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SAN FRANCISCO COUNTY
SUPERIOR COURT

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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 ATF FITNESS PRODUCTS, INC.;
16 BODYBUILDING.COM, LLC; and DOES
17 1-50, inclusive,

18 Defendants.

Case No. CGC-11-514211

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

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

21 INTRODUCTION

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

25 2. Defendants have manufactured, packaged, distributed, marketed, and/or sold, and
26 continue to manufacture, package, distribute, market and/or sell, the ingestible products
27 identified in Exhibit A attached hereto (hereinafter referred to as "THE PRODUCTS"), which
28 contain the chemical lead and which have been and continue to be offered for sale, sold and/or
otherwise provided for use and/or handling to individuals in California.

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

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

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

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

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

JURISDICTION AND VENUE

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

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

1 reproductive harm.” (Section 1(b) of Initiative Measure, Proposition 65).

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

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

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

15 FACTUAL BACKGROUND

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

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

25 19. Plaintiff is informed and believes, and based on such information and belief,
26 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in
27 California without the requisite clear and reasonable warnings before, on, and after September
28 24, 2010. THE PRODUCTS continue to be marketed, distributed and sold in California without
the requisite warning information.

20. As a proximate result of acts by Defendants, as persons in the course of doing
business within the meaning of H&S Code §25249.11(b), individuals throughout the State of

1 California, including in the County of San Francisco, have been exposed to lead without clear
2 and reasonable warnings. The individuals subject to exposures to lead include normal and
3 foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE
4 PRODUCTS.

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

8 22. Individuals using or handling THE PRODUCTS are exposed to lead in excess of
9 the "maximum allowable daily" and "no significant risk" levels determined by the State of
10 California, as applicable.

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

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

16 FIRST CAUSE OF ACTION

17 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning
18 THE PRODUCTS, which are identified in Plaintiff's September 24, 2010, November 5,
19 2010, and March 11, 2011 60-Day Notices of Violations)**

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

22 26. On September 24, 2010, November 5, 2010 and March 11, 2011, Plaintiff sent 60-
23 Day Notices of Proposition 65 violations to the requisite public enforcement agencies and to
24 Defendant ATF FITNESS PRODUCTS, INC.; and on March 11, 2011, Plaintiff sent a separate
25 60-Day Notice of Proposition 65 violations to the requisite public enforcement agencies and to
26 Defendant BODYBUILDING.COM, LLC. These four notices are hereinafter referred to together
27 as the "Notices of Violations". THE PRODUCTS were identified in the Notices of Violations as
28 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) and the statute's
implementing regulations regarding the notice of violations to be given to certain public
enforcement agencies and to the violator. The Notices of Violations were issued as follows:

- 1 a. On September 24, 2010, November 5, 2010 and March 11, 2011, copies of
2 60-Day Notices of Proposition 65 violations were sent by Certified Mail to
3 Defendant ATF FITNESS PRODUCTS, INC. and the California Attorney
4 General; and on March 11, 2011, a copy of a separate 60-Day Notice of
5 Proposition 65 violations was sent by Certified Mail to Defendant
6 BODYBUILDING.COM, LLC and the California Attorney General. The
7 requisite county district attorneys and city attorneys were provided copies
8 by First Class Mail of the Notices of Violations. The Notices of
9 Violations were accompanied by Certificates of Merit by the attorney for
10 the noticing party stating that there is a reasonable and meritorious cause
11 for this action.
- 12 b. Defendants ATF FITNESS PRODUCTS, INC. and
13 BODYBUILDING.COM, LLC were provided, with each of their
14 respective Notices of Violations, a copy of a document entitled "The Safe
15 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
16 Summary," which is also known as Appendix A to Title 27 of CCR
17 §25903.
- 18 c. The California Attorney General was provided, with each of the Notices of
19 Violations, additional factual information sufficient to establish a basis for
20 the Certificate of Merit, including the identity of the persons consulted
21 with and relied on by the certifier, and the facts, studies, or other data
22 reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1) and
23 25249.7(h)(2).

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

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

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

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

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

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

19 SECOND CAUSE OF ACTION

20 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning THE**
21 **PRODUCTS, which are identified in Plaintiff's September 24, 2010, November 5, 2010, and**
22 **March 11, 2011 60-Day Notices of Violations)**

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

25 33. On September 24, 2010, November 5, 2010 and March 11, 2011, Plaintiff sent 60-
26 Day Notices of Proposition 65 violations to the requisite public enforcement agencies and to
27 Defendant ATF FITNESS PRODUCTS, INC.; and on March 11, 2011, Plaintiff sent a separate
28 60-Day Notice of Proposition 65 violations to the requisite public enforcement agencies and to
Defendant BODYBUILDING.COM, LLC. These four notices are hereinafter referred to together
as the "Notices of Violations". THE PRODUCTS were identified in the Notices of Violations as

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

- 5 a. On September 24, 2010, November 5, 2010 and March 11, 2011, copies of
6 60-Day Notices of Proposition 65 violations were sent by Certified Mail to
7 Defendant ATF FITNESS PRODUCTS, INC. and the California Attorney
8 General; and on March 11, 2011, a copy of a separate 60-Day Notice of
9 Proposition 65 violations was sent by Certified Mail to Defendant
10 BODYBUILDING.COM, LLC and the California Attorney General. The
11 requisite county district attorneys and city attorneys were provided copies
12 by First Class Mail of the Notices of Violations. The Notices of
13 Violations were accompanied by Certificates of Merit by the attorney for
14 the noticing party stating that there is a reasonable and meritorious cause
15 for this action.
- 16 b. Defendants ATF FITNESS PRODUCTS, INC. and
17 BODYBUILDING.COM, LLC were provided, with each of their
18 respective Notices of Violations, a copy of a document entitled "The Safe
19 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
21 §25903.
- 22 c. The California Attorney General was provided, with each of the Notices of
23 Violations, additional factual information sufficient to establish a basis for
24 the Certificate of Merit, including the identity of the persons consulted
25 with and relied on by the certifier, and the facts, studies, or other data
26 reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1) and
27 25249.7(h)(2).

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

35. By committing the acts alleged in this Complaint, Defendants at all times relevant

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

13 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
14 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
15 relating to THE PRODUCTS.

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

17 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

25 **PRAYER FOR RELIEF**

26 Wherefore, Plaintiff prays for the following relief:

27 A. A preliminary and permanent injunction enjoining Defendants, their agents,
28 employees, assigns and all persons acting in concert or participating with Defendants, from
manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or

1 use in California without first providing clear and reasonable warnings, within the meaning of
2 Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead.

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

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


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

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

9 Dated: September 13, 2011

LAW OFFICE OF PHILIP T. EMMONS

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

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3 EXHIBIT A TO COMPLAINT

- 4 1. SciFit PROCUTS Ephedra Free.
5 2. SciFit Hunger Strike.
6 3. SciFit Fat Burner Plus.
7 4. SciFit TZ3 Stack.
8 5. SciFit T-500 Extreme.
9 6. SciFit Tribesterone 1500.
10 7. SciFit 3-Test Stack.
11 8. SciFit G.H.T. Stack.
12 9. SciFit Eurycoma 1500 EX.
13 10. SciFit T-Max Daytime Anabolic Formula.
14 11. SciFit T-Max Nighttime Anabolic Formula.
15 12. SciFit Super Garcinia HCA 1000
16 13. SciFit New & Improved ThermoGen