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ELECTRONICALLY FILED
Superior Court of California,
County of Orange
05/20/2013 at 12:21:08 PM
Clerk of the Superior Court
By Eleanor Sutter, Deputy Clerk

5 Attorneys for Plaintiff
6 Environmental Research Center

8 SUPERIOR COURT OF CALIFORNIA
9
10 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

11
12 ENVIRONMENTAL RESEARCH) **Case No.:** 30-2013-00850458-CU-MC-CJC
13 CENTER, a California non-profit)
14 corporation,)
15 Plaintiffs,) **COMPLAINT FOR INJUNCTIVE**
16 vs.) **RELIEF AND CIVIL PENALTIES**
17) **[Health & Safety Code § 25249.5, et seq.]**
18 MARKET AMERICA, INC., MARKET) **[UNLIMITED CIVIL CASE - AMOUNT**
19 AMERICA WORLDWIDE, INC., and) **DEMANDED EXCEEDS \$25,000]**
20 DOES 1-25, Inclusive,)
21 Defendants.)
22 Judge Sheila Fell

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

23 **INTRODUCTION**

- 24 1. This action seeks to remedy Defendants' continuing failure to warn consumers in
25 California that they are being exposed to lead, a substance known to the State of California to
26 cause cancer, birth defects and other reproductive harm.
27 2. Defendants have manufactured, packaged, distributed, marketed, sold and/or have
28 otherwise been involved in the chain of commerce of, and continue to manufacture, package,

1 distribute, market, sell and/or otherwise continue to be involved in the chain of commerce of the
2 following ingestible products, which contain the chemical lead and which have been and
3 continue to be offered for sale, sold and/or otherwise provided for use and/or handling to
4 individuals in California:

- 5 a. Market America, Inc. Complete Greens Powder
- 6 b. Market America, Inc. NutriClean 7-Day Cleansing and Detoxification System
7 (which includes the following products in the kit – Market America, Inc.
8 NutriClean Release; Market America, Inc. NutriClean Advanced Fiber Powder;
9 Market America, Inc. NutriClean HepatoCleanse)
- 10 c. Market America, Inc. TLS Weight Loss Solution Protein Shake Chocolate Delight
- 11 d. Market America, Inc. Mocha Tonix Chocolate Mocha Flavor
- 12 e. Market America, Inc. Advanced Level 90 Blood Sugar Maintenance

13 These listed products are hereinafter referred to together as “THE PRODUCTS”.

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

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

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

1 11. ERC is a person within the meaning of H&S Code §25118 and brings this
2 enforcement action in the public interest pursuant to H&S Code §25249.7(d).

3 12. ERC alleges on information and belief that Defendant MARKET AMERICA,
4 INC. is a North Carolina Corporation that is a person within the meaning of H&S Code
5 §25249.11(a).

6 13. ERC alleges on information and belief that Defendant MARKET AMERICA
7 WORLDWIDE, INC. is a North Carolina Corporation that is a person within the meaning of
8 H&S Code §25249.11(a).

9 14. Defendants manufactured, packaged, distributed, marketed, sold and/or have
10 otherwise been involved in the chain of commerce, and continues to manufacture, package,
11 distribute, market, sell and/or otherwise continue to be involved in the chain of commerce of
12 THE PRODUCTS for sale or use in California. Defendants employ ten or more persons, and are
13 thus each a “person in the course of doing business” within the meaning of Proposition 65.

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

24 16. Plaintiffs are informed and believe and thereon allege that each of the defendants
25 is in some manner responsible for the events set forth in this Complaint and proximately caused
26 the injuries and damages to Plaintiffs as alleged in this Complaint.

27 17. Plaintiff is informed and believes and thereon alleges that at all material times,
28 defendants, and each of them, were the agents, servants, and employees of the other defendants,

1 and each of them in such a way as to cause each defendant to be jointly and severally liable and
2 responsible for the conduct of one another. The conduct of each defendant was within the course
3 and scope of the authority granted each defendant by the other defendants. Each defendant
4 ratified and approved of the acts or omissions of each other such as to cause each to be jointly
5 and severally liable for the conduct of each other defendant.

6 **STATUTORY BACKGROUND**

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

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

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

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

23 **FACTUAL BACKGROUND**

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

1 22. 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 23. 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 September
8 13, 2009. THE PRODUCTS continue to be marketed, distributed and sold in California without
9 the requisite warning information.

10 24. As a proximate result of acts by Defendants, as a person 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 Orange, 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 25. 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 26. 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 27. 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 expose individuals to lead.

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

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28 ///

FIRST CAUSE OF ACTION

(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.*)

29. Plaintiff hereby incorporates by reference each and every preceding allegation and paragraph as though fully set forth in this cause of action.

30. On June 19, 2012 and September 17, 2012, Plaintiff sent separate 60-Day Notice of Proposition 65 violations to the requisite public enforcement agencies (“Notices of Violations”). Each of the Notices of Violations were sent to each MARKET AMERICA, INC. and MARKET AMERICA WORLDWIDE, INC. THE PRODUCTS were identified in the Notices of Violations as 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 notices of violations to be given to certain public enforcement agencies and to the violator. The Notices of Violations were issued as follows:

- a. Defendants MARKET AMERICA, INC. and MARKET AMERICA WORLDWIDE, INC. and the California Attorney General were provided copies by Priority Mail of the Notices of Violations, along with a Certificate of Merit by the attorney for the noticing party stating that there is a reasonable and meritorious cause for this action. The requisite county district attorneys and city attorneys were provided copies by Priority Mail of the Notices of Violations and Certificate of Merit.
- b. Defendants MARKET AMERICA, INC. and MARKET AMERICA WORLDWIDE, INC. were provided, with the Notices of Violations, a copy of a document entitled “The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is also known as Appendix A to Title 27 of CCR § 25903.
- c. The California Attorney General was provided, with the Notices of Violations, additional factual information sufficient to establish a basis for the Certificate of Merit, including the identity of the persons consulted with and relied on by the

1 certifier, and the facts, studies, or other data reviewed by those persons, pursuant
2 to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).

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

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

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

25 34. An action for injunctive relief under Proposition 65 is specifically authorized by
26 Health & Safety Code §25249.7(a).

27 35. Continuing commission by Defendants of the acts alleged above will irreparably
28 harm the citizens of the State of California, for which harm they have no plain, speedy, or

1 adequate remedy at law.

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

3 **SECOND CAUSE OF ACTION**

4 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq.)**

5 37. Plaintiff hereby incorporates by reference each and every preceding allegation and
6 paragraph as though fully set forth in this cause of action.

7 38. On June 19, 2012 and September 17, 2012, Plaintiff sent separate 60-Day Notice
8 of Proposition 65 violations to the requisite public enforcement agencies (“Notices of
9 Violations”). Each of the Notices of Violations were sent to each MARKET AMERICA, INC.
10 and MARKET AMERICA WORLDWIDE, INC. THE PRODUCTS were identified in the
11 Notices of Violations as containing lead exceeding allowable levels. The Notices of Violations
12 were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
13 and the statute’s implementing regulations regarding the notices of violations to be given to
14 certain public enforcement agencies and to the violator. The Notices of Violations were issued as
15 follows:

- 16 a. Defendants MARKET AMERICA, INC. and MARKET AMERICA
17 WORLDWIDE, INC. and the California Attorney General were provided copies
18 by Priority Mail of the Notices of Violations, along with a Certificate of Merit by
19 the attorney for the noticing party stating that there is a reasonable and
20 meritorious cause for this action. The requisite county district attorneys and city
21 attorneys were provided copies by Priority Mail of the Notices of Violations and
22 Certificate of Merit.
- 23 b. Defendants MARKET AMERICA, INC. and MARKET AMERICA
24 WORLDWIDE, INC. were provided, with the Notices of Violations, a copy of a
25 document entitled “The Safe Drinking Water and Toxic Enforcement Act of 1986
26 (Proposition 65): A Summary,” which is also known as Appendix A to Title 27 of
27 CCR § 25903.
- 28 c. The California Attorney General was provided, with the Notices of Violations,

1 additional factual information sufficient to establish a basis for the Certificate of
2 Merit, including the identity of the persons consulted with and relied on by the
3 certifier, and the facts, studies, or other data reviewed by those persons, pursuant
4 to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).

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

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

23 41. By the above-described acts, Defendants are liable, pursuant to H&S Code
24 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
25 relating to THE PRODUCTS.

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

27 **THE NEED FOR INJUNCTIVE RELIEF**

28 43. Plaintiff hereby incorporates by reference each and every preceding allegation and

1 paragraph as though fully set forth in this cause of action.

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

7 **PRAYER FOR RELIEF**

8 Wherefore, Plaintiff prays for the following relief against Defendant AYUSH HERBS,
9 INC. in its individual capacity and in its capacity of doing business as R-U-VED:

10 A. A preliminary and permanent injunction enjoining each Defendant, its agents,
11 employees, assigns and all persons acting in concert or participating with each Defendant, from
12 manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or
13 use in California without first providing clear and reasonable warnings, within the meaning of
14 Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead;

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


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

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

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

21 Dated: May 18, 2013

22 WRAITH LAW

23 

24 By: _____
25 WILLIAM F. WRAITH
26 Attorney for Plaintiff Environmental
27 Research Center
28