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FILED  
ALAMEDA COUNTY

AUG 19 2015

CLERK OF THE SUPERIOR COURT  
By Julie Ball  
Deputy

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8 ENVIRONMENTAL RESEARCH CENTER, INC.

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ALAMEDA

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

13 Plaintiff,

14 v.

15 B.N.G. ENTERPRISES INCORPORATED,  
16 an Arizona Corporation, and FUSION  
17 FORMULATIONS, L.L.C., an Arizona  
18 Limited Liability Company,

19 Defendants.

Case No.  
RG15782403

COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES

Health & Safety Code §25249.5, et seq.

BY FAX

20 Plaintiff Environmental Research Center, Inc. ("PLAINTIFF" or "ERC") brings this  
21 action in the interests of the general public and, on information and belief, hereby alleges:

22 INTRODUCTION

23 1. This action seeks to remedy the continuing failure of Defendants B.N.G.  
24 ENTERPRISES INCORPORATED and FUSION FORMULATIONS, L.L.C. ("B.N.G.  
25 ENTERPRISES" or "DEFENDANTS") to warn consumers in California that they are being  
26 exposed to lead, a substance known to the State of California to cause cancer, birth defects, and  
other reproductive harm. DEFENDANTS manufacture, package, distribute, market, and/or sell

1 in California certain products containing lead (collectively, the "PRODUCTS"):

- 2 • **BNG Enterprises Inc. Natural Treasures Horny Goat Weed**
- 3 • **BNG Enterprises Inc. Natural Treasures Miracle Breast**
- 4 • **BNG Enterprises Inc. Herbal Clean Simply Slender Master**
- 5 **Cleanse**

6 2. Lead (hereinafter, the "LISTED CHEMICAL") is a substance known to the  
7 State<sup>1</sup> of California to cause cancer, birth defects, and other reproductive harm.

8 3. The use and/or handling of the PRODUCTS causes exposures to the LISTED  
9 CHEMICAL at levels requiring a "clear and reasonable warning" under California's Safe  
10 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code")  
11 §25249.5, *et seq.* (also known as "Proposition 65"). DEFENDANTS have failed to provide the  
12 health hazard warnings required by Proposition 65.

13 4. DEFENDANTS' past sales and continued manufacturing, packaging,  
14 distributing, marketing and/or sales of the PRODUCTS without the required health hazard  
15 warnings, cause individuals to be involuntarily and unwittingly exposed to levels of the  
16 LISTED CHEMICAL that violate Proposition 65.

17 5. PLAINTIFF seeks injunctive relief enjoining DEFENDANTS from the  
18 continued manufacturing, packaging, distributing, marketing and/or sales of the PRODUCTS  
19 in California without provision of clear and reasonable warnings regarding the risks of cancer,  
20 birth defects, and other reproductive harm posed by exposure to the LISTED CHEMICAL  
21 through the use and/or handling of the PRODUCTS. PLAINTIFF seeks an injunctive order  
22 compelling DEFENDANTS to bring their business practices into compliance with Proposition  
23 65 by providing a clear and reasonable warning to each individual who has been and who in  
24 the future may be exposed to the LISTED CHEMICAL from the use of the PRODUCTS.  
25 PLAINTIFF also seeks an order compelling DEFENDANTS to identify and locate each

26 \_\_\_\_\_  
<sup>1</sup> All statutory and regulatory references herein are to California law, unless otherwise specified.

1 individual person who in the past has purchased the PRODUCTS, and to provide to each such  
2 purchaser a clear and reasonable warning that the use of the PRODUCTS will cause exposures  
3 to the LISTED CHEMICAL.

4 6. In addition to injunctive relief, PLAINTIFF seeks an assessment of civil  
5 penalties up to the maximum civil penalty of \$2,500 per day per exposure authorized by  
6 Proposition 65 to remedy DEFENDANTS' failure to provide clear and reasonable warnings  
7 regarding exposures to the LISTED CHEMICAL.

8 **JURISDICTION AND VENUE**

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

13 8. This Court has jurisdiction over DEFENDANTS because, based on information  
14 and belief, DEFENDANTS are each a business having sufficient minimum contacts with  
15 California, or otherwise intentionally availing themselves of the California market through the  
16 distribution and sale of the PRODUCTS in the State of California to render the exercise of  
17 jurisdiction over them by the California courts consistent with traditional notions of fair play  
18 and substantial justice.

19 9. Venue in this action is proper in the Alameda Superior Court because the  
20 DEFENDANTS have violated California law in the County of Alameda.

21 10. On April 10, 2015, PLAINTIFF sent a 60-Day Notice of Proposition 65  
22 ("Notice") violations to the requisite public enforcement agencies, and to DEFENDANTS.  
23 The Notice was issued pursuant to, and in compliance with, the requirements of H&S Code  
24 §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to  
25 be given to certain public enforcement agencies and to the violators. The Notice included,  
26 *inter alia*, the following information: the name, address, and telephone number of the noticing

1 individuals; the name of the alleged violator; the statute violated; the approximate time period  
2 during which violations occurred; and descriptions of the violations, including the chemical  
3 involved, the routes of toxic exposure, and the specific product or type of product causing the  
4 violations, and was issued as follows:

- 5 a. DEFENDANTS were provided a copy of the Notice by Certified Mail.
- 6 b. DEFENDANTS were provided a copy of a document entitled "The Safe  
7 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A  
8 Summary," which is also known as Appendix A to Title 27 of CCR §25903.
- 9 c. The California Attorney General was provided a copy of the Notice via  
10 online submission.
- 11 d. The California Attorney General was provided with a Certificate of Merit by  
12 the attorney for the noticing parties, stating that there is a reasonable and  
13 meritorious case for this action, and attaching factual information sufficient  
14 to establish a basis for the certificate, including the identity of the persons  
15 consulted with and relied on by the certifier, and the facts, studies, or other  
16 data reviewed by those persons, pursuant to H&S Code §25249.7(h) (2).

17 11. At least 60 days have elapsed since PLAINTIFF sent the NOTICE to  
18 DEFENDANTS. 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  
20 DEFENDANTS based on the allegations herein.

#### 21 PARTIES

22 12. PLAINTIFF is a non-profit corporation organized under California's  
23 Corporation Law. ERC is dedicated to, among other causes, reducing the use and misuse of  
24 hazardous and toxic substances, consumer protection, worker safety, and corporate  
25 responsibility.  
26

1 13. 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 14. DEFENDANT B.N.G. ENTERPRISES INCORPORATED is a  
4 corporation organized under the State of Arizona's Corporation Law and is a person  
5 doing business within the meaning of H&S Code §25249.11.

6 15. DEFENDANT FUSION FORMULATIONS, L.L.C. is a limited liability  
7 company organized under the laws of the State of Arizona and is a person doing business  
8 within the meaning of H&S Code §25249.11.

9 16. DEFENDANTS have manufactured, packaged, distributed, marketed and /or  
10 sold the PRODUCTS for sale or use in California and the County of Alameda. ERC is  
11 informed and believes, and thereupon alleges, that DEFENDANTS continue to manufacture,  
12 package, distribute, market and/or sell the PRODUCTS for sale or use in California and in  
13 Alameda County.

14 STATUTORY BACKGROUND

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

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

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

26 19. "'Knowingly' refers only to knowledge of the fact that a discharge of, release of,  
or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring. No  
knowledge that the discharge, release or exposure is unlawful is required." (27 California Code

1 of Regulations (“CCR”) § 25102(n).)

2       20.     Proposition 65 provides that any person “violating or threatening to violate” the  
3 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7). The phrase  
4 “threatening to violate” is defined to mean creating “a condition in which there is a substantial  
5 likelihood that a violation will occur.” (H&S Code §25249.11(e)). Violators are liable for civil  
6 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

7                               **FACTUAL BACKGROUND**

8       21.     On February 27, 1987, the State of California officially listed the chemical lead  
9 as a chemical known to cause reproductive toxicity. Lead became subject to the warning  
10 requirement one year later and was therefore subject to the “clear and reasonable” warning  
11 requirements of Proposition 65 beginning on February 27, 1988. (27 CCR § 25000, *et seq.*;  
12 H&S Code §25249.5, *et seq.*). Due to the high toxicity of lead, the maximum allowable dose  
13 level for lead is 0.5 ug/day (micrograms a day) for reproductive toxicity. (27 CCR  
14 § 25805(b).)

15       22.     On October 1, 1992, the State of California officially listed the chemicals lead  
16 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became  
17 subject to the warning requirement one year later and were therefore subject to the “clear and  
18 reasonable” warning requirements of Proposition 65 beginning on October 1, 1993 (27 CCR §  
19 25000, *et seq.*; H&S Code §25249.6 *et seq.*). Due to the carcinogenicity of lead, the no  
20 significant risk level for lead is 15 ug/day (micrograms a day). (27 CCR § 25705(b)(1).)

21       23.     To test DEFENDANTS’ PRODUCTS for lead, PLAINTIFF hired a well-  
22 respected and accredited testing laboratory. The results of testing undertaken by PLAINTIFF  
23 of DEFENDANTS’ PRODUCTS show that the PRODUCTS tested were in violation of the 0.5  
24 ug/day “safe harbor” daily dose limit set forth in Proposition 65’s regulations. Very significant  
25 is the fact that people are being exposed to lead through ingestion as opposed to other not as  
26 harmful methods of exposure such as dermal exposure. Ingestion of lead produces much

1 higher exposure levels and health risks than does dermal exposure to this chemical.

2 24. At all times relevant to this action, DEFENDANTS, therefore, have knowingly  
3 and intentionally exposed the users and/or handlers of the PRODUCTS to the LISTED  
4 CHEMICAL without first giving a clear and reasonable warning to such individuals.

5 25. The PRODUCTS have allegedly been sold by DEFENDANTS for use in  
6 California since at least April 10, 2012. The PRODUCTS continue to be distributed and  
7 sold in California without the requisite warning information.

8 26. On April 10, 2015, ERC served DEFENDANTS and each of the appropriate  
9 public enforcement agencies with a Proposition 65 Notice, a document entitled "Notice of  
10 Violations of California Health & Safety Code Section 25249.5" that provided DEFENDANTS  
11 and the public enforcement agencies with notice that DEFENDANTS were in violation of  
12 Proposition 65 for failing to warn purchasers and individuals using the PRODUCTS that the  
13 use of the PRODUCTS exposes them to lead, a chemical known to the State of California to  
14 cause cancer and/or reproductive toxicity (a true and copy of the 60-Day Notice is attached  
15 hereto as **Exhibit A** and incorporated by reference).

16 27. As a proximate result of acts by DEFENDANTS, as persons in the course of  
17 doing business within the meaning of Health & Safety Code §25249.11, individuals throughout  
18 the State of California, including in the County of Alameda, have been exposed to the LISTED  
19 CHEMICAL without a clear and reasonable warning. The individuals subject to the illegal  
20 exposures include normal and foreseeable users of the PRODUCTS, as well as all other  
21 persons exposed to the PRODUCTS.

22 **FIRST CAUSE OF ACTION**  
23 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, et seq. concerning**  
24 **the PRODUCTS described in the April 10, 2015, Prop. 65 Notice)**  
25 **Against DEFENDANTS**

26 28. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 27,  
inclusive, as if specifically set forth herein.

1 29. By committing the acts alleged in this Complaint, DEFENDANTS, at all times  
2 relevant to this action, and continuing through the present, have violated H&S Code §25249.6  
3 by, in the course of doing business, knowingly and intentionally exposing individuals who use  
4 or handle the PRODUCTS set forth in the Notice to the LISTED CHEMICAL, without first  
5 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§  
6 25249.6 and 25249.11(f).

7 30. By the above-described acts, DEFENDANTS have violated H&S Code §  
8 25249.6 and are therefore subject to an injunction ordering DEFENDANTS to stop violating  
9 Proposition 65, to provide warnings to all present and future customers, and to provide  
10 warnings to DEFENDANTS' past customers who purchased or used the PRODUCTS without  
11 receiving a clear and reasonable warning.

12 31. An action for injunctive relief under Proposition 65 is specifically authorized by  
13 Health & Safety Code §25249.7(a).

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

20 Wherefore, PLAINTIFF prays for judgment against DEFENDANTS, as set forth  
21 hereafter.

22 **SECOND CAUSE OF ACTION**  
23 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, et seq. concerning the**  
24 **PRODUCTS described in PLAINTIFF's NOTICE)**  
25 **Against DEFENDANTS**

26 33. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 32,  
inclusive, as if specifically set forth herein.



1 34. By committing the acts alleged in this Complaint, DEFENDANTS at all times  
2 relevant to this action, and continuing through the present, have violated H&S Code §25249.6  
3 by, in the course of doing business, knowingly and intentionally exposing individuals who use  
4 or handle the PRODUCTS set forth in the Notice to the LISTED CHEMICAL, without first  
5 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§  
6 25249.6 and 25249.11(f).

7 35. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code  
8 §25249.7(b), for a civil penalty of \$2,500 per day per violation for each unlawful exposure to  
9 the LISTED CHEMICAL from the PRODUCTS.

10 Wherefore, PLAINTIFF prays for judgment against DEFENDANTS, as set forth  
11 hereafter.

12 **PRAYER FOR RELIEF**

13 Wherefore, PLAINTIFF accordingly prays for the following relief:

14 A. a preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),  
15 enjoining DEFENDANTS, their agents, employees, assigns and all persons acting in concert or  
16 participating with DEFENDANTS, from distributing or selling the PRODUCTS in California  
17 without first providing a clear and reasonable warning, within the meaning of Proposition 65,  
18 that the users and/or handlers of the PRODUCTS are exposed to the LISTED CHEMICAL;

19 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling  
20 DEFENDANTS to identify and locate each individual who has purchased the PRODUCTS  
21 since April 10, 2012, and to provide a warning to such person that the use of the PRODUCTS  
22 will expose the user to chemicals known to birth defects and other reproductive harm;

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

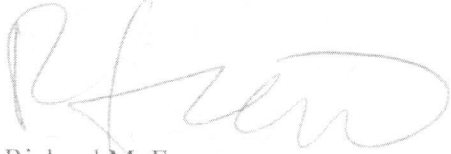
25 D. an award to PLAINTIFF of its reasonable attorney's fees and costs of suit  
26 pursuant to California Code of Civil Procedure §1021.5, as PLAINTIFF shall specify in further

1 application to the Court: and,

2 E. such other and further relief as may be just and proper.

3  
4 DATED: 8/18/15

LAW OFFICE OF RICHARD M. FRANCO

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7 Richard M. Franco  
8 Attorney for Plaintiff  
9 Environmental Research Center, Inc.

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# EXHIBIT A