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SAN FRANCISCO COUNTY
SUPERIOR COURT

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 ENVIRONMENTAL RESEARCH
12 CENTER, INC.,

13 Plaintiff,

14 v.

15 CLIF BAR & COMPANY; and DOES 1-
16 50, inclusive,

17 Defendants.

Case No. CGC-13-532935

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

18 Plaintiff Environmental Research Center, Inc. brings this action in the interests of the
19 general 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, sold and/or have
24 otherwise been involved in the chain of commerce of, and continue to manufacture, package,
25 distribute, market, sell, and/or otherwise continue to be involved in the chain of commerce of the
26 following products (referred to collectively as "THE PRODUCTS"), which contain the chemical
27 lead and which have been and continue to be offered for sale, sold and/or otherwise provided for

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

1 use and/or handling to individuals in California:

- 2 a. Clif Bar & Company Peanut Butter 20 g Protein Builder's
- 3 b. Clif Bar & Company Vanilla Almond 20 g Protein Builder's
- 4 c. Clif Bar & Company Chocolate Mint 20 g Protein Builder's
- 5 d. Clif Bar & Company Cookies & Cream 20 g Protein Builder's
- 6 e. Clif Bar & Company Chocolate 20 g Protein Builder's
- 7 f. Clif Bar & Company LUNA Minis S'mores
- 8 g. Clif Bar & Company Clif Shot Bloks Energy Chews Margarita Flavor
- 9 h. Clif Bar & Company Clif Shot Bloks Electrolyte Chews Mountain Berry
- 10 Flavor

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

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

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

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

1 lead.

2 **JURISDICTION AND VENUE**

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

7 8. This Court has jurisdiction over Defendants because, based on information and
8 belief, Defendants are businesses located in San Francisco County, California and/or have
9 sufficient minimum contacts with California, or have otherwise intentionally availed themselves
10 of California laws through the marketing, distribution and/or sale of THE PRODUCTS in the
11 State of California to render the exercise of jurisdiction over them by the California courts
12 consistent with traditional notions of fair play and substantial justice.

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

18 **PARTIES**

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

23 11. ERC is a “Person” within the meaning of H&S Code §25118 and H&S Code
24 §25249.11(a), and brings this enforcement action “in the public interest” pursuant to H&S Code
25 §25249.7(d).

26 12. Defendant CLIF BAR & COMPANY is a corporation that is incorporated in the
27 State of California and is a “Person” within the meaning of H&S Code §25249.11(a). Defendant
28 CLIF BAR & COMPANY has manufactured, packaged, distributed, marketed, sold and/or has

1 otherwise been involved in the chain of commerce of, and continues to manufacture, package,
2 distribute, market, sell, and/or otherwise continues to be involved in the chain of commerce of
3 THE PRODUCTS for sale or use in California. Based on information and belief, Defendant
4 CLIF BAR & COMPANY, at all times relevant to this action, has had and now has 10 or more
5 employees and is a "Person in the course of doing business" pursuant to H&S Code
6 §25249.11(b).

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

17 **STATUTORY BACKGROUND**

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

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

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

28 16. Proposition 65 provides that any person who "violates or threatens to violate" the

1 statute "may be enjoined in any court of competent jurisdiction." (H&S Code §25249.7(a).)
2 "Threaten to violate" is defined to mean creating "a condition in which there is a substantial
3 probability that a violation will occur." (H&S Code §25249.11(e).) Violators are liable for civil
4 penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S Code §25249.7(b).)

5 FACTUAL BACKGROUND

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

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

15 19. Plaintiff is informed and believes, and based on such information and belief,
16 alleges THE PRODUCTS have been marketed, distributed, sold, or otherwise provided to
17 individuals in California without the requisite clear and reasonable warnings before, on, and after
18 November 23, 2007. THE PRODUCTS continue to be marketed, distributed and sold in
19 California without the requisite warning information.

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

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

1 Violations, a copy of a document entitled "The Safe Drinking Water and
2 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is
3 also known as Appendix A to Title 27 of CCR §25903.

4 c. The California Attorney General was provided, with each Notice of
5 Violations, additional factual information sufficient to establish a basis for
6 the respective Certificate of Merit, including the identity of the persons
7 consulted with and relied on by the certifier, and the facts, studies, or other
8 data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1)
9 and 25249.7(h)(2).

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

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

28 29. By the above-described acts, Defendants have violated H&S Code §25249.6 and

1 are therefore subject to an injunction ordering Defendants to stop violating Proposition 65, and to
2 provide required warnings to consumers and other individuals who will purchase, use and/or
3 handle THE PRODUCTS.

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

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

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

10 **SECOND CAUSE OF ACTION**

11 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning THE**
12 **PRODUCTS, which are identified in Plaintiff's November 23, 2010 and August 5, 2011 60-**
13 **Day Notices of Violations)**

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

16 33. On November 23, 2010 and August 5, 2011, Plaintiff sent 60-Day Notices of
17 Proposition 65 violations to the requisite public enforcement agencies and to Defendant CLIF
18 BAR & COMPANY ("Notices of Violations"). THE PRODUCTS were identified in the Notices
19 of Violations as containing lead exceeding allowable levels. The Notices of Violations were
20 issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
21 statute's implementing regulations regarding the notice of violations to be given to certain public
22 enforcement agencies and to the violator. The Notices of Violations were issued as follows:

- 23 a. Defendant CLIF BAR & COMPANY and the California Attorney General
24 were provided copies by First Class Certified Mail of the Notices of
25 Violations, along with Certificates of Merit by the attorney for the noticing
26 party stating that there is a reasonable and meritorious cause for this
27 action. The requisite county district attorneys and city attorneys were
28 provided copies by First Class Mail of the Notices of Violations and
Certificates of Merit.

1 b. Defendant CLIF BAR & COMPANY was provided, with each Notice of
2 Violations, a copy of a document entitled "The Safe Drinking Water and
3 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is
4 also known as Appendix A to Title 27 of CCR §25903.

5 c. The California Attorney General was provided, with each Notice of
6 Violations, additional factual information sufficient to establish a basis for
7 the respective Certificate of Merit, including the identity of the persons
8 consulted with and relied on by the certifier, and the facts, studies, or other
9 data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1)
10 and 25249.7(h)(2).

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

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

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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: July 18, 2013

LAW OFFICE OF PHILIP T. EMMONS

By: 

Philip T. Emmons
Attorney for Plaintiff
Environmental Research Center, Inc.