

1 Philip T. Emmons (SBN 124902)
2 Law Office of Philip T. Emmons
3 1990 N. California Blvd., 8th Floor
4 Walnut Creek, CA 94596
5 T: (925) 287-6436

6 Attorney for Plaintiff
7 Environmental Research Center

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF CONTRA COSTA

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

13 Plaintiff,

14 v.

15 VITAMIN SHOPPE, INC.; VITAMIN
16 SHOPPE INDUSTRIES INC.; and DOES
1-50, inclusive,

17 Defendants.

Case No.

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

SUMMONS ISSUED
FILED
MAR 16 2012

K. TORRE, CLERK OF THE COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA
By S. PASSO

PER LOCAL RULE 5 THIS
CASE IS ASSIGNED TO
DEPT 2

C12 - 00556

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 California¹ 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

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

1 individuals in California:

- 2 - Amazing Grass Green SuperFood Chocolate Peanut Butter Protein Bar
- 3 - Amazing Grass Green SuperFood Whole Food Energy Bar
- 4 - Amazing Grass Amazing Meal Original Blend
- 5 - Amazing Grass Green SuperFood Chocolate Drink Powder
- 6 - Amazing Grass Green SuperFood Lemon Lime Energy Drink Powder
- 7 - Amazing Grass Green SuperFood Berry Flavor Drink Powder
- 8 - Amazing Grass Green SuperFood All Natural Drink Powder.

9 These listed products are hereinafter referred to as "THE PRODUCTS".

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

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

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

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

JURISDICTION AND VENUE

29 7. This Court has jurisdiction over this action pursuant to California Constitution
30 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes except
31 those given by statute to other trial courts." The statute under which this action is brought does

1 not specify any other basis for jurisdiction.

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

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

12 PARTIES

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

17 11. ERC is a “Person” within the meaning of H&S Code §25118 and H&S Code
18 §25249.11(a), and brings this enforcement action “in the public interest” pursuant to H&S Code
19 §25249.7(d).

20 12. Defendants VITAMIN SHOPPE, INC. and VITAMIN SHOPPE INDUSTRIES
21 INC. are corporations and each is a “Person” within the meaning of H&S Code §25249.11(a).
22 Defendants VITAMIN SHOPPE, INC. and VITAMIN SHOPPE INDUSTRIES INC. have
23 manufactured, packaged, distributed, marketed, sold and/or has otherwise been involved in the
24 chain of commerce of, and continue to manufacture, package, distribute, market, sell, and/or
25 otherwise continues to be involved in the chain of commerce of THE PRODUCTS for sale or use
26 in California. Defendants VITAMIN SHOPPE, INC. and VITAMIN SHOPPE INDUSTRIES
27 INC., at all times relevant to this action, have each had 10 or more employees and is a “Person in
28 the course of doing business” pursuant to H&S Code §25249.11(b).

13 13. Defendants DOES 1-50 are named herein under fictitious names, as their true
names and capacities are unknown to Plaintiff. ERC is informed and believes, and thereon

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

9 STATUTORY BACKGROUND

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

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

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

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

26 FACTUAL BACKGROUND

27 17. On February 27, 1987, the State of California officially listed the chemical lead as
28 a chemical known to cause developmental and reproductive toxicity. Lead became subject to the
warning requirement one year later and was therefore subject to the “clear and reasonable”
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.*)

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

5 19. Plaintiff is informed and believes, and based on such information and belief,
6 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in
7 California without the requisite clear and reasonable warnings before, on, and after March 25,
8 2009. THE PRODUCTS continue to be marketed, distributed and sold in California without the
9 requisite warning information.

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

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

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

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

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

FIRST CAUSE OF ACTION

27 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning
28 THE PRODUCTS, which are identified in Plaintiff's March 25, 2011 60-Day Notice of
Violations)**

25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,

1 inclusive, as if specifically set forth herein.

2 26. On March 25, 2011, Plaintiff sent a 60-Day Notice of Proposition 65 violations to
3 the requisite public enforcement agencies and to Defendants VITAMIN SHOPPE, INC. and
4 VITAMIN SHOPPE INDUSTRIES INC. ("Notice of Violations"). THE PRODUCTS were
5 identified in the Notice of Violations as containing lead exceeding allowable levels. The Notice
6 of Violations was issued pursuant to, and in compliance with, the requirements of H&S Code
7 §25249.7(d) and the statute's implementing regulations regarding the notice of violations to be
8 given to certain public enforcement agencies and to the violator. The Notice of Violations was
9 issued as follows:

- 10 a. Defendants VITAMIN SHOPPE, INC. and VITAMIN SHOPPE
11 INDUSTRIES INC., and the California Attorney General were provided
12 copies by Certified Mail of the Notice of Violations, along with a
13 Certificate of Merit by the attorney for the noticing party stating that there
14 is a reasonable and meritorious cause for this action. The requisite county
15 district attorneys and city attorneys were provided copies by First Class
16 Mail of the Notice of Violations and Certificate of Merit.
- 17 b. Defendants VITAMIN SHOPPE, INC. and VITAMIN SHOPPE
18 INDUSTRIES INC. were provided, with the Notice of Violations, a copy
19 of a document entitled "The Safe Drinking Water and Toxic Enforcement
20 Act of 1986 (Proposition 65): A Summary," which is also known as
21 Appendix A to Title 27 of CCR §25903.
- 22 c. The California Attorney General was provided, with the Notice of
23 Violations, additional factual information sufficient to establish a
24 basis for the certificate, 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 27. The appropriate public enforcement agencies have failed to commence and
diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants
based on the allegations herein.

28 28. 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, sold and/or have otherwise been involved in the chain of
7 commerce of, and continue to manufacture, package, distribute, market, sell, and/or otherwise
8 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,
9 and will be used and/or handled by individuals in California, without Defendants providing clear
10 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,
11 birth defects and other reproductive harm posed by exposure to lead through the use and/or
12 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code
13 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
14 for use and/or handling to individuals in California.

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

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

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

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

23 **SECOND CAUSE OF ACTION**

24 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning THE**
25 **PRODUCTS, which are identified in Plaintiff's March 25, 2011 60-Day Notice of**
26 **Violations)**

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

28 38. On March 25, 2011, Plaintiff sent a 60-Day Notice of Proposition 65 violations to

1 the requisite public enforcement agencies and to Defendants VITAMIN SHOPPE, INC. and
2 VITAMIN SHOPPE INDUSTRIES INC. (“Notice of Violations”). THE PRODUCTS were
3 identified in the Notice of Violations as containing lead exceeding allowable levels. The Notice
4 of Violations was issued pursuant to, and in compliance with, the requirements of H&S Code
5 §25249.7(d) and the statute’s implementing regulations regarding the notice of violations to be
6 given to certain public enforcement agencies and to the violator. The Notice of Violations was
7 issued as follow:

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

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

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

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.

13 41. 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 42. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 41, as
19 if set forth below.

20 43. 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 pursuant to Health & Safety Code §25249.7(b),
4 against Defendants 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

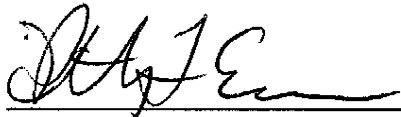
8 E. Such other and further relief as may be just and proper.

9 Dated: March 16, 2012

LAW OFFICE OF PHILIP T. EMMONS

10

11

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

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28