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SAN FRANCISCO COUNTY  
SUPERIOR COURT

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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
7 COUNTY OF SAN FRANCISCO

8 ENVIRONMENTAL RESEARCH  
9 CENTER, a California non-profit  
10 corporation,

11 Plaintiff,

12 v.

13 TOPSPIN PARTNERS, L.P.,  
14 CHALLENGER HOLDINGS, INC., and  
DOES 1-50, inclusive,

15 Defendants.  
16

Case No. **CGC-11-513931**

**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

[Health & Safety Code §25249.5, et seq.]

17  
18 Plaintiff Environmental Research Center brings this action in the interests of the general  
19 public and, on information and belief, hereby alleges:

20 **INTRODUCTION**

21 1. This action seeks to remedy Defendants' continuing failure to warn consumers in  
22 California that they are being exposed to lead, a substance known to the State of California<sup>1</sup> to  
23 cause cancer, birth defects and other reproductive harm.

24 2. Defendants have manufactured, packaged, distributed, marketed, sold and/or have  
25 otherwise been involved in the chain of commerce of, and continue to manufacture, package,  
26 distribute, market, sell and/or otherwise continue to be involved in the chain of commerce of the  
27 following ingestible products, which contain the chemical lead and which have been and  
28 continue to be offered for sale, sold and/or otherwise provided for use and/or handling to

<sup>1</sup> All statutory and regulatory references herein are to California law, unless otherwise specified.

1 individuals in California:

- 2 a. Innovative Delivery Systems Multi-Pro Whey Isolate Blend – Belgian  
3 Chocolate.
- 4 b. Innovative Delivery Systems New Whey Liquid Protein Orange.
- 5 c. Innovative Delivery Systems New Whey Liquid Protein Grape.
- 6 d. Innovative Delivery Systems New Whey Liquid Protein Fruit Punch.
- 7 e. IDS Rapid Release Lean Up.

8 These listed products are hereinafter referred to together as “THE PRODUCTS”.

9 3. The use and/or handling of THE PRODUCTS causes exposures to lead at levels  
10 requiring a “clear and reasonable warning” under California’s Safe Drinking Water and Toxic  
11 Enforcement Act of 1986, Health & Safety Code (“H&S Code”) §25249.5, *et. seq.* (also known  
12 as “Proposition 65”). Defendants have failed to provide the health hazard warnings required by  
13 Proposition 65.

14 4. The continued manufacturing, packaging, distributing, marketing and/or sales of  
15 THE PRODUCTS without the required health hazard warnings, causes individuals to be  
16 involuntarily and unwittingly exposed to levels of lead that violate Proposition 65.

17 5. Plaintiff seeks injunctive relief enjoining Defendants from the continued  
18 manufacturing, packaging, distributing, marketing and/or selling of THE PRODUCTS for sale or  
19 use in California without first providing clear and reasonable warnings, within the meaning of  
20 Proposition 65, regarding the risks of cancer, birth defects and other reproductive harm posed by  
21 exposure to lead through the use and/or handling of THE PRODUCTS. Plaintiff seeks an  
22 injunctive order compelling Defendants to bring their business practices into compliance with  
23 Proposition 65 by providing clear and reasonable warnings to each individual who may be  
24 exposed to lead from the use and/or handling of THE PRODUCTS.

25 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to  
26 remedy Defendants’ failure to provide clear and reasonable warnings regarding exposures to the  
27 lead.

### 28 **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this action pursuant to California Constitution  
Article VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except

1 those given by statute to other trial courts.” The statute under which this action is brought does  
2 not specify any other basis for jurisdiction.

3 8. This Court has jurisdiction over Defendants because, based on information and  
4 belief, Defendants are businesses having sufficient minimum contacts with California, or  
5 otherwise intentionally availing themselves of the California market through the marketing,  
6 distribution and/or sale of THE PRODUCTS in the State of California to render the exercise of  
7 jurisdiction over them by the California courts consistent with traditional notions of fair play and  
8 substantial justice.

9 9. This Court is the proper venue for this action because the Defendants have  
10 violated California law in the County of San Francisco. Furthermore, this Court is the proper  
11 venue under Code of Civil Procedure §395.5 and H&S Code §25249.7(a), which provides that  
12 any person who violates or threatens to violate H&S Code §§25249.5 or 25249.6 may be  
13 enjoined in any court of competent jurisdiction.

### 13 PARTIES

14 10. Plaintiff Environmental Research Center (“ERC”) is a non-profit corporation  
15 organized under California’s Non-Profit Benefit Corporation Law. ERC is dedicated to, among  
16 other causes, reducing the use and misuse of hazardous and toxic substances, consumer  
17 protection, worker safety and corporate responsibility.

18 11. ERC is a person within the meaning of H&S Code §25118 and brings this  
19 enforcement action in the public interest pursuant to H&S Code §25249.7(d).

20 12. Defendant TOPSPIN PARTNERS, L.P. is a limited partnership and Defendant  
21 CHALLENGER HOLDINGS, INC. is a corporation, thus each being a person within the  
22 meaning of H&S Code §25249.11(a). Defendants TOPSPIN PARTNERS, L.P. and  
23 CHALLENGER HOLDINGS, INC. have manufactured, packaged, distributed, marketed, sold  
24 and/or have otherwise been involved in the chain of commerce, and continue to manufacture,  
25 package, distribute, market, sell and/or otherwise continue to be involved in the chain of  
26 commerce of THE PRODUCTS for sale or use in California.

27 13. Defendants Does 1-50 are named herein under fictitious names, as their true  
28 names and capacities are unknown to Plaintiff. ERC is informed and believes, and thereon  
alleges, that each of said Does has manufactured, packaged, distributed, marketed, sold and/or  
has otherwise been involved in the chain of commerce of, and continues to manufacture,

1 package, distribute, market, sell and/or otherwise continues to be involved in the chain of  
2 commerce of THE PRODUCTS for sale or use in California, and/or is responsible, in some  
3 actionable manner, for the events and happenings referred to herein, either through its conduct or  
4 through the conduct of its agents, servants or employees, or in some other manner, causing the  
5 harms alleged herein. Plaintiff will seek leave to amend this Complaint to set forth the true  
6 names and capacities of Does when ascertained.

#### 7 STATUTORY BACKGROUND

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

11 15. To effect this goal, Proposition 65 requires that individuals be provided with a  
12 “clear and reasonable warning” before being exposed to substances listed by the State of  
13 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent  
14 part:

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

19 16. Proposition 65 provides that any person who “violates or threatens to violate” the  
20 statute “may be enjoined in any court of competent jurisdiction.” (H&S Code §25249.7(a).)  
21 “Threaten to violate” is defined to mean creating “a condition in which there is a substantial  
22 probability that a violation will occur.” (H&S Code §25249.11(e).) Violators are liable for civil  
23 penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S Code §25249.7(b).)

#### 24 FACTUAL BACKGROUND

25 17. On February 27, 1987, the State of California officially listed the chemical lead as  
26 a chemical known to cause developmental and reproductive toxicity. Lead became subject to the  
27 warning requirement one year later and was therefore subject to the “clear and reasonable”  
28 warning requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of  
Regulations (“CCR”) §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

18. On October 1, 1992, the State of California officially listed the chemical lead as a  
chemical known to cause cancer. Lead became subject to the warning requirement one year later

1 and was therefore subject to the “clear and reasonable” warning requirements of Proposition 65  
2 beginning on October 1, 1993. (27 CCR §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

3 19. Plaintiff is informed and believes, and based on such information and belief,  
4 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in  
5 California without the requisite clear and reasonable warnings before, on, and after September 4,  
6 2010. THE PRODUCTS continue to be marketed, distributed and sold in California without the  
7 requisite warning information.

8 20. As a proximate result of acts by Defendants, as persons in the course of doing  
9 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of  
10 California, including in the County of San Francisco, have been exposed to lead without clear  
11 and reasonable warnings. The individuals subject to exposures to lead include normal and  
12 foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE  
13 PRODUCTS.

14 21. At all times relevant to this action, Defendants have knowingly and intentionally  
15 exposed the users and/or handlers of THE PRODUCTS to lead without first giving clear and  
16 reasonable warnings to such individuals.

17 22. Individuals using or handling THE PRODUCTS are exposed to lead in excess of  
18 the “maximum allowable daily” and “no significant risk” levels determined by the State of  
19 California, as applicable.

20 23. At all times relevant to this action, Defendants have, in the course of doing  
21 business, failed to provide individuals using and/or handling THE PRODUCTS with clear and  
22 reasonable warnings that THE PRODUCTS expose individuals to lead.

23 24. THE PRODUCTS continue to be marketed, distributed, and/or sold in California  
24 without the requisite clear and reasonable warnings.

### 25 **FIRST CAUSE OF ACTION**

26 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning**  
27 **THE PRODUCTS, which are identified in Plaintiff’s September 4, 2010 and January 14,**  
28 **2011 60-Day Notices of Violations)**

29 25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,  
30 inclusive, as if specifically set forth herein.

31 26. On September 4, 2010 and January 14, 2011, Plaintiff sent 60-Day Notices of

1 Proposition 65 violations to the requisite public enforcement agencies and to Defendants  
2 TOPSPIN PARTNERS, L.P. and CHALLENGER HOLDINGS, INC. (“Notices of Violations”).  
3 THE PRODUCTS were identified in the Notices of Violations as containing lead exceeding  
4 allowable levels. The Notices of Violations were issued pursuant to, and in compliance with, the  
5 requirements of H&S Code §25249.7(d) and the statute’s implementing regulations regarding the  
6 notice of violations to be given to certain public enforcement agencies and to the violator. The  
7 Notices of Violations were issued as follows:

- 8 a. Defendants TOPSPIN PARTNERS, L.P. and CHALLENGER  
9 HOLDINGS, INC., and the California Attorney General were provided  
10 copies by Certified Mail of the Notices of Violations, along with  
11 Certificates of Merit by the attorney for the noticing party stating that  
12 there is a reasonable and meritorious cause for this action. The requisite  
13 county district attorneys and city attorneys were provided copies by First  
14 Class Mail of the Notices of Violations and Certificates of Merit.
- 15 b. Defendants TOPSPIN PARTNERS, L.P. and CHALLENGER  
16 HOLDINGS, INC. were provided, with each of their respective Notices of  
17 Violations, a copy of a document entitled “The Safe Drinking Water and  
18 Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is  
19 also known as Appendix A to Title 27 of CCR §25903.
- 20 c. The California Attorney General was provided, with each of the Notices of  
21 Violations, additional factual information sufficient to establish a  
22 basis for the Certificate of Merit, including the identity of the persons  
23 consulted with and relied on by the certifier, and the facts, studies, or other  
24 data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1)  
25 and 25249.7(h)(2).

26 27. The appropriate public enforcement agencies have failed to commence and  
27 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants  
28 based on the allegations herein.

29 28. By committing the acts alleged in this Complaint, Defendants at all times relevant  
30 to this action, and continuing through the present, have violated and continue to violate H&S  
31 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing

1 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding  
2 allowable exposure levels without Defendants first giving clear and reasonable warnings to such  
3 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,  
4 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of  
5 commerce of, and continue to manufacture, package, distribute, market, sell and/or otherwise  
6 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,  
7 and will be used and/or handled by individuals in California, without Defendants providing clear  
8 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,  
9 birth defects and other reproductive harm posed by exposure to lead through the use and/or  
10 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code  
11 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided  
12 for use and/or handling to individuals in California.

12 29. By the above-described acts, Defendants have violated H&S Code §25249.6 and  
13 are therefore subject to an injunction ordering Defendants to stop violating Proposition 65, and to  
14 provide required warnings to consumers and other individuals who will purchase, use and/or  
15 handle THE PRODUCTS.

16 30. An action for injunctive relief under Proposition 65 is specifically authorized by  
17 Health & Safety Code §25249.7(a).

18 31. Continuing commission by Defendants of the acts alleged above will irreparably  
19 harm the citizens of the State of California, for which harm they have no plain, speedy, or  
20 adequate remedy at law.

21 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

## 22 SECOND CAUSE OF ACTION

23 (Civil Penalties for Violations of Health and Safety Code §25249.5, *et seq.* concerning THE  
24 PRODUCTS, which are identified in Plaintiff's September 4, 2010 and January 14, 2011  
25 60-Day Notices of Violations)

26 32. Plaintiff realleges and incorporates by reference Paragraphs 1 through 31,  
27 inclusive, as if specifically set forth herein.

28 33. On September 4, 2010 and January 14, 2011, Plaintiff sent 60-Day Notices of  
Proposition 65 violations to the requisite public enforcement agencies and to Defendants  
TOPSPIN PARTNERS, L.P. and CHALLENGER HOLDINGS, INC. ("Notices of Violations").

1 THE PRODUCTS were identified in the Notices of Violations as containing lead exceeding  
2 allowable levels. The Notices of Violations were issued pursuant to, and in compliance with, the  
3 requirements of H&S Code §25249.7(d) and the statute's implementing regulations regarding the  
4 notice of violations to be given to certain public enforcement agencies and to the violator. The  
5 Notices of Violations were issued as follows:

- 6 a. Defendants TOPSPIN PARTNERS, L.P. and CHALLENGER  
7 HOLDINGS, INC., and the California Attorney General were provided  
8 copies by Certified Mail of the Notices of Violations, along with  
9 Certificates of Merit by the attorney for the noticing party stating that  
10 there is a reasonable and meritorious cause for this action. The requisite  
11 county district attorneys and city attorneys were provided copies by First  
12 Class Mail of the Notices of Violations and Certificates of Merit.
- 13 b. Defendants TOPSPIN PARTNERS, L.P. and CHALLENGER  
14 HOLDINGS, INC. were provided, with each of their respective Notices of  
15 Violations, a copy of a document entitled "The Safe Drinking Water and  
16 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is  
17 also known as Appendix A to Title 27 of CCR §25903.
- 18 c. The California Attorney General was provided, with each of the Notices of  
19 Violations, additional factual information sufficient to establish a  
20 basis for the Certificate of Merit, including the identity of the persons  
21 consulted with and relied on by the certifier, and the facts, studies, or other  
22 data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1)  
23 and 25249.7(h)(2).

24 34. The appropriate public enforcement agencies have failed to commence and  
25 diligently prosecute a cause of action under H&S Code §2524935, *et seq.* against Defendants  
26 based on the allegations herein.

27 35. By committing the acts alleged in this Complaint, Defendants at all times relevant  
28 to this action, and continuing through the present, have violated and continue to violate H&S  
Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing  
individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding  
allowable exposure levels without Defendants first giving clear and reasonable warnings to such

1 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,  
2 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of  
3 commerce of, and continue to manufacture, package, distribute, market, sell and/or otherwise  
4 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,  
5 and will be used and/or handled by individuals in California, without Defendants providing clear  
6 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,  
7 birth defects and other reproductive harm posed by exposure to lead through the use and/or  
8 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code  
9 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided  
10 for use and/or handling to individuals in California.

11 36. By the above-described acts, Defendants are liable, pursuant to H&S Code  
12 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6  
13 relating to THE PRODUCTS.

14 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

#### 15 **THE NEED FOR INJUNCTIVE RELIEF**

16 37. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 36,  
17 inclusive, as if specifically set forth herein.

18 38. By committing the acts alleged in this Complaint, Defendants have caused  
19 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence  
20 of equitable relief, Defendants will continue to create a substantial risk of irreparable injury by  
21 continuing to cause consumers to be involuntarily and unwittingly exposed to lead through the  
22 use and/or handling of THE PRODUCTS.

#### 23 **PRAYER FOR RELIEF**

24 Wherefore, Plaintiff prays for the following relief:

25 A. A preliminary and permanent injunction enjoining Defendants, their agents,  
26 employees, assigns and all persons acting in concert or participating with Defendants, from  
27 manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or  
28 use in California without first providing clear and reasonable warnings, within the meaning of  
Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead.

B. An assessment of civil penalties against Defendants, pursuant to Health & Safety

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Code §25249.7(b), in the amount of \$2,500 per day for each violation of Proposition 65;

C. An award to Plaintiff of its reasonable attorney fees pursuant to California Code of Civil Procedure §1021.5 or the substantial benefit theory;

D. An award of costs of suit herein; and

E. Such other and further relief as may be just and proper.

Dated: September 6, 2011

LAW OFFICE OF PHILIP T. EMMONS

By:   
Philip T. Emmons  
Attorney for Plaintiff  
Environmental Research Center