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CLERK OF THE SUPERIOR COURT
COUNTY OF CONTRA COSTA, CA
BY _____

D. WEBER

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.; GRASS
17 ADVANTAGE; and DOES 1-50,
18 inclusive,

19 Defendants.

Case No. MSC12-00556

**FIRST AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF AND CIVIL
PENALTIES**

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

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

22 **INTRODUCTION**

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

26 2. Defendants have manufactured, packaged, distributed, marketed, sold and/or have
27 otherwise been involved in the chain of commerce of, and continue to manufacture, package,
28 distribute, market, sell, and/or otherwise continue to be involved in the chain of commerce of the
following ingestible products, which contain the chemical lead and which have been and

¹ 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 - Amazing Grass Green SuperFood Chocolate Peanut Butter Protein Bar
- 4 - Amazing Grass Green SuperFood Whole Food Energy Bar
- 5 - Amazing Grass Amazing Meal Original Blend
- 6 - Amazing Grass Green SuperFood Chocolate Drink Powder
- 7 - Amazing Grass Green SuperFood Lemon Lime Energy Drink Powder
- 8 - Amazing Grass Green SuperFood Berry Flavor Drink Powder
- 9 - Amazing Grass Green SuperFood All Natural Drink Powder.
- 10 - Amazing Grass Green Superfood Raw Reserve
- 11 - Amazing Grass Amazing Meal Vanilla Chai Infusion
- 12 - Amazing Grass Amazing Meal Chocolate Infusion
- 13 - Amazing Grass Amazing Meal Pomegranate Mango Infusion
- 14 - Amazing Grass GreenSuperFood Orange Dreamsicle Drink Powder
- 15 - Amazing Grass The Amazing Trio Barley Grass Wheat Grass & Alfalfa
16 Whole Food Drink Powder
- 17 - Amazing Grass GreenSuperFood Whole Food Energy Bar Berry.

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

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

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

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

6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to

1 remedy Defendants' failure to provide clear and reasonable warnings regarding exposures to the
2 lead.

3 JURISDICTION AND VENUE

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

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

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

20 PARTIES

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

25 11. ERC is a "Person" within the meaning of H&S Code §25118 and H&S Code
26 §25249.11(a), and brings this enforcement action "in the public interest" pursuant to H&S Code
27 §25249.7(d).

28 12. Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE INDUSTRIES INC.,
and GRASS ADVANTAGE are corporations, and each is a "Person" within the meaning of
H&S Code §25249.11(a). Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE
INDUSTRIES INC., and GRASS ADVANTAGE have manufactured, packaged, distributed,

1 marketed, sold and/or has otherwise been involved in the chain of commerce of, and continue to
2 manufacture, package, distribute, market, sell, and/or otherwise continue to be involved in the
3 chain of commerce of THE PRODUCTS for sale or use in California. Defendants VITAMIN
4 SHOPPE, INC., VITAMIN SHOPPE INDUSTRIES INC., and GRASS ADVANTAGE, at all
5 times relevant to this action, have each had 10 or more employees and is a "Person in the course
6 of doing business" pursuant to H&S Code §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.

16 STATUTORY BACKGROUND

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

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

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

28 16. Proposition 65 provides that any person who "violates or threatens to violate" the
statute "may be enjoined in any court of competent jurisdiction." (H&S Code §25249.7(a).)
"Threaten to violate" is defined to mean creating "a condition in which there is a substantial

1 probability that a violation will occur.” (H&S Code §25249.11(e).) Violators are liable for civil
2 penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S Code §25249.7(b).)

3 FACTUAL BACKGROUND

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

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

13 19. Plaintiff is informed and believes, and based on such information and belief,
14 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in
15 California without the requisite clear and reasonable warnings before, on, and after March 25,
16 2009. THE PRODUCTS continue to be marketed, distributed and sold in California without the
17 requisite warning information.

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

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

27 22. Individuals using or handling THE PRODUCTS are exposed to lead in excess of
28 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 March 25, 2011 and May 17, 2013 60-**
8 **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 March 25, 2011, Plaintiff sent a 60-Day Notice of Proposition 65 violations to
12 the requisite public enforcement agencies and to Defendants VITAMIN SHOPPE, INC. and
13 VITAMIN SHOPPE INDUSTRIES INC. ("March 25, 2011 Notice of Violation"). On May 17,
14 2013, Plaintiff sent a 60-Day Notice of Proposition 65 violations to the requisite public
15 enforcement agencies and to Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE
16 INDUSTRIES INC., and GRASS ADVANTAGE ("May 17, 2013 Notice of Violation"). (The
17 March 25, 2011 Notice of Violation and the May 17, 2013 Notice of Violation are hereinafter
18 referred to collectively as "Notices of Violation.") THE PRODUCTS were identified in the
19 Notices of Violations as containing lead exceeding allowable levels. The Notices of Violations
20 were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
21 and the statute's implementing regulations regarding the notice of violations to be given to
22 certain public enforcement agencies and to the violator. The Notices of Violations were issued
23 as follows:

- 24 a. Defendants VITAMIN SHOPPE, INC. and VITAMIN SHOPPE
25 INDUSTRIES INC., and the California Attorney General were provided
26 copies by Certified Mail of the March 25, 2011 Notice of Violation, along
27 with a Certificate of Merit by the attorney for the noticing party stating
28 that there is a reasonable and meritorious cause for this action; and
Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE
INDUSTRIES INC. and GRASS ADVANTAGE, and the California
Attorney General were provided copies by Certified Mail of the May 17,

1 2013 Notice of Violation, along with a Certificate of Merit by the attorney
2 for the noticing party stating that there is a reasonable and meritorious
3 cause for this action. The requisite county district attorneys and city
4 attorneys were provided copies by First Class Mail of the Notices of
5 Violations and Certificates of Merit.

6 b. Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE
7 INDUSTRIES INC. and GRASS ADVANTAGE were provided, with
8 each of the respective Notices of Violations, a copy of a document entitled
9 "The Safe Drinking Water and Toxic Enforcement Act of 1986
10 (Proposition 65): A Summary," which is also known as Appendix A to
11 Title 27 of CCR §25903.

12 c. The California Attorney General was provided, with the Notices of
13 Violations, additional factual information sufficient to establish a basis for
14 the certificates, including the identity of the persons consulted with and
15 relied on by the certifier, and the facts, studies, or other data reviewed by
16 those persons, pursuant to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).

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

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

1 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code
2 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
3 for use and/or handling to individuals in California.

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

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

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

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

14 **SECOND CAUSE OF ACTION**

15 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning THE
16 PRODUCTS, which are identified in Plaintiff's March 25, 2011 and May 17, 2013 60-Day
17 Notices of Violations)**

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

20 38. On March 25, 2011, Plaintiff sent a 60-Day Notice of Proposition 65 violations to
21 the requisite public enforcement agencies and to Defendants VITAMIN SHOPPE, INC. and
22 VITAMIN SHOPPE INDUSTRIES INC. ("March 25, 2011 Notice of Violation"). On May 17,
23 2013, Plaintiff sent a 60-Day Notice of Proposition 65 violations to the requisite public
24 enforcement agencies and to Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE
25 INDUSTRIES INC., and GRASS ADVANTAGE ("May 17, 2013 Notice of Violation"). (The
26 March 25, 2011 Notice of Violation and the May 17, 2013 Notice of Violation are hereinafter
27 referred to collectively as "Notices of Violation.") THE PRODUCTS were identified in the
28 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 notice of violations to be given to
certain public enforcement agencies and to the violator. The Notices of Violations were issued

1 as follows:

- 2 a. Defendants VITAMIN SHOPPE, INC. and VITAMIN SHOPPE
3 INDUSTRIES INC., and the California Attorney General were provided
4 copies by Certified Mail of the March 25, 2011 Notice of Violation, along
5 with a Certificate of Merit by the attorney for the noticing party stating
6 that there is a reasonable and meritorious cause for this action; and
7 Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE
8 INDUSTRIES INC. and GRASS ADVANTAGE, and the California
9 Attorney General were provided copies by Certified Mail of the May 17,
10 2013 Notice of Violation, along with a Certificate of Merit by the attorney
11 for the noticing party stating that there is a reasonable and meritorious
12 cause for this action. The requisite county district attorneys and city
13 attorneys were provided copies by First Class Mail of the Notices of
14 Violations and Certificates of Merit.
- 15 b. Defendants VITAMIN SHOPPE, INC., VITAMIN SHOPPE
16 INDUSTRIES INC. and GRASS ADVANTAGE were provided, with
17 each of the respective Notices of Violations, a copy of a document entitled
18 "The Safe Drinking Water and Toxic Enforcement Act of 1986
19 (Proposition 65): A Summary," which is also known as Appendix A to
20 Title 27 of CCR §25903.
- 21 c. The California Attorney General was provided, with the Notices of
22 Violations, additional factual information sufficient to establish a basis for
23 the certificates, including the identity of the persons consulted with and
24 relied on by the certifier, and the facts, studies, or other data reviewed by
25 those persons, pursuant to H&S Code §§25249.7(d)(1) and 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.

39. 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.

12 41. By the above-described acts, Defendants are 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 Defendants, as set forth hereafter.

16 **THE NEED FOR INJUNCTIVE RELIEF**

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

19 43. By committing the acts alleged in this Complaint, Defendants have caused
20 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
21 of equitable relief, Defendants 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 **PRAYER FOR RELIEF**

25 Wherefore, Plaintiff prays for the following relief:

26 A. A preliminary and permanent injunction enjoining Defendants, their agents,
27 employees, assigns and all persons acting in concert or participating with Defendants, from
28 manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or

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use in California without first providing clear and reasonable warnings, within the meaning of Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead.

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

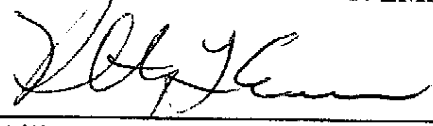
C. An award to Plaintiff of its reasonable attorney fees pursuant to California Code of Civil Procedure §1021.5 or the substantial benefit theory;

D. An award of costs of suit herein; and

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

Dated: 1/13/14

LAW OFFICE OF PHILIP T. EMMONS

By: 

Philip T. Emmons
Attorney for Plaintiff
Environmental Research Center