants have, therefore, in
19 the course of doing business, knowingly and intentionally exposed individuals to a chemical
20 known to the State of California to cause reproductive toxicity and cancer without first providing
21 a clear and reasonable warning.

22 48. By the above-described acts, Defendants are liable, pursuant to § 25249.7(b), for a civil
23 penalty of up to \$2500 per day per individual exposure to lead through Defendants’ PROTEIN
24 SUPPLEMENTS.

25 49. An action for injunctive relief under Proposition 65 is specifically authorized by §
26 25249.7(a).

27
28

1 50. Continuing commission by Defendants of the acts alleged above will irreparably harm the
2 citizens of the State of California, for which harm they have no plain, speedy, or adequate
3 remedy at law.

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

5 **THE NEED FOR INJUNCTIVE RELIEF**

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

- 10 a. continuing to cause consumers to be involuntarily and unwittingly exposed to
11 lead through the ingestion of the PROTEIN SUPPLEMENTS; and,
12 b. preventing consumers from distinguishing between products that cause
13 exposures to lead and similar products that do not cause such exposures.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff prays for the following relief:

16 A. a preliminary and permanent injunction, pursuant to § 25249.7(b), enjoining Defendants,
17 their agents, employees, assigns and all persons acting in concert or participating with
18 Defendants from importing, manufacturing, packaging, distributing, marketing or selling the
19 PROTEIN SUPPLEMENTS in California without first providing a clear and reasonable warning
20 that the users of the PROTEIN SUPPLEMENTS are exposed, within the meaning of Proposition
21 65, to lead;

22 B. an assessment of civil penalties, pursuant to § 25249.7(b), against each Defendant in the
23 amount of \$2500 per day for each violation of Proposition 65;

24 C. that Defendants be ordered to identify and locate each individual who purchased their
25 PROTEIN SUPPLEMENTS and to provide a warning to each person that the PROTEIN
26 SUPPLEMENTS have exposed, or will expose, that person to chemicals known to cause cancer
27 and reproductive harm;

- 1 D. that the Court, pursuant to § 25249.7(a), order Defendants to take any other action this
2 Court may deem necessary and proper;
- 3 E. an award to Plaintiff of its reasonably attorneys' fees and costs of suit pursuant to
4 California Code of Civil Procedure § 1021.5 as Plaintiff shall specify in further application to the
5 Court; and,
- 6 F. such other and further relief as may be just and proper.

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9 DATED: December 17, 2010

BARON & BUDD, P.C.

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