

APR 26 2011

CLERK OF THE COURT

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Deputy Clerk

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7 Environmental Research Center

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10 ENVIRONMENTAL RESEARCH
11 CENTER, a California non-profit
12 corporation,

13 Plaintiff,

14 v.

15 OLYMPIAN LABS, INC., and DOES 1-
16 100, inclusive,

17 Defendants.

Case No. CGC-10-505663

**SECOND AMENDED COMPLAINT
FOR INJUNCTIVE RELIEF AND
CIVIL PENALTIES**

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

Action Filed: November 29, 2010
Trial Date: None

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

INTRODUCTION

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

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

- 27 a. Olympian Labs Inc. Ultimate Greens Protein 8 in 1 w/ Hemp Protein
28 Vanilla-Banana-Berry Flavor.

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

- b. Olympian Labs Incorporated – Beef Protein Chocolate Flavor.
- c. Olympian Labs Incorporated – Glucosalage S04.
- d. Olympian Labs Incorporated – Greens Protein 8 in 1.
- e. Olympian Labs Incorporated – Maxcuts.

These five products are hereinafter referred to together as “THE PRODUCTS”).

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

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

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

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

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

8. This Court has jurisdiction over Defendants because, based on information and

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

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

11 **PARTIES**

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

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

18 12. Defendant OLYMPIAN LABS, INC. is a corporation and a person within the
19 meaning of H&S Code §25249.11(a). Defendant OLYMPIAN LABS, INC. has manufactured,
20 packaged, distributed, marketed and/or sold, and continues to manufacture, package, distribute,
21 market and/or sell, THE PRODUCTS for sale or use in California.

22 13. Defendants Does 1-100 are named herein under fictitious names, as their true
23 names and capacities are unknown to Plaintiff. ERC is informed and believes, and thereon
24 alleges, that each of said Does has manufactured, packaged, distributed, marketed and/or sold,
25 and continues to manufacture, package, distribute, market and/or sell, THE PRODUCTS for sale
26 or use in California, and/or is responsible, in some actionable manner, for the events and
27 happenings referred to herein, either through its conduct or through the conduct of its agents,
28 servants or employees, or in some other manner, causing the harms alleged herein. Plaintiff will
seek leave to amend this Complaint to set forth the true names and capacities of Does when
ascertained.

1 California without the requisite clear and reasonable warnings before, on, and after September 4,
2 2010. THE PRODUCTS continue to be marketed, distributed and sold in California without the
3 requisite warning information.

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

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

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

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

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

21 **FIRST CAUSE OF ACTION**

22 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, et seq. concerning**
23 **THE PRODUCTS, which are identified in Plaintiff’s September 4, 2010 and October 22,**
24 **2010 60-Day Notices of Violations)**

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

27 26. On September 4, 2010 and October 22, 2010, Plaintiff sent 60-Day Notices of
28 Proposition 65 violations to the requisite public enforcement agencies and to Defendant
OLYMPIAN LABS, INC. (“Notices of Violations”). THE PRODUCTS were identified in the
Notices of Violations as containing lead exceeding allowable levels. The Notices of Violations
were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)

1 and the statute's implementing regulations regarding the notice of violations to be given to
2 certain public enforcement agencies and to the violator. The Notices of Violations were issued
3 as follows:

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

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

23 28. By committing the acts alleged in this Complaint, Defendants at all times relevant
24 to this action, and continuing through the present, have violated and continue to violate H&S
25 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
26 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
27 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
28 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
packaged, distributed, marketed and/or sold THE PRODUCTS, and continue to manufacture,
package, distribute, market and/or sell THE PRODUCTS, which have been, are, and will be used
and/or handled by individuals in California, without Defendants providing clear and reasonable

1 warnings, within the meaning of Proposition 65, regarding the risks of cancer, birth defects and
2 other reproductive harm posed by exposure to lead through the use and/or handling of THE
3 PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code §25249.6 by THE
4 PRODUCTS being marketed, offered for sale, sold and/or otherwise provided for use and/or
5 handling to individuals in California.

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

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

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

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

16 **SECOND CAUSE OF ACTION**

17 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning THE**
18 **PRODUCTS, which are identified in Plaintiff's September 4, 2010 and October 22, 2010**
19 **60-Day Notices of Violations)**

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

22 33. On September 4, 2010 and October 22, 2010, Plaintiff sent 60-Day Notices of
23 Proposition 65 violations to the requisite public enforcement agencies and to Defendant
24 OLYMPIAN LABS, INC. ("Notices of Violations"). THE PRODUCTS were identified in the
25 Notices of Violations as containing lead exceeding allowable levels. The Notices of Violations
26 were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
27 and the statute's implementing regulations regarding the notice of the violations to be given to
28 certain public enforcement agencies and to the violator. The Notices of Violations were issued
as follows:

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

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

21 35. By committing the acts alleged in this Complaint, Defendants at all times relevant
22 to this action, and continuing through the present, have violated and continue to violate H&S
23 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
24 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
25 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
26 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
27 packaged, distributed, marketed and/or sold THE PRODUCTS, and continue to manufacture,
28 package, distribute, market and/or sell THE PRODUCTS, which have been, are, and will be used
and/or handled by individuals in California, without Defendants providing clear and reasonable
warnings, within the meaning of Proposition 65, regarding the risks of cancer, birth defects and
other reproductive harm posed by exposure to lead through the use and/or handling of THE

1 PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code §25249.6 by THE
2 PRODUCTS being marketed, offered for sale, sold or otherwise provided for use and/or
3 handling to individuals in California.

4 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
5 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
6 relating to THE PRODUCTS.

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

8 **THE NEED FOR INJUNCTIVE RELIEF**

9 37. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 36, as
10 if set forth below.

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

16 **PRAYER FOR RELIEF**

17 Wherefore, Plaintiff prays for the following relief:

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

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

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

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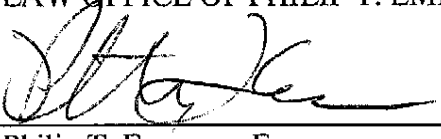
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- D. An award of costs of suit herein; and
- E. Such other and further relief as may be just and proper.

Dated: April 26, 2011

LAW OFFICE OF PHILIP T. EMMONS

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

1 **PROOF OF SERVICE**

2 I, Philip T. Emmons of the Law Office of Philip T. Emmons, 208 Normandy Lane,
3 Walnut Creek, CA 94598, declare that I am over the age of eighteen years, an active member of
4 the State Bar of California, and not a party to the within entitled action.

5 On the date set forth below, I served the following document(s):

6 **(1) SECOND AMENDED COMPLAINT**

- 7 **(By Mail)** on each person listed below, in accordance with Code of Civil Procedure §1013a(2), by placing a
8 true copy of the document(s) in a sealed envelope, addressed as set forth below and deposited that same day
9 in a United States mailbox in the City of Walnut Creek, California, with the postage thereon fully prepaid.
- 10 **(By Express Mail)** on each person listed below, by placing a true copy of the document(s) in a sealed
11 envelope, addressed as set forth below and deposited that same day in a United States Post Office in the City
12 of Walnut Creek, California, with Express Mail postage thereon fully prepaid.
- 13 **(By Federal Express):** on each person listed below, by placing a true copy of the document(s) in an envelope
14 or package designated by Federal Express, addressed as set forth below and deposited in a Federal Express
15 facility in the City of Walnut Creek, California, with the delivery fees paid or provided for.
- 16 **(By Facsimile Transmission)** on each person listed below, by transmitting a true copy of the document(s) to
17 the facsimile number(s) shown below, with no transmission error reported.
- 18 **(By Electronic Mail)** on each person listed below, by personally transmitting a true copy of the document(s) in
19 "pdf" format by electronic mail (e-mail) to the e-mail address(es) shown below, with no transmission error
20 reported.
- 21 **(By Personal Service)** on each person listed below, by delivering or transmitting a true copy of the
22 document(s) to an agent for *Quest Discovery Services* or *East Bay Mail & Delivery* to be delivered on that
23 same date to the address(es) set forth below. [A Proof of Service by the messenger is retained in our file, or
24 filed with the Court separately.]

25 26 27 28 Malcolm C. Weiss Chris M. Amantea Hunton & Williams 550 South Hope Street, Suite 2000 Los Angeles, CA 90071	
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29 I declare under penalty of perjury under the laws of the State of California that the
30 foregoing is true and correct. Executed on April 26, 2011, at Walnut Creek, California.

31 

32 Philip T. Emmons