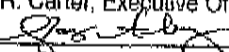


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8 Environmental Research Center

FILED
Superior Court of California
County of Los Angeles

AUG 25 2014

Sherri R. Carter, Executive Officer/Clerk
By  Deputy
Nancy Alvarez

9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
10 CENTRAL DISTRICT, STANLEY MOSK COURTHOUSE

11 ENVIRONMENTAL RESEARCH
12 CENTER, a California non-profit
13 corporation,

14 Plaintiff,

15 vs.

16 BIO NUTRITIONAL RESEARCH
17 GROUP, INC. and DOES 1-25, Inclusive,

18 Defendants.

Case No.: HC537514

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

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

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

21 **INTRODUCTION**

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

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

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

- 3 a. BNRG Proto Whey Vanilla Crème
- 4 b. BNRG Power Crunch Proto Whey Café Mocha
- 5 c. BNRG Power Crunch Protein Energy Bar Original Triple Chocolate
- 6 d. BNRG Power Crunch Proto Whey Double Chocolate
- 7 e. BNRG Power Crunch Proto Whey Cookies & Crème
- 8 f. BNRG Power Crunch Proto Whey Ultraburn Chocolate Crème
- 9 g. BNRG Power Crunch Proto Whey Ultraburn Vanilla Café

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

11 3. The use and/or handling of THE PRODUCTS causes exposures to lead at levels
12 requiring a “clear and reasonable warning” under California’s Safe Drinking Water and Toxic
13 Enforcement Act of 1986, Health & Safety Code (“H&S Code”) §25249.5, *et. seq.* (also known
14 as “Proposition 65”). Defendant has failed to provide the health hazard warnings required by
15 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 Defendant 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 Defendant to bring each of its business practices into compliance
25 with 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 Defendant’s 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 Defendant because, based on information and
8 belief, each Defendant is a business having sufficient minimum contacts with California, or
9 otherwise intentionally availing itself of the California market through the marketing,
10 distribution and/or sale of THE PRODUCTS in the State of California to render the exercise of
11 jurisdiction over it by the California courts consistent with traditional notions of fair play and
12 substantial justice.

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

18 **PARTIES**

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

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

25 12. ERC alleges on information and belief that Defendant BIO NUTRITIONAL
26 RESEARCH GROUP, INC. is a California Corporation that is a person within the meaning of
27 H&S Code §25249.11(a).

28 13. Defendant manufactured, packaged, distributed, marketed, sold and/or has

1 otherwise been involved in the chain of commerce, and continues to manufacture, package,
2 distribute, market, sell and/or otherwise continue to be involved in the chain of commerce of
3 THE PRODUCTS for sale or use in California. Defendant employs ten or more persons, and is
4 thus a “person in the course of doing business” within the meaning of Proposition 65.

5 14. Defendants DOES 1-25 are named herein under fictitious names, as their true
6 names and capacities are unknown to Plaintiff. ERC is informed and believes, and thereon
7 alleges, that each of said DOES has manufactured, packaged, distributed, marketed, sold and/or
8 has otherwise been involved in the chain of commerce of, and continues to manufacture,
9 package, distribute, market, sell, and/or otherwise continues to be involved in the chain of
10 commerce of THE PRODUCTS for sale or use in California, and/or is responsible, in some
11 actionable manner, for the events and happenings referred to herein, either through its conduct or
12 through the conduct of its agents, servants or employees, or in some other manner, causing the
13 harms alleged herein. Plaintiff will seek leave to amend this Complaint to set forth the true
14 names and capacities of DOES when ascertained.

15 15. Plaintiff is informed and believes and thereon alleges that each of the defendants
16 is in some manner responsible for the events set forth in this Complaint and proximately caused
17 the injuries and damages to Plaintiff as alleged in this Complaint.

18 16. Plaintiff is informed and believes and thereon alleges that at all material times,
19 defendants, and each of them, were the agents, servants, and employees of the other defendant,
20 and each of them in such a way as to cause each defendant to be jointly and severally liable and
21 responsible for the conduct of one another. The conduct of each defendant was within the course
22 and scope of the authority granted each defendant by the other defendant. Each defendant ratified
23 and approved of the acts or omissions of each other such as to cause each to be jointly and
24 severally liable for the conduct of each other defendant.

25 **STATUTORY BACKGROUND**

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

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

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

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

14 **FACTUAL BACKGROUND**

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

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

24 22. Plaintiff is informed and believes, and based on such information and belief,
25 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in
26 California without the requisite clear and reasonable warnings. THE PRODUCTS continue to be
27 marketed, distributed and sold in California without the requisite warning information.

28 23. As a proximate result of acts by Defendant, as a person in the course of doing

1 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of
2 California, including in the County of Los Angeles, have been exposed to lead without clear and
3 reasonable warnings. The individuals subject to exposures to lead include normal and
4 foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE
5 PRODUCTS.

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

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

12 26. At all times relevant to this action, Defendant has, in the course of doing business,
13 failed to provide individuals using and/or handling THE PRODUCTS with clear and reasonable
14 warnings that THE PRODUCTS expose individuals to lead.

15 27. Upon information and belief, Plaintiff alleges THE PRODUCTS continue to be
16 marketed, distributed, and/or sold in California without the requisite clear and reasonable
17 warnings.

18 **FIRST CAUSE OF ACTION**

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

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

22 29. On July 19, 2013 and May 23, 2014, Plaintiff sent 60-Day Notices of Proposition
23 65 violations to the requisite public enforcement agencies and to defendant BIO NUTRITIONAL
24 RESEARCH GROUP, INC. (“Notices of Violations”). Each of the Notices of Violations was
25 issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
26 statute’s implementing regulations regarding the notices of violations to be given to certain
27 public enforcement agencies and to the violator. Each of the Notices of Violations was issued as
28 follows:

- 1 a. Defendant BIO NUTRITIONAL RESEARCH GROUP, INC. and the California
2 Attorney General were provided copies of the Notices of Violations, along with a
3 Certificate of Merit by the attorney for the noticing party stating that there is a
4 reasonable and meritorious cause for this action. The requisite county district
5 attorneys and city attorneys were provided copies of the Notices of Violations and
6 Certificate of Merit.
- 7 b. Defendant BIO NUTRITIONAL RESEARCH GROUP, INC. was provided, with
8 the Notices of Violations, a copy of a document entitled “The Safe Drinking
9 Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which
10 is also known as Appendix A to Title 27 of CCR § 25903.
- 11 c. The California Attorney General was provided, with the Notices of Violations,
12 additional factual information sufficient to establish a basis for the Certificate of
13 Merit, including the identity of the persons consulted with and relied on by the
14 certifier, and the facts, studies, or other data reviewed by those persons, pursuant
15 to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).
- 16 30. The appropriate public enforcement agencies have failed to commence and
17 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendant
18 based on the allegations herein.
- 19 31. By committing the acts alleged in this Complaint, Defendant at all times relevant
20 to this action, and continuing through the present, has violated and continues to violate H&S
21 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
22 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
23 allowable exposure levels without Defendant first giving clear and reasonable warnings to such
24 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendant has manufactured,
25 packaged, distributed, marketed, sold and/or has otherwise been involved in the chain of
26 commerce of, and continues to manufacture, package, distribute, market, sell and/or otherwise
27 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,
28 and will be used and/or handled by individuals in California, without Defendant providing clear

1 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,
2 birth defects and other reproductive harm posed by exposure to lead through the use and/or
3 handling of THE PRODUCTS. Furthermore, Defendant has threatened to violate H&S Code
4 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
5 for use and/or handling to individuals in California.

6 32. By the above-described acts, Defendant has violated H&S Code §25249.6 and is
7 therefore subject to an injunction ordering Defendant to stop violating Proposition 65, and to
8 provide required warnings to consumers and other individuals who will purchase, use and/or
9 handle THE PRODUCTS.

10 33. An action for injunctive relief under Proposition 65 is specifically authorized by
11 Health & Safety Code §25249.7(a).

12 34. Continuing commission by Defendant of the acts alleged above will irreparably
13 harm the citizens of the State of California, for which harm they have no plain, speedy, or
14 adequate remedy at law.

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

16 **SECOND CAUSE OF ACTION**

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

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

20 37. On July 19, 2013 and May 23, 2014, Plaintiff sent 60-Day Notices of Proposition
21 65 violations to the requisite public enforcement agencies and to defendant BIO NUTRITIONAL
22 RESEARCH GROUP, INC. (“Notices of Violations”). Each of the Notices of Violations was
23 issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
24 statute’s implementing regulations regarding the notices of violations to be given to certain
25 public enforcement agencies and to the violator. Each of the Notices of Violations was issued as
26 follows:

27 a. Defendant BIO NUTRITIONAL RESEARCH GROUP, INC. and the California
28 Attorney General were provided copies of the Notices of Violations, along with a

1 Certificate of Merit by the attorney for the noticing party stating that there is a
2 reasonable and meritorious cause for this action. The requisite county district
3 attorneys and city attorneys were provided copies of the Notices of Violations and
4 Certificate of Merit.

5 b. Defendant BIO NUTRITIONAL RESEARCH GROUP, INC. was provided, with
6 the Notices of Violations, a copy of a document entitled “The Safe Drinking
7 Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which
8 is also known as Appendix A to Title 27 of CCR § 25903.

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

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

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

1 handling of THE PRODUCTS. Furthermore, Defendant 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 40. By the above-described acts, Defendant is liable, pursuant to H&S Code
5 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
6 relating to THE PRODUCTS.

7 41. Wherefore, Plaintiff prays judgment against Defendant, as set forth hereafter.

8 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

16 **PRAYER FOR RELIEF**

17 Wherefore, Plaintiff prays for the following relief against Defendant BIO
18 NUTRITIONAL RESEARCH GROUP, INC.:

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

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

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

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

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

Dated: August 14, 2014

WRAITH LAW



By: _____
WILLIAM F. WRAITH
Attorney for Plaintiff Environmental
Research Center

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ERC v. Bio Nutritional Research Group, Inc., et al., LASC Case No. BC537514
PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, William F. Wraith, am an active member of the State Bar of California and not a party to this action. I am a resident or employed in the county where the mailing took place. My business address is 16485 Laguna Canyon Road, Suite 250, Irvine, CA 92618.

On August 23, 2014, I served the foregoing documents described as: **FIRST AMENDED COMPLAINT** on the following interested parties in this action in the manner identified below:

Daniel B. Chammas, Esq.
Ryan M. Andrews, Esq.
Venable LLP
2049 Century Park East, Suite 2100
Los Angeles, CA 90067
Tel: (310) 229-9900 / Fax: (310) 229-9901
Attorneys for Defendant BIO NUTRITIONAL RESEARCH GROUP, INC.

BY MAIL – COLLECTION: I placed the envelope for collection and mailing following this business's ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

BY MAIL – USPS DEPOSIT: I deposited the sealed envelope with the United States Postal service with the postage fully prepaid.

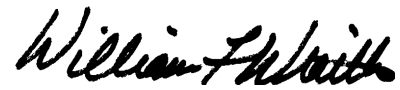
BY FACSIMILE: I caused such document(s) to be transmitted via facsimile transmission to the addressee(s) pursuant to Code of Civil Procedure section 1013(e).

BY PERSONAL SERVICE: I caused a true copy of such document(s) to be hand-delivered to the addressee(s) via a California registered process server pursuant to Code of Civil Procedure section 1011. If required, the process server's original proof of personal service will be filed with the court immediately upon its receipt.

BY EXPRESS MAIL/CARRIER: I deposited the sealed envelope with delivery fees paid or provided for, or postage fully prepaid, for delivery in a box or other facility regularly maintained by [____], an express service carrier providing overnight delivery pursuant to Code of Civil Procedure section 1013(c).

BY EMAIL OR ELECTRONIC TRANSMISSION: I caused the documents to be sent to the persons at the e-mail addresses. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **August 23, 2014** at Irvine, California.



William F. Wraith