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ENDORSED
FILED
ALAMEDA COUNTY

OCT 22 2012

CLERK OF THE SUPERIOR COURT
By PILIPINO TUNGOHAN
Deputy

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA

16 ENVIRONMENTAL RESEARCH
17 CENTER, INC.,

18 Plaintiff,

19 v.

20 SAN FRANCISCO HERB & NATURAL
21 FOOD CO. dba NATURE'S HERB
22 COMPANY; and DOES 1-50, inclusive,

23 Defendants.

Case No. **RG12653042**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

24 Plaintiff Environmental Research Center, Inc. brings this action in the interests of the
25 general public and, on information and belief, hereby alleges:

26 **INTRODUCTION**

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

2. Defendants have manufactured, packaged, distributed, marketed, sold and/or have

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

1 otherwise been involved in the chain of commerce of, and continue to manufacture, package,
2 distribute, market, sell, and/or otherwise continue to be involved in the chain of commerce of the
3 ingestible products identified in Exhibit A hereto (hereinafter referred to as "THE
4 PRODUCTS"), which contain the chemical lead and which have been and continue to be offered
5 for sale, sold and/or otherwise provided for use and/or handling to individuals in California.

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

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

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

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

25 JURISDICTION AND VENUE

26 7. This Court has jurisdiction over this action pursuant to California Constitution
27 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes except
28 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 located in Alameda County, California and/or have sufficient
4 minimum contacts with California, or have otherwise intentionally availed themselves of
5 California laws through the marketing, distribution and/or sale of THE PRODUCTS in the State
6 of California to render the exercise of jurisdiction over them by the California courts consistent
7 with traditional notions of fair play and substantial justice.

8 9. This Court is the proper venue for this action because the Defendants have
9 violated California law in the Alameda County, California. 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.

13 **PARTIES**

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

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

21 12. Defendant SAN FRANCISCO HERB & NATURAL FOOD CO. (“SAN
22 FRANCISCO HERB”) is a corporation that is incorporated in the State of California and does
23 business as NATURE’S HERB COMPANY. Defendant SAN FRANCISCO HERB is a
24 “Person” within the meaning of H&S Code §25249.11(a). Defendant SAN FRANCISCO
25 HERB has manufactured, packaged, distributed, marketed, sold and/or has otherwise been
26 involved in the chain of commerce of, and continues to manufacture, package, distribute, market,
27 sell, and/or otherwise continues to be involved in the chain of commerce of THE PRODUCTS
28 for sale or use in California. Based on information and belief, Defendant SAN FRANCISCO

1 HERB, at all times relevant to this action, has had and now has 10 or more employees and is a
2 “Person in the course of doing business” pursuant to H&S Code §25249.11(b).

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

13 STATUTORY BACKGROUND

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

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

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

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

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FACTUAL BACKGROUND

17. On February 27, 1987, the State of California officially listed the chemical lead as 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.*)

18. On October 1, 1992, the State of California officially listed the chemical lead as a chemical known to cause cancer. 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 October 1, 1993. (27 CCR §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

19. Plaintiff is informed and believes, and based on such information and belief, alleges THE PRODUCTS have been marketed, distributed, sold, or otherwise provided to individuals in California without the requisite clear and reasonable warnings before, on, and after October 21, 2008. 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 California, including in the County of Alameda, have been exposed to lead without clear and reasonable warnings. The individuals subject to exposures to lead include normal and foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE PRODUCTS.

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

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

23. At all times relevant to this action, Defendants have, in the course of doing

1 business, failed to provide individuals using and/or handling THE PRODUCTS with clear and
2 reasonable warnings that THE PRODUCTS exposes individuals to lead.

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

5 **FIRST CAUSE OF ACTION**

6 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, et seq. concerning**
7 **THE PRODUCTS, which are identified in Plaintiff's October 21, 2011 and March 8, 2012**
8 **60-Day Notices of Violations)**

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

11 26. On October 21, 2011 and March 8, 2012, Plaintiff sent 60-Day Notices of
12 Proposition 65 violations to the requisite public enforcement agencies and to Defendant SAN
13 FRANCISCO HERB ("Notices of Violations"). THE PRODUCTS were identified in the
14 Notices of Violations as containing lead exceeding allowable levels. The Notices of Violations
15 were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
16 and the statute's implementing regulations regarding the notice of violations to be given to
17 certain public enforcement agencies and to the violator. The Notices of Violations were issued
18 as follows:

- 19 a. Defendant SAN FRANCISCO HERB and the California Attorney General
20 were provided copies by First Class Certified Mail of the Notices of
21 Violations, along with Certificates of Merit by the attorney for the noticing
22 party stating that there is a reasonable and meritorious cause for this
23 action. The requisite county district attorneys and city attorneys were
24 provided copies by First Class Mail of the Notices of Violations and
25 Certificates of Merit.
- 26 b. Defendant SAN FRANCISCO HERB was provided, with each Notice of
27 Violations, a copy of a document entitled "The Safe Drinking Water and
28 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is
also known as Appendix A to Title 27 of CCR §25903.

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

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

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

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

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

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

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

7 **SECOND CAUSE OF ACTION**

8 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning THE**
9 **PRODUCTS, which are identified in Plaintiff's October 21, 2011 and March 8, 2012 60-**
10 **Day Notices of Violations)**

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

13 33. On October 21, 2011 and March 8, 2012, Plaintiff sent 60-Day Notices of
14 Proposition 65 violations to the requisite public enforcement agencies and to Defendant SAN
15 FRANCISCO HERB ("Notices of Violations"). THE PRODUCTS were identified in the
16 Notices of Violations as containing lead exceeding allowable levels. The Notices of Violations
17 were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
18 and the statute's implementing regulations regarding the notice of violations to be given to
19 certain public enforcement agencies and to the violator. The Notices of Violations were issued
20 as follows:

- 21 a. Defendant SAN FRANCISCO HERB and the California Attorney General
22 were provided copies by First Class Certified Mail of the Notices of
23 Violations, along with Certificates of Merit by the attorney for the noticing
24 party stating that there is a reasonable and meritorious cause for this
25 action. The requisite county district attorneys and city attorneys were
26 provided copies by First Class Mail of the Notices of Violations and
27 Certificates of Merit.
- 28 b. Defendant SAN FRANCISCO HERB was provided, with each Notice of
Violations, a copy of a document entitled "The Safe Drinking Water and

1 Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is
2 also known as Appendix A to Title 27 of CCR §25903.

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

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

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

27 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
28 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6

1 relating to THE PRODUCTS.

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

3 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

11 **PRAYER FOR RELIEF**

12 Wherefore, Plaintiff prays for the following relief:

- 13 A. A preliminary and permanent injunction enjoining Defendants, their agents,
14 employees, assigns and all persons acting in concert or participating with Defendants, from
15 manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or
16 use in California without first providing clear and reasonable warnings, within the meaning of
17 Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead.
- 18 B. An assessment of civil penalties, pursuant to Health & Safety Code §25249.7(b),
19 against Defendants in the amount of \$2,500 per day for each violation of Proposition 65;
- 20 C. An award to Plaintiff of its reasonable attorney fees pursuant to California Code
21 of Civil Procedure §1021.5 or the substantial benefit theory;
- 22 D. An award of costs of suit herein; and
- 23 E. Such other and further relief as may be just and proper.

24
25 Dated: October 22, 2012

LAW OFFICE OF PHILIP T. EMMONS

26
27 By: 

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

2
3 **EXHIBIT A TO COMPLAINT**

- 4 Nature's Herb Co. Fo-ti Root
5 Nature's Herb Co. Astragalus
6 Nature's Herb Co. FatLess
7 Nature's Herb Co. Bob's Blend
8 Nature's Herb Co. Laxative Blend
9 Nature's Herb Co. Male Power Formula
10 Nature's Herb Co. Bee Pollen
11 Nature's Herb Co. Ginger
12 Nature's Herb Co. Green Energy
13 Nature's Herb Co. Gotu Kola
14 Nature's Herb Co. Eyebright
15 Nature's Herb Co. Milk Thistle Seed
16 Nature's Herb Co. Burdock Root
17 Nature's Herb Co. Dong Quai
18 Nature's Herb Co. Dandelion Root
19 Nature's Herb Co. Ginko Biloba
20 Nature's Herb Co. My Helping Heart
21 Nature's Herb Co. Female Hormone Balance
22 Nature's Herb Co. Detox
23 Nature's Herb Co. Healthy Kidney & Bladder
24 Nature's Herb Co. Fasting Blend
25 Nature's Herb Co. Ginseng, Chinese
26 Nature's Herb Co. Licorice
27 Nature's Herb Co. Eleuthro Root
28 Nature's Herb Co. Colon Cleansing
Nature's Herb Co. Healthy Hair, Skin, And Nail
Nature's Herb Co. Kudzu Root
Nature's Herb Co. Standardized Green Tea
Nature's Herb Co. Relaxing
Nature's Herb Co. Stress Relief Formula
Nature's Herb Co. Support for Aging Men
Nature's Herb Co. Suma Root
Nature's Herb Co. Passion Flower
Nature's Herb Co. Uva Ursi
Nature's Herb Co. Support for Aging Women
Nature's Herb Co. Valerian Root
Nature's Herb Co. Red Clover
Nature's Herb Co. Neem Leaf
Nature's Herb Co. Psyllium Husk
Nature's Herb Co. Psyllium Seed
Nature's Herb Co. Watercress