

AUG 31 2011

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Attorney for Plaintiff
Environmental Research Center

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ENVIRONMENTAL RESEARCH
CENTER, a California non-profit
corporation,

Plaintiff,

v.

ATKINS NUTRITIONALS, INC.,
ATKINS NUTRITIONALS HOLDINGS,
INC., NORTH CASTLE PARTNERS,
L.L.C., and DOES 1-50, inclusive,

Defendants.

Case No.

CGC-11-513819

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

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

INTRODUCTION

1. This action seeks to remedy Defendants' continuing failure to warn consumers in California that they are being exposed to lead, a substance known to the State of California¹ to cause cancer, birth defects and other reproductive harm.

2. Defendants have manufactured, packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of commerce of, and continue to manufacture, package, distribute, market, sell, and/or otherwise continue to be involved in the chain of commerce of Atkins Nutritionals, Inc. Day Break Peanut Butter Fudge Crisp Bar (hereinafter referred to as

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

1 “THE PRODUCT”), an ingestible product that contains the chemical lead and that has been and
2 continues to be offered for sale, sold and/or otherwise provided for use and/or handling to
3 individuals in California.

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

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

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

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

23 JURISDICTION AND VENUE

24 7. This Court has jurisdiction over this action pursuant to California Constitution
25 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except
26 those given by statute to other trial courts.” The statute under which this action is brought does
27 not specify any other basis for jurisdiction.

28 8. This Court has jurisdiction over Defendants because, based on information and
belief, Defendants are businesses having sufficient minimum contacts with California, or
otherwise intentionally availing themselves of the California market through the marketing,

1 distribution and/or sale of THE PRODUCT in the State of California to render the exercise of
2 jurisdiction over them by the California courts consistent with traditional notions of fair play and
3 substantial justice.

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

9 **PARTIES**

10 10. Plaintiff Environmental Research Center ("ERC") is a non-profit corporation
11 organized under California's Non-Profit Benefit Corporation Law. ERC is dedicated to, among
12 other causes, reducing the use and misuse of hazardous and toxic substances, consumer
13 protection, worker safety and corporate responsibility.

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

16 12. Defendant ATKINS NUTRITIONALS, INC. is a corporation and a person within
17 the meaning of H&S Code §25249.11(a). Defendant ATKINS NUTRITIONALS, INC. has
18 manufactured, packaged, distributed, marketed, sold and/or has otherwise been involved in the
19 chain of commerce of, and continues to manufacture, package, distribute, market, sell, and/or
20 otherwise continues to be involved in the chain of commerce of THE PRODUCT for sale or use
21 in California.

22 13. Defendant ATKINS NUTRITIONALS HOLDINGS, INC. is a corporation and a
23 person within the meaning of H&S Code §25249.11(a). Defendant ATKINS NUTRITIONALS
24 HOLDINGS, INC. has manufactured, packaged, distributed, marketed, sold and/or has otherwise
25 been involved in the chain of commerce of, and continues to manufacture, package, distribute,
26 market, sell, and/or otherwise continues to be involved in the chain of commerce of THE
27 PRODUCT for sale or use in California.

28 14. Defendant NORTH CASTLE PARTNERS, L.L.C. is a limited liability company
and a person within the meaning of H&S Code §25249.11(a). Defendant NORTH CASTLE
PARTNERS, L.L.C. has manufactured, packaged, distributed, marketed, sold and/or has
otherwise been involved in the chain of commerce of, and continues to manufacture, package,

1 distribute, market, sell, and/or otherwise continues to be involved in the chain of commerce of
2 THE PRODUCT for sale or use in California.

3 15. Defendants Does 1-50 are named herein under fictitious names, as their true
4 names and capacities are unknown to Plaintiff. ERC is informed and believes, and thereon
5 alleges, that each of said Does has manufactured, packaged, distributed, marketed, sold and/or
6 has otherwise been involved in the chain of commerce of, and continues to manufacture,
7 package, distribute, market, sell, and/or otherwise continues to be involved in the chain of
8 commerce of THE PRODUCT for sale or use in California, and/or is responsible, in some
9 actionable manner, for the events and happenings referred to herein, either through its conduct or
10 through the conduct of its agents, servants or employees, or in some other manner, causing the
11 harms alleged herein. Plaintiff will seek leave to amend this Complaint to set forth the true
12 names and capacities of Does when ascertained.

12 **STATUTORY BACKGROUND**

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

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

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

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

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1 **FACTUAL BACKGROUND**

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

7 20. On October 1, 1992, the State of California officially listed the chemical lead as a
8 chemical known to cause cancer. Lead became subject to the warning requirement one year later
9 and was therefore subject to the “clear and reasonable” warning requirements of Proposition 65
10 beginning on October 1, 1993. (27 CCR §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

11 21. Plaintiff is informed and believes, and based on such information and belief,
12 alleges THE PRODUCT has been marketed, distributed and/or sold to individuals in California
13 without the requisite clear and reasonable warnings before, on, and after September 24, 2010.
14 THE PRODUCT continues to be marketed, distributed and sold in California without the
15 requisite warning information.

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

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

24 24. Individuals using or handling THE PRODUCT are exposed to lead in excess of
25 the “maximum allowable daily” and “no significant risk” levels determined by the State of
26 California, as applicable.

27 25. At all times relevant to this action, Defendants have, in the course of doing
28 business, failed to provide individuals using and/or handling THE PRODUCT with clear and
reasonable warnings that THE PRODUCT exposes individuals to lead.

26. THE PRODUCT continues to be marketed, distributed, and/or sold in California
without the requisite clear and reasonable warnings.

1 **FIRST CAUSE OF ACTION**

2 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning**
3 **THE PRODUCT, which is identified in Plaintiff's September 24, 2010 60-Day Notice of**
4 **Violations)**

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

7 28. On September 24, 2010, Plaintiff sent a 60-Day Notice of Proposition 65
8 violations to the requisite public enforcement agencies and to Defendants ATKINS
9 NUTRITIONALS, INC., ATKINS NUTRITIONALS HOLDINGS, INC., and NORTH
10 CASTLE PARTNERS, L.L.C. ("Notice of Violations"). THE PRODUCT was identified in the
11 Notice of Violations as containing lead exceeding allowable levels. The Notice of Violations
12 was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and
13 the statute's implementing regulations regarding the notice of violations to be given to certain
14 public enforcement agencies and to the violator. The Notice of Violations was issued as follows:

- 15 a. Defendants ATKINS NUTRITIONALS, INC., ATKINS
16 NUTRITIONALS HOLDINGS, INC. and NORTH CASTLE
17 PARTNERS, L.L.C., and the California Attorney General were provided
18 copies by Certified Mail of the Notice of Violations, along with a
19 Certificate of a Merit by the attorney for the noticing party stating that
20 there is a reasonable and meritorious cause for this action. The requisite
21 county district attorneys and city attorneys were provided copies by First
22 Class Mail of the Notice of Violations and Certificate of Merit.
- 23 b. Defendants ATKINS NUTRITIONALS, INC., ATKINS
24 NUTRITIONALS HOLDINGS, INC. and NORTH CASTLE
25 PARTNERS, L.L.C. were provided, with the Notice of Violations, a copy
26 of a document entitled "The Safe Drinking Water and Toxic Enforcement
27 Act of 1986 (Proposition 65): A Summary," which is also known as
28 Appendix A to Title 27 of CCR §25903.
- c. The California Attorney General was provided, with the Notice of
Violations, additional factual information sufficient to establish a
basis for the certificate, including the identity of the persons consulted

1 with and relied on by the certifier, and the facts, studies, or other data
2 reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1) and
3 25249.7(h)(2).

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

7 30. By committing the acts alleged in this Complaint, Defendants at all times relevant
8 to this action, and continuing through the present, have violated and continue to violate H&S
9 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
10 individuals who use or handle THE PRODUCT to the chemical lead at levels exceeding
11 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
12 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
13 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of
14 commerce of, and continue to manufacture, package, distribute, market, sell, and/or otherwise
15 continue to be involved in the chain of commerce of THE PRODUCT, which has been, is, and
16 will be used and/or handled by individuals in California, without Defendants providing clear and
17 reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer, birth
18 defects and other reproductive harm posed by exposure to lead through the use and/or handling
19 of THE PRODUCT. Furthermore, Defendants have threatened to violate H&S Code §25249.6
20 by THE PRODUCT being marketed, offered for sale, sold and/or otherwise provided for use
21 and/or handling to individuals in California.

22 31. By the above-described acts, Defendants have violated H&S Code §25249.6 and
23 are therefore subject to an injunction ordering Defendants to stop violating Proposition 65, and to
24 provide required warnings to consumers and other individuals who will purchase, use and/or
25 handle THE PRODUCT.

26 32. An action for injunctive relief under Proposition 65 is specifically authorized by
27 Health & Safety Code §25249.7(a).

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

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

1 **SECOND CAUSE OF ACTION**

2 **(Civil Penalties for Violations of Health and Safety Code §25249.5, *et seq.* concerning THE**
3 **PRODUCT, which is identified in Plaintiff's September 24, 2010 60-Day Notice of**
4 **Violations)**

5 34. Plaintiff realleges and incorporates by reference Paragraphs 1 through 33,
6 inclusive, as if specifically set forth herein.

7 35. On September 24, 2010, Plaintiff sent a 60-Day Notice of Proposition 65
8 violations to the requisite public enforcement agencies and to Defendants ATKINS
9 NUTRITIONALS, INC., ATKINS NUTRITIONALS HOLDINGS, INC., and NORTH
10 CASTLE PARTNERS, L.L.C. ("Notice of Violations"). THE PRODUCT was identified in the
11 Notice of Violations as containing lead exceeding allowable levels. The Notice of Violations
12 was issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and
13 the statute's implementing regulations regarding the notice of violations to be given to certain
14 public enforcement agencies and to the violator. The Notice of Violations was issued as follows:

- 15 a. Defendants ATKINS NUTRITIONALS, INC., ATKINS
16 NUTRITIONALS HOLDINGS, INC. and NORTH CASTLE
17 PARTNERS, L.L.C., and the California Attorney General were provided
18 copies by Certified Mail of the Notice of Violations, along with a
19 Certificate of a Merit by the attorney for the noticing party stating that
20 there is a reasonable and meritorious cause for this action. The requisite
21 county district attorneys and city attorneys were provided copies by First
22 Class Mail of the Notice of Violations and Certificate of Merit.
- 23 b. Defendants ATKINS NUTRITIONALS, INC., ATKINS
24 NUTRITIONALS HOLDINGS, INC. and NORTH CASTLE
25 PARTNERS, L.L.C. were provided, with the Notice of Violations, a copy
26 of a document entitled "The Safe Drinking Water and Toxic Enforcement
27 Act of 1986 (Proposition 65): A Summary," which is also known as
28 Appendix A to Title 27 of CCR §25903.
- c. The California Attorney General was provided, with the Notice of
Violations, additional factual information sufficient to establish a
basis for the certificate, including the identity of the persons consulted

1 with and relied on by the certifier, and the facts, studies, or other data
2 reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1) and
3 25249.7(h)(2).

4 36. The appropriate public enforcement agencies have failed to commence and
5 diligently prosecute a cause of action under H&S Code §25249.35, *et seq.* against Defendants
6 based on the allegations herein.

7 37. By committing the acts alleged in this Complaint, Defendants at all times relevant
8 to this action, and continuing through the present, have violated and continue to violate H&S
9 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
10 individuals who use or handle THE PRODUCT to the chemical lead at levels exceeding
11 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
12 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
13 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of
14 commerce of, and continue to manufacture, package, distribute, market, sell, and/or otherwise
15 continue to be involved in the chain of commerce of THE PRODUCT, which has been, is, and
16 will be used and/or handled by individuals in California, without Defendants providing clear and
17 reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer, birth
18 defects and other reproductive harm posed by exposure to lead through the use and/or handling
19 of THE PRODUCT. Furthermore, Defendants have threatened to violate H&S Code §25249.6
20 by THE PRODUCT being marketed, offered for sale, sold and/or otherwise provided for use
21 and/or handling to individuals in California.

22 38. By the above-described acts, Defendants are liable, pursuant to H&S Code
23 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
24 relating to THE PRODUCT.

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

26 **THE NEED FOR INJUNCTIVE RELIEF**

27 39. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 36, as
28 if set forth below.

40. By committing the acts alleged in this Complaint, Defendants have caused
irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence

1 of equitable relief, Defendants will continue to create a substantial risk of irreparable injury by
2 continuing to cause consumers to be involuntarily and unwittingly exposed to lead through the
3 use and/or handling of THE PRODUCT.

4
5 **PRAYER FOR RELIEF**

6 Wherefore, Plaintiff prays for the following relief:

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

12 B. An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
13 against Defendants in the amount of \$2,500 per day for each violation of Proposition 65;

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

16 D. An award of costs of suit herein; and

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

18 Dated: August 31, 2011

LAW OFFICE OF PHILIP T. EMMONS

19 By: 

20 Philip T. Emmons

21 Attorney for Plaintiff

22 Environmental Research Center
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