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12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF ALAMEDA

14 ENVIRONMENTAL RESEARCH
15 CENTER, a California non-profit
16 corporation,

17 Plaintiffs,

18 vs.

19 LIVING ECOLOGY INC, LIVING
20 ECOLOGY MANUFACTURING INC.
21 and DOES 1-25, Inclusive,

22 Defendants.

23) **Case No.: RG14748134**

24) **FIRST AMENDED COMPLAINT FOR**
25) **INJUNCTIVE RELIEF AND CIVIL**
26) **PENALTIES**

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

28 Plaintiff Environmental Research Center, Inc. (“Plaintiff”) brings this action in the
interests of the general public and, on information and belief, hereby alleges:

INTRODUCTION

1. This action seeks to remedy Defendants Living Ecology Inc, Living Ecology
Manufacturing Inc. and Does 1-25, Inclusive’s (individually referred to hereinafter as
“Defendant” or collectively as “Defendants”) continuing failure to warn consumers in California
that they are being exposed to lead or cadmium, substances known to the State of California to
cause cancer, birth defects and other reproductive harm.

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

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 following ingestible products, which contain the chemical lead and which have been and
4 continue to be offered for sale, sold and/or otherwise provided for use and/or handling to
5 individuals in California:

- 6 1. Bio International Organic Active Greens Powder
- 7 2. Bio International Organic Active Greens
- 8 3. Organic Food Bar Inc. Raw Organic Food Bar Cinnamon Raisin
- 9 4. Organic Food Bar Inc. Raw Organic Food Bar Chocolatey Chocolate Chip
- 10 5. Organic Food Bar Inc. Organic Food Bar Chocolate Covered Active Greens
- 11 6. Organic Food Bar Inc. Organic Food Bar Active Greens - Protein Chocolate
12 Covered
- 13 7. Organic Food Bar Inc. Organic Food Bar Active Greens
- 14 8. Organic Food Bar Inc. Organic Food Bar Active Greens Chocolate
- 15 9. Organic Food Bar Inc. Organic Food Bar Original
- 16 10. Organic Food Bar Inc. Organic Food Bar Protein
- 17 11. Organic Food Bar Inc. Organic Food Bar Vegan
- 18 12. Organic Food Bar Inc. OFB Vegan Protein Vanilla
- 19 13. Organic Food Bar Inc. OFB Vegan Protein Strawberry
- 20 14. Organic Food Bar Inc. OFB Vegan Protein Chocolate
- 21 15. Organic Food Bar Inc. OFB Whey Protein Strawberry
- 22 16. Organic Food Bar Inc. OFB Whey Protein Vanilla
- 23 17. Organic Food Bar Inc. Organic Food Bar High Energy Protein\
- 24 18. Organic Food Bar Inc. Organic Food Bar High Energy Vegan

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

- 26 3. Lead and Cadmium (hereinafter, the “LISTED CHEMICALS”) are substances
27 known to the State of California to cause cancer, birth defects, and other reproductive harm.
- 28 4. The use and/or handling of THE PRODUCTS causes exposures to the LISTED

1 business” within the meaning of Proposition 65.

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

12 17. Plaintiff is informed and believes and thereon alleges that each Defendant is in
13 some manner responsible for the events set forth in this Complaint and proximately caused the
14 injuries and damages to Plaintiff as alleged in this Complaint.

15 **STATUTORY BACKGROUND**

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

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

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

27 20. Proposition 65 provides that any person who “violates or threatens to violate” the
28 statute “may be enjoined in any court of competent jurisdiction.” (H&S Code §25249.7(a).)

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

4 **FACTUAL BACKGROUND**

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

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

14 23. On May 1, 1997, the State of California officially listed the chemical cadmium as
15 a chemical known to cause reproductive toxicity. Cadmium became subject to the warning
16 requirement one year later and was therefore subject to the “clear and reasonable” warning
17 requirements for Proposition 65 beginning on May 1, 1998. (27 CCR § 25000, *et seq.*; H&S
18 Code §25249.5, *et seq.*). Due to the high toxicity of cadmium, the maximum allowable dose
19 level for cadmium is 4.1 ug/day (micrograms a day) for reproductive toxicity. (27 CCR
20 § 25805(b).)

21 24. On October 1, 1987, the State of California officially listed the chemicals
22 cadmium and cadmium compounds as chemicals known to cause cancer. Cadmium and
23 cadmium compounds became subject to the warning requirement one year later and were
24 therefore subject to the “clear and reasonable” warning requirements of Proposition 65 beginning
25 on October 1, 1988 (27 CCR § 25000, *et seq.*; H&S Code §25249.6 *et seq.*).

26 25. Plaintiff is informed and believes, and based on such information and belief,
27 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in
28 California without the requisite clear and reasonable warnings before, on, and after January 31,

1 2011. THE PRODUCTS continue to be marketed, distributed and sold in California without the
2 requisite warning information.

3 26. As a proximate result of acts by Defendants, as a person in the course of doing
4 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of
5 California, including in the County of Alameda, have been exposed to lead without clear and
6 reasonable warnings. The individuals subject to exposures to lead include normal and
7 foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE
8 PRODUCTS.

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

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

15 29. At all times relevant to this action, each Defendant has, in the course of doing
16 business, failed to provide individuals using and/or handling THE PRODUCTS with clear and
17 reasonable warnings that THE PRODUCTS expose individuals to lead.

18 30. THE PRODUCTS continues to be marketed, distributed, and/or sold in California
19 without the requisite clear and reasonable warnings.

20 **FIRST CAUSE OF ACTION**

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

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

24 32. On January 31, 2014, April 4, 2014, and April 10, 2015 Plaintiff sent separate 60-
25 Day Notice of Proposition 65 Violations to the requisite public enforcement agencies (“Notices
26 of Violations”). The Notices of Violation are incorporated herein by this reference, and are
27 attached hereto as Exhibit A, B, and C, respectively. The Notices of Violations were issued
28 pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the

1 statute's implementing regulations regarding the notices of violations to be given to certain
2 public enforcement agencies and to the violator. The Notices of Violations were issued as
3 follows:

- 4 1. Defendants LIVING ECOLOGY INC. and LIVING ECOLOGY
5 MANUFACTURING INC. and the California Attorney General were provided
6 copies of the Notices of Violations, along with a Certificates of Merit by the
7 attorney for the noticing party stating that there is a reasonable and meritorious
8 cause for this action. The requisite county district attorneys and city attorneys
9 were provided copies of the Notices of Violations and Certificates of Merit.
- 10 2. Defendants LIVING ECOLOGY INC. and LIVING ECOLOGY
11 MANUFACTURING INC. were provided with the Notices of Violations, a copy
12 of a document entitled "The Safe Drinking Water and Toxic Enforcement Act of
13 1986 (Proposition 65): A Summary," which is also known as Appendix A to Title
14 27 of CCR § 25903.
- 15 3. The California Attorney General was provided, with the Notices of Violations,
16 additional factual information sufficient to establish a basis for the Certificates of
17 Merit, including the identity of the persons consulted with and relied on by the
18 certifier, and the facts, studies, or other data reviewed by those persons, pursuant
19 to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).

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

23 34. By committing the acts alleged in this Complaint, Defendants at all times relevant
24 to this action, and continuing through the present, have violated and continue to violate H&S
25 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
26 individuals who use or handle THE PRODUCTS to the LISTED CHEMICALS at levels
27 exceeding allowable exposure levels without Defendants first giving clear and reasonable
28 warnings to such individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants

1 have manufactured, packaged, distributed, marketed, sold and/or have otherwise been involved
2 in the chain of commerce of, and continue to manufacture, package, distribute, market, sell
3 and/or otherwise continue to be involved in the chain of commerce of THE PRODUCTS, which
4 have been, are, and will be used and/or handled by individuals in California, without Defendants
5 providing clear and reasonable warnings, within the meaning of Proposition 65, regarding the
6 risks of cancer, birth defects and other reproductive harm posed by exposure to the LISTED
7 CHEMICALS through the use and/or handling of THE PRODUCTS. Furthermore, Defendants
8 have threatened to violate H&S Code §25249.6 by THE PRODUCTS being marketed, offered
9 for sale, sold and/or otherwise provided for use and/or handling to individuals in California.

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

14 36. An action for injunctive relief under Proposition 65 is specifically authorized by
15 Health & Safety Code §25249.7(a).

16 37. Continuing commission by Defendants of the acts alleged above will irreparably
17 harm the citizens of the State of California, for which harm they have no plain, speedy, or
18 adequate remedy at law.

19 38. Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

20 **SECOND CAUSE OF ACTION**

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

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

24 40. On January 31, 2014, April 4, 2014, and April 10, 2015 Plaintiff sent separate 60-
25 Day Notice of Proposition 65 Violations to the requisite public enforcement agencies (“Notices
26 of Violations”). The Notices of Violations were issued pursuant to, and in compliance with, the
27 requirements of H&S Code §25249.7(d) and the statute’s implementing regulations regarding the
28 notices of violations to be given to certain public enforcement agencies and to the violator. The

1 Notices of Violations were issued as follows:

- 2 1. Defendants LIVING ECOLOGY INC. and LIVING ECOLOGY
3 MANUFACTURING INC. and the California Attorney General were provided
4 copies of the Notices of Violations, along with a Certificates of Merit by the
5 attorney for the noticing party stating that there is a reasonable and meritorious
6 cause for this action. The requisite county district attorneys and city attorneys
7 were provided copies of the Notices of Violations and Certificates of Merit.
- 8 2. Defendants LIVING ECOLOGY INC. and LIVING ECOLOGY
9 MANUFACTURING INC. were provided with the Notices of Violations, a copy
10 of a document entitled “The Safe Drinking Water and Toxic Enforcement Act of
11 1986 (Proposition 65): A Summary,” which is also known as Appendix A to Title
12 27 of CCR § 25903.
- 13 3. The California Attorney General was provided, with the Notices of Violations,
14 additional factual information sufficient to establish a basis for the Certificate of
15 Merit, including the identity of the persons consulted with and relied on by the
16 certifier, and the facts, studies, or other data reviewed by those persons, pursuant
17 to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).

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

21 42. By committing the acts alleged in this Complaint, Defendants at all times relevant
22 to this action, and continuing through the present, have violated and continue to violate H&S
23 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
24 individuals who use or handle THE PRODUCTS to the LISTED CHEMICALS at levels
25 exceeding allowable exposure levels without Defendants first giving clear and reasonable
26 warnings to such individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants
27 have manufactured, packaged, distributed, marketed, sold and/or have otherwise been involved
28 in the chain of commerce of, and continue to manufacture, package, distribute, market, sell

1 and/or otherwise continue to be involved in the chain of commerce of THE PRODUCTS, which
2 have been, are, and will be used and/or handled by individuals in California, without Defendants
3 providing clear and reasonable warnings, within the meaning of Proposition 65, regarding the
4 risks of cancer, birth defects and other reproductive harm posed by exposure to the LISTED
5 CHEMICALS through the use and/or handling of THE PRODUCTS. Furthermore, Defendants
6 have threatened to violate H&S Code §25249.6 by THE PRODUCTS being marketed, offered
7 for sale, sold and/or otherwise provided for use and/or handling to individuals in California.

8 43. By the above-described acts, Defendants are liable, pursuant to H&S Code
9 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
10 relating to THE PRODUCTS.

11 **THE NEED FOR INJUNCTIVE RELIEF**

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

14 45. By committing the acts alleged in this Complaint, Defendants have caused
15 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence of
16 equitable relief, Defendants will continue to create a substantial risk of irreparable injury by
17 continuing to cause consumers to be involuntarily and unwittingly exposed to the LISTED
18 CHEMICALS through the use and/or handling of THE PRODUCTS.

19 **PRAYER FOR RELIEF**

20 Wherefore, Plaintiff prays for the following relief against Defendants LIVING
21 ECOLOGY INC. and LIVING ECOLOGY MANUFACTURING INC.:

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

28 B. An assessment of civil penalties against each Defendant, pursuant to Health &

- 1 Safety Code §25249.7(b), in the amount of \$2,500 per day for each violation of Proposition 65;
- 2 C. An award to Plaintiff of its reasonable attorney fees pursuant to California Code
- 3 of Civil Procedure §1021.5 or the substantial benefit theory;
- 4 D. An award of costs of suit herein; and
- 5 E. Such other and further relief as may be just and proper.
- 6

7 Dated: November 9, 2015

WRAITH LAW

William F. Wraith

By: _____

WILLIAM F. WRAITH

Attorney for Plaintiff Environmental
Research Center

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