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9 ENDORSED  
10 FILED  
11 ALAMEDA COUNTY

12 OCT 18 2013

13 CLERK OF THE SUPERIOR COURT

14 By ~~PILIPINO TUNGOHAN~~

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 COUNTY OF ALAMEDA

17 ENVIRONMENTAL RESEARCH  
18 CENTER, INC.,

19 Plaintiff,

20 v.

21 PROMAX NUTRITION  
22 CORPORATION,

23 Defendant.

24 Case No.

25 **RG 13699644**

26 **COMPLAINT FOR INJUNCTIVE  
27 RELIEF AND CIVIL PENALTIES**

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

1 Plaintiff Environmental Research Center, Inc. ("Plaintiff") brings this action in the  
2 interests of the general public and, on information and belief, hereby alleges:

3 **INTRODUCTION**

4 1. This action seeks to remedy the continuing failure of Defendant Promax Nutrition  
5 Corporation ("Defendant") to warn consumers in California that they are being exposed to lead,  
6 a substance known to the State of California<sup>1</sup> to cause cancer, birth defects and other  
7 reproductive harm.

8 2. Defendant has manufactured, packaged, distributed, marketed, sold and/or has  
9 otherwise been involved in the chain of commerce of, and continues to manufacture, package,  
10 distribute, market, sell, and/or otherwise continues to be involved in the chain of commerce of  
11 the following ingestible products, which contain the chemical lead and which have been and  
12

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

1 continue to be offered for sale, sold and/or otherwise provided for use and/or handling to  
2 individuals in California:

- 3 1) Promax Nutrition Corp. Promax Bar Cookies 'N Cream,
- 4 2) Promax Nutrition Corp. Promax Bar Double Fudge Brownie, and
- 5 3) Promax Nutrition Corp. Energy Bar German Chocolate Cake.

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

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

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

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

23 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to  
24 remedy Defendant's failure to provide clear and reasonable warnings regarding exposures to the  
25 lead.

### 26 **JURISDICTION AND VENUE**

27 7. This Court has jurisdiction over this action pursuant to California Constitution  
28 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 Defendant because, based on information and  
4 belief, Defendant is a Delaware corporation with its principal place of business located in  
5 California, and/or has sufficient minimum contacts with California, and/or has otherwise  
6 intentionally availed itself of California laws through the marketing, distribution and/or sale of  
7 THE PRODUCTS in the State of California, which render the exercise of jurisdiction over it by  
8 the California courts consistent with traditional notions of fair play and substantial justice.

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

#### 14 PARTIES

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

19 11. Plaintiff is a “Person” within the meaning of H&S Code §25118 and H&S Code  
20 §25249.11(a), and brings this enforcement action “in the public interest” pursuant to H&S Code  
21 §25249.7(d).

22 12. Defendant is a corporation that is incorporated in the State of Delaware, and is a  
23 “Person” within the meaning of H&S Code §25249.11(a). Defendant has manufactured,  
24 packaged, distributed, marketed, sold and/or has otherwise been involved in the chain of  
25 commerce of, and continues to manufacture, package, distribute, market, sell, and/or otherwise  
26 continues to be involved in the chain of commerce of THE PRODUCTS for sale or use in  
27 California. Based on information and belief, Defendant, at all times relevant to this action, has  
28 had and now has 10 or more employees and is a “Person in the course of doing business”

1 pursuant to H&S Code §25249.11(b).

2 **STATUTORY BACKGROUND**

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

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

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

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

18 **FACTUAL BACKGROUND**

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

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

28 18. Plaintiff is informed and believes, and based on such information and belief,

1 alleges THE PRODUCTS have been marketed, distributed, sold, or otherwise provided to  
2 individuals in California without the requisite clear and reasonable warnings before, on, and after  
3 March 25, 2008. THE PRODUCTS continue to be marketed, distributed and sold in California  
4 without the requisite warning information.

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

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

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

17 22. At all times relevant to this action, Defendant has, in the course of doing business,  
18 failed to provide individuals using and/or handling THE PRODUCTS with clear and reasonable  
19 warnings that THE PRODUCTS exposes individuals to lead.

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

#### 22 **FIRST CAUSE OF ACTION**

23 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning**  
24 **THE PRODUCTS, which are identified in Plaintiff's March 25, 2011 and June 1, 2011 60-**  
25 **Day Notices of Violations)**

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

28 25. On March 25, 2011 and June 1, 2011, Plaintiff sent 60-Day Notices of Proposition  
65 violations to the requisite public enforcement agencies and to Defendant ("Notices of

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

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

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

25 27. By committing the acts alleged in this Complaint, Defendant at all times relevant  
26 to this action, and continuing through the present, has violated and continues to violate H&S  
27 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing  
28 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding

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

12 28. By the above-described acts, Defendant has violated H&S Code §25249.6 and is  
13 therefore subject to an injunction ordering Defendant 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 29. An action for injunctive relief under Proposition 65 is specifically authorized by  
17 Health & Safety Code §25249.7(a).

18 30. Continuing commission by Defendant 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 Defendant, 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 March 25, 2011 and June 1, 2011 60-Day**  
25 **Notices of Violations)**

26 31. Plaintiff realleges and incorporates by reference Paragraphs 1 through 30,  
27 inclusive, as if specifically set forth herein.

28 32. On March 25, 2011 and June 1, 2011, Plaintiff sent 60-Day Notices of Proposition  
65 violations to the requisite public enforcement agencies and to Defendant ("Notices of

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

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

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

16 **THE NEED FOR INJUNCTIVE RELIEF**

17 36. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 35, as  
18 if set forth below.

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

24 **PRAAYER FOR RELIEF**

25 Wherefore, Plaintiff prays for the following relief:

26 A. A preliminary and permanent injunction enjoining Defendant, its agents,  
27 employees, assigns and all persons acting in concert or participating with Defendant, from  
28 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 Defendant 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  
10 Dated: October 18, 2013

LAW OFFICE OF PHILIP T. EMMONS

11  
12 By: 

Philip T. Emmons

Attorney for Plaintiff

Environmental Research Center, Inc.