

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Richard T. Drury SBN 163559 / Rebecca L. Davis SBN 271662
Lozeau | Drury LLP
1939 Harrison St, Suite 150
Oakland, CA 94612
TELEPHONE NO.: 510-836-4200 FAX NO.:

FOR COURT USE ONLY
ELECTRONICALLY FILED
Superior Court of California,
County of Alameda
08/10/2022 at 10:18:50 AM
By: Angela Linhares,
Deputy Clerk

ATTORNEY FOR (Name): Plaintiff Environmental Research Center, Inc. (ERC)
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda
STREET ADDRESS: 1225 Fallon Street
MAILING ADDRESS: 1225 Fallon Street
CITY AND ZIP CODE: Oakland, CA 94612
BRANCH NAME: Rene C. Davidson

CASE NAME:
Environmental Research Center, Inc. v. BiOptimizers USA, Inc. et

a) CIVIL CASE COVER SHEET
[checked] Unlimited (Amount demanded exceeds \$25,000)
[] Limited (Amount demanded is \$25,000 or less)

Complex Case Designation
[] Counter [] Joinder
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER: 22CV015886
JUDGE:
DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:
Auto Tort
[] Auto (22)
[] Uninsured motorist (46)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
[] Asbestos (04)
[] Product liability (24)
[] Medical malpractice (45)
[] Other PI/PD/WD (23)
Non-PI/PD/WD (Other) Tort
[] Business tort/unfair business practice (07)
[] Civil rights (08)
[] Defamation (13)
[] Fraud (16)
[] Intellectual property (19)
[] Professional negligence (25)
[] Other non-PI/PD/WD tort (35)
Employment
[] Wrongful termination (36)
[] Other employment (15)
Contract
[] Breach of contract/warranty (06)
[] Rule 3.740 collections (09)
[] Other collections (09)
[] Insurance coverage (18)
[] Other contract (37)
Real Property
[] Eminent domain/Inverse condemnation (14)
[] Wrongful eviction (33)
[] Other real property (26)
Unlawful Detainer
[] Commercial (31)
[] Residential (32)
[] Drugs (38)
Judicial Review
[] Asset forfeiture (05)
[] Petition re: arbitration award (11)
[] Writ of mandate (02)
[] Other judicial review (39)
Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)
[] Antitrust/Trade regulation (03)
[] Construction defect (10)
[] Mass tort (40)
[] Securities litigation (28)
[] Environmental/Toxic tort (30)
[] Insurance coverage claims arising from the above listed provisionally complex case types (41)
Enforcement of Judgment
[] Enforcement of judgment (20)
Miscellaneous Civil Complaint
[] RICO (27)
[X] Other complaint (not specified above) (42)
Miscellaneous Civil Petition
[] Partnership and corporate governance (21)
[] Other petition (not specified above) (43)

2. This case [] is [X] is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
a. [] Large number of separately represented parties
b. [] Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
c. [] Substantial amount of documentary evidence
d. [] Large number of witnesses
e. [] Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
f. [] Substantial postjudgment judicial supervision
3. Remedies sought (check all that apply): a. [checked] monetary b. [checked] nonmonetary; declaratory or injunctive relief c. [] punitive
4. Number of causes of action (specify): 2
5. This case [] is [checked] is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.) Date: August 10, 2022

Rebecca L. Davis

(TYPE OR PRINT NAME)

[Signature]

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
File this cover sheet in addition to any cover sheet required by local court rule.
If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

F. ADDENDUM TO CIVIL CASE COVER SHEET

Short Title: Environmental Research Center, Inc. v. biOptimizers USA, Inc. et al.	Case Number:
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CIVIL CASE COVER SHEET ADDENDUM

**THIS FORM IS REQUIRED IN ALL NEW UNLIMITED CIVIL CASE FILINGS IN THE
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA**

<input checked="" type="checkbox"/> Oakland, Rene C. Davidson Alameda County Courthouse (446)	<input type="checkbox"/> Hayward Hall of Justice (447)
<input type="checkbox"/> Pleasanton, Gale-Schenone Hall of Justice (448)	

Civil Case Cover Sheet Category	Civil Case Cover Sheet Case Type	Alameda County Case Type (check only one)
Auto Tort	Auto tort (22)	<input type="checkbox"/> 34 Auto tort (G) Is this an uninsured motorist case? <input type="checkbox"/> yes <input type="checkbox"/> no
Other PI /PD / WD Tort	Asbestos (04)	<input type="checkbox"/> 75 Asbestos (D)
	Product liability (24)	<input type="checkbox"/> 89 Product liability (<u>not</u> asbestos or toxic tort/environmental) (G)
	Medical malpractice (45)	<input type="checkbox"/> 97 Medical malpractice (G)
	Other PI/PD/WD tort (23)	<input type="checkbox"/> 33 Other PI/PD/WD tort (G)
Non - PI /PD / WD Tort	Bus tort / unfair bus. practice (07)	<input type="checkbox"/> 79 Bus tort / unfair bus. practice (G)
	Civil rights (08)	<input type="checkbox"/> 80 Civil rights (G)
	Defamation (13)	<input type="checkbox"/> 84 Defamation (G)
	Fraud (16)	<input type="checkbox"/> 24 Fraud (G)
	Intellectual property (19)	<input type="checkbox"/> 87 Intellectual property (G)
	Professional negligence (25)	<input type="checkbox"/> 59 Professional negligence - non-medical (G)
	Other non-PI/PD/WD tort (35)	<input type="checkbox"/> 03 Other non-PI/PD/WD tort (G)
Employment	Wrongful termination (36)	<input type="checkbox"/> 38 Wrongful termination (G)
	Other employment (15)	<input type="checkbox"/> 85 Other employment (G)
		<input type="checkbox"/> 53 Labor comm award confirmation
		<input type="checkbox"/> 54 Notice of appeal - L.C.A.
Contract	Breach contract / Wrnty (06)	<input type="checkbox"/> 04 Breach contract / Wrnty (G)
	Collections (09)	<input type="checkbox"/> 81 Collections (G)
	Insurance coverage (18)	<input type="checkbox"/> 86 Ins. coverage - non-complex (G)
	Other contract (37)	<input type="checkbox"/> 98 Other contract (G)
Real Property	Eminent domain / Inv Cdm (14)	<input type="checkbox"/> 18 Eminent domain / Inv Cdm (G)
	Wrongful eviction (33)	<input type="checkbox"/> 17 Wrongful eviction (G)
	Other real property (26)	<input type="checkbox"/> 36 Other real property (G)
Unlawful Detainer	Commercial (31)	<input type="checkbox"/> 94 Unlawful Detainer - commercial
	Residential (32)	<input type="checkbox"/> 47 Unlawful Detainer - residential
	Drugs (38)	<input type="checkbox"/> 21 Unlawful detainer - drugs
		Is the deft. in possession of the property? <input type="checkbox"/> Yes <input type="checkbox"/> No
Judicial Review	Asset forfeiture (05)	<input type="checkbox"/> 41 Asset forfeiture
	Petition re: arbitration award (11)	<input type="checkbox"/> 62 Pet. re: arbitration award
	Writ of Mandate (02)	<input type="checkbox"/> 49 Writ of mandate
	Other judicial review (39)	<input type="checkbox"/> 64 Other judicial review
		Is this a CEQA action (Publ.Res.Code section 21000 et seq) <input type="checkbox"/> Yes <input type="checkbox"/> No
Provisionally Complex	Antitrust / Trade regulation (03)	<input type="checkbox"/> 77 Antitrust / Trade regulation
	Construction defect (10)	<input type="checkbox"/> 82 Construction defect
	Claims involving mass tort (40)	<input type="checkbox"/> 78 Claims involving mass tort
	Securities litigation (28)	<input type="checkbox"/> 91 Securities litigation
	Toxic tort / Environmental (30)	<input type="checkbox"/> 93 Toxic tort / Environmental
	Ins covrg from cmplx case type (41)	<input type="checkbox"/> 95 Ins covrg from complex case type
Enforcement of Judgment	Enforcement of judgment (20)	<input type="checkbox"/> 19 Enforcement of judgment
		<input type="checkbox"/> 08 Confession of judgment
Misc Complaint	RICO (27)	<input type="checkbox"/> 90 RICO (G)
	Partnership / Corp. governance (21)	<input type="checkbox"/> 88 Partnership / Corp. governance (G)
	Other complaint (42)	<input checked="" type="checkbox"/> 68 All other complaints (G)
Misc. Civil Petition	Other petition (43)	<input type="checkbox"/> 06 Change of name
		<input type="checkbox"/> 69 Other petition

**SUMMONS
(CITACION JUDICIAL)**

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

BIOOPTIMIZERS USA, INC. and DOES 1-100

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

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

*FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)*

ELECTRONICALLY FILED
Superior Court of California
County of Alameda
08/10/2022
Chad Finke, Executive Officer / Clerk of the Court
By: A. Linhares Deputy

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): **Alameda County Superior Court**
1225 Fallon Street
Oakland, CA 94612

CASE NUMBER:
(Número del Caso): **22CV015886**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Richard T. Drury, Rebecca L. Davis 1939 Harrison St, Suite 150, Oakland, CA 94612 Tel: (510) 836-4200

DATE: 08/10/2022 Chad Finke, Executive Officer / Clerk of the Court Clerk, by A. Linhares , Deputy
(Fecha) (Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



- NOTICE TO THE PERSON SERVED:** You are served
1. as an individual defendant.
 2. as the person sued under the fictitious name of (specify):
 3. on behalf of (specify):

under: <input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
 4. by personal delivery on (date):

1 RICHARD T. DRURY (CBN 163559)
2 REBECCA L. DAVIS (CBN 271662)
3 LOZEAU | DRURY LLP
4 1939 Harrison Street, Suite 150
5 Oakland, CA 94612
6 Ph: 510-836-4200
7 Email: richard@lozeaudrury.com
8 rebecca@lozeuadrury.com

9 Attorneys for Plaintiff Environmental Research Center, Inc.

ELECTRONICALLY FILED
Superior Court of California,
County of Alameda
08/10/2022 at 10:18:50 AM
By: Angela Linhares,
Deputy Clerk

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF ALAMEDA**

13 **ENVIRONMENTAL RESEARCH CENTER,**
14 **INC., a California non-profit corporation**

15 **Plaintiff,**

16 **vs.**

17 **BIOOPTIMIZERS USA, INC. and DOES 1-100**

18 **Defendants.**

19 **CASE NO. 22CV015886**

20 **COMPLAINT FOR INJUNCTIVE**
21 **AND DECLARATORY RELIEF AND**
22 **CIVIL PENALTIES**

23 [Miscellaneous Civil Complaint (42)]
24 Proposition 65, Health & Safety Code
25 Section 25249.5 et seq.]

26 Plaintiff Environmental Research Center, Inc. hereby alleges:

27 **I**

28 **INTRODUCTION**

1. Plaintiff Environmental Research Center, Inc. (hereinafter “Plaintiff” or “ERC”) brings this action as a private attorney general enforcer and in the public interest pursuant to Health & Safety Code section 25249.7, subdivision (d). The Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Safety Code section 25249.5 *et seq.*) also known as “Proposition 65,” mandates that businesses with ten or more employees must provide a “clear and reasonable warning” prior to exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity. Lead and mercury are chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm. This Complaint seeks injunctive and

1 declaratory relief and civil penalties to remedy the ongoing failure of Defendants biOptimizers
2 USA, Inc. (“biOptimizers”) and Does 1-100 (hereinafter individually referred to as “Defendant”
3 or collectively as “Defendants”), to warn consumers that they have been exposed to lead and/or
4 mercury from a number of biOptimizers’ nutritional health products as set forth in paragraph 3
5 at levels exceeding the applicable Maximum Allowable Dose Level (“MADL”) and requiring a
6 warning pursuant to Health & Safety Code section 25249.6.

7 II

8 PARTIES

9 2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes,
10 helping safeguard the public from health hazards by reducing the use and misuse of hazardous
11 and toxic chemicals, facilitating a safe environment for consumers and employees, and
12 encouraging corporate responsibility.

13 3. Defendant biOptimizers is a business that develops, manufactures, markets, distributes,
14 and/or sells nutritional health products that have exposed users to lead and/or mercury in the
15 State of California within the relevant statute of limitations period. These “SUBJECT
16 PRODUCTS” (as identified in the Notice of Violation dated May 26, 2022 attached hereto as
17 *Exhibit A*) are: (1) biOptimizers Blood Sugar Breakthrough (lead), and (2) biOptimizers Protein
18 Breakthrough Plant-Based Protein Supplement Berry Bliss (lead, mercury). biOptimizers USA,
19 Inc. is a company subject to Proposition 65 as it employs ten or more persons and has employed
20 ten or more persons at all times relevant to this action.

21 4. Defendants Does 1-100, are named herein under fictitious names, as their true names
22 and capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that
23 each of said Does is responsible, in some actionable manner, for the events and happenings
24 hereinafter referred to, either through said Does’ conduct, or through the conduct of its agents,
25 servants or employees, or in some other manner, causing the harms alleged by ERC in this
26 Complaint. When said true names and capacities of Does are ascertained, ERC will seek leave
27 to amend this Complaint to set forth the same.

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III

JURISDICTION AND VENUE

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

6. This Court has jurisdiction over biOptimizers because biOptimizers has sufficient minimum contacts with California, and otherwise intentionally avails itself of the California market through the marketing, distribution, and/or sale of the SUBJECT PRODUCTS in the State of California so as to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

7. The Complaint is based on allegations contained in the Notice of Violation dated May 26, 2022 served on the California Attorney General, other public enforcers, and biOptimizers. The Notice of Violation constitutes adequate notice to biOptimizers because it provided adequate information to allow biOptimizers to assess the nature of the alleged violations, consistent with Proposition 65 and its implementing regulations. A certificate of merit and a certificate of service accompanied each copy of the Notice of Violation, and both certificates comply with Proposition 65 and its implementing regulations. The Notice of Violation served on biOptimizers also included a copy of “The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary.” Service of the Notice of Violation and accompanying documents complied with Proposition 65 and its implementing regulations. Attached hereto as *Exhibit A* is a true and correct copy of the Notice of Violation and associated documents. More than 60 days have passed since ERC mailed the Notice of Violation and no public enforcement entity has filed a Complaint in this case.

8. This Court is the proper venue for the action because the causes of action have arisen in the County of Alameda where some of the violations of law have occurred, and will continue to occur, due to the ongoing sale of biOptimizers’ products. Furthermore, venue is proper in this Court under Code of Civil Procedure section 395.5 and Health & Safety Code section 25249.7.

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IV

STATUTORY BACKGROUND

9. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as “Proposition 65” by an overwhelming majority vote of the people in November of 1986.

10. The warning requirement of Proposition 65 is contained in Health & Safety Code section 25249.6, which provides:

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

11. The Office of Environmental Health Hazard Assessment (“OEHHA”), a division of Cal EPA, is the lead agency in charge of the implementation of Proposition 65. OEHHA administers the Proposition 65 program and administers regulations that govern Proposition 65 in general, including warnings to comply with the statute. The warning regulations are found at Title 27 of the California Code of Regulations, Article 6. The regulations define expose as “to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical. An individual may come into contact with a listed chemical through water, air, food, consumer products and any other environmental exposure as well as occupational exposures.” (Cal. Code Regs., tit. 27, § 25102, subd. (i).)

12. In this case, the exposures are caused by consumer products. A consumer product is defined as “any article, or component part thereof, including food, that is produced, distributed, or sold for the personal use, consumption or enjoyment of a consumer.” (Cal. Code Regs., tit. 27, § 25600.1, subd. (d).) Food “includes ‘dietary supplements’ as defined in California Code of Regulations, title 17, section 10200.” (*Id.* at subd. (g).) A consumer product exposure is “an exposure that results from a person’s acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer product, including consumption of a food.” (*Id.* at subd. (e).)

1 13. On August 30, 2016, the Office of Administrative Law approved the adoption of
2 OEHHA’s amendments to Article 6, Clear and Reasonable Warnings of the California Code of
3 Regulations. This action repealed virtually all of the regulatory provisions of Title 27 of the
4 California Code of Regulations, Article 6 (sections 25601 *et seq.*) and replaced the repealed
5 sections with new regulations set forth in two new Subarticles to Article 6 that became
6 operative on August 30, 2018 (the “New Warning Regulations”). The New Warning
7 Regulations provide, among other things, methods of transmission and content of warnings
8 deemed to comply with Proposition 65. biOptimizers is subject to the warning requirements set
9 forth in the New Warning Regulations that became operative on August 30, 2018.

10 14. Health & Safety Code section 25249.6 provides that “No person in the course of doing
11 business shall knowingly and intentionally expose any individual to a chemical known to the
12 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
13 to such individual” The New Warning Regulations apply when clear and reasonable
14 warnings are required under Section 25249.6. Pursuant to the New Warning Regulations,
15 consumer product warnings “must be prominently displayed on a label, labeling, or sign, and
16 must be displayed with such conspicuousness as compared with other words, statements,
17 designs or devices on the label, labeling, or sign, as to render the warning likely to be seen,
18 read, and understood by an ordinary individual under customary conditions of purchase or use.”
19 (*Id.* at § 25601, subd. (c).)

20 15. Proposition 65 establishes a procedure by which the State is to develop a list of
21 chemicals “known to the State to cause cancer or reproductive toxicity.” (Health & Safety Code,
22 § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months after
23 the chemical is published on the State list. (Health & Safety Code, § 25249.10, subd. (b).)

24 16. Lead was listed as a chemical known to the State of California to cause developmental
25 toxicity in the fetus and male and female reproductive toxicity on February 27, 1987. Lead was
26 listed as a chemical known to the State of California to cause cancer on October 1, 1992. (State
27 of California EPA OEHHA Safe Drinking Water and Toxic Enforcement Act of 1986
28 Chemicals Known to the State to Cause Cancer and Reproductive Toxicity.) The MADL for

1 lead as a chemical known to cause reproductive toxicity is 0.5 micrograms per day. (Cal. Code
2 Regs., tit. 27, §25805, subd. (b).) The No Significant Risk Level for lead as a carcinogen is 15
3 micrograms per day. (Cal. Code Regs., tit. 27, §25705, subd. (b).)

4 17. Mercury and mercury compounds were listed as chemicals known to the State of
5 California to cause developmental toxicity in the fetus and male and female reproductive
6 toxicity on July 1, 1990 (State of California EPA OEHHA Safe Drinking Water and Toxic
7 Enforcement Act of 1986 Chemicals Known to the State to Cause Cancer and Reproductive
8 Toxicity).

9 18. Proposition 65 provides that any person “violating or threatening to violate” Proposition
10 65 may be enjoined in any court of competent jurisdiction. (Health & Safety Code, §25249.7,
11 subd. (a).) To “threaten to violate” means “to create a condition in which there is a substantial
12 probability that a violation will occur.” (Health & Safety Code, § 25249.11, subd. (e).)
13 Furthermore, violators are subject to a civil penalty of up to \$2,500 per day for each violation.
14 (Health & Safety Code, § 25249.7, subd. (b)(1).)

15 19. Proposition 65 may be enforced by any person in the public interest who provides notice
16 sixty days before filing suit to both the violator and designated law enforcement officials. The
17 failure of law enforcement officials to file a timely Complaint enables a citizen suit to be filed
18 pursuant to Health & Safety Code section 25249.7, subdivisions (c) and (d).

19 V

20 STATEMENT OF FACTS

21 20. biOptimizers has developed, manufactured, marketed, distributed, and/or sold the
22 SUBJECT PRODUCTS containing lead and/or mercury into the State of California.
23 Consumption of the SUBJECT PRODUCTS according to the directions and/or
24 recommendations provided for said products causes consumers to be exposed to lead at levels
25 exceeding the 0.5 micrograms per day MADL and/or to be exposed to mercury and requiring a
26 warning. Consumers have been ingesting these products for many years, without any
27 knowledge of their exposure to these very dangerous chemicals.

28 21. For many years, biOptimizers has knowingly and intentionally exposed numerous

1 persons to lead and/or mercury without providing any type of Proposition 65 warning. Prior to
2 ERC's Notice of Violation and this Complaint, biOptimizers failed to provide a warning on the
3 labels of the SUBJECT PRODUCTS or provide any other legally acceptable warning.

4 biOptimizers has, at all times relevant hereto, been aware that the SUBJECT PRODUCTS
5 contained lead and/or mercury and that persons using these products have been exposed to these
6 chemicals. biOptimizers has been aware of the presence of lead and/or mercury in the
7 SUBJECT PRODUCTS and has failed to disclose the presence of these chemicals to the public,
8 who undoubtedly believe they have been ingesting totally healthy and pure products pursuant to
9 the company's statements.

10 22. Both prior and subsequent to ERC's Notice of Violation, biOptimizers failed to provide
11 consumers of the SUBJECT PRODUCTS with a clear and reasonable warning that they have
12 been exposed to chemicals known to the State of California to cause cancer, birth defects and
13 other reproductive harm. This failure to warn is ongoing.

14 **FIRST CAUSE OF ACTION**
15 **(Violation of Section 25249.6 of the Health and Safety Code, Failure to Provide Clear and**
16 **Reasonable Warning under Proposition 65)**

17 23. ERC refers to paragraphs 1-22, inclusive, and incorporates them herein by this
18 reference.

19 24. By committing the acts alleged above, biOptimizers has, in the course of doing business,
20 knowingly and intentionally exposed users of the SUBJECT PRODUCTS to lead and/or
21 mercury, chemicals known to the State of California to cause cancer, birth defects, and other
22 reproductive harm, without first giving clear and reasonable warning to such individuals within
23 the meaning of Health & Safety Code section 25249.6. In doing so, biOptimizers has violated
24 Health & Safety Code section 25249.6 and continues to violate the statute with each successive
25 sale of the SUBJECT PRODUCTS.

26 25. Said violations render biOptimizers liable for civil penalties, up to \$2,500 per day for
27 each violation, and subject biOptimizers to injunction.

28 ///

1 **SECOND CAUSE OF ACTION**
2 **(Declaratory Relief)**

3 26. ERC refers to paragraphs 1-25, inclusive, and incorporates them herein by this
4 reference.

5 27. There exists an actual controversy relating to the legal rights and duties of the Parties,
6 within the meaning of Code of Civil Procedure section 1060, between ERC and biOptimizers,
7 concerning whether biOptimizers has exposed individuals to chemicals known to the State of
8 California to cause cancer, birth defects, and other reproductive harm without providing clear
9 and reasonable warning.

10 **VI**
11 **PRAYER**

12 WHEREFORE ERC prays for relief as follows:

13 1. On the First Cause of Action, for civil penalties for each and every violation according
14 to proof;

15 2. On the First Cause of Action, and pursuant to Health & Safety Code section 25249.7,
16 subdivision (a), for such temporary restraining orders, preliminary and permanent injunctive
17 orders, or other orders as are necessary to prevent biOptimizers from exposing persons to lead
18 and/or mercury without providing clear and reasonable warning;

19 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil
20 Procedure section 1060 declaring that biOptimizers has exposed individuals to lead and/or
21 mercury without providing clear and reasonable warning; and

22 4. On all Causes of Action, for reasonable attorneys' fees pursuant to Code of Civil
23 Procedure section 1021.5 or the substantial benefit theory;

24 5. For costs of suit herein; and

25 6. For such other relief as the Court may deem just and proper.

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27 ///

28 ///

1 DATED: August 10, 2022

LOZEAU | DRURY LLP

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4 _____
5 Rebecca L. Davis
6 Attorneys for Plaintiff Environmental Research Center,
7 Inc.
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EXHIBIT A



T 510.836.4200
F 510.836.4205

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May 26, 2022

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VIA ONLINE SUBMISSION

Office of the California Attorney General

VIA FIRST CLASS MAIL

District Attorneys of Select California
Counties and Select City Attorneys
(See Attached Certificate of Service)

Re: Notice of Violations of California Health & Safety Code Section 25249.5 *et seq.*

Dear Addressees:

I represent Environmental Research Center, Inc. (“ERC”) in connection with this Notice of Violations of California’s Safe Drinking Water and Toxic Enforcement Act of 1986, which is codified at California Health & Safety Code Section 25249.5 *et seq.* and also referred to as Proposition 65.

ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

The name of the Company covered by this notice that violated Proposition 65 (hereinafter the “Violator”) is:

biOptimizers USA, Inc.

The products that are the subject of this notice and the chemicals in those products identified as exceeding allowable levels are:

1. biOptimizers Blood Sugar Breakthrough - Lead

2. biOptimizers Protein Breakthrough Plant-Based Protein Supplement Berry Bliss – Lead, Mercury

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

On July 1, 1990, the State of California officially listed mercury and mercury compounds as chemicals known to cause developmental toxicity and male and female reproductive toxicity.

This letter is a notice to the Violator and the appropriate governmental authorities of the Proposition 65 violations concerning the listed products. This notice covers all violations of Proposition 65 involving the Violator currently known to ERC from the information now available. ERC may continue to investigate other products that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with the copy of this letter to the Violator.

The Violator has manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemicals, lead and/or mercury. The consumer exposures that are the subject of this notice result from the recommended use of these products by consumers. The route of exposure to lead and/or mercury has been through ingestion. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to lead and/or mercury. The method of warning should be a warning that appears on the product's label. The Violator violated Proposition 65 because it failed to provide an appropriate warning to persons ingesting these products that they are being exposed to lead and/or mercury. Each of these ongoing violations has occurred on every day since May 26, 2019, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users.

Pursuant to Section 25249.7(d) of the statute, ERC intends to file a citizen enforcement action sixty days after effective service of this notice unless the Violator agrees in an enforceable written instrument to: (1) reformulate the listed products so as to eliminate further exposures to the identified chemicals; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Consistent with the public interest goals of Proposition 65 and my client's objectives in pursuing this notice, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemicals and expensive and time-consuming litigation.

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

May 26, 2022

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ERC's Executive Director is Chris Heptinstall, and is located at 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. 619-500-3090. ERC has retained me in connection with this matter. We suggest that communications regarding this Notice of Violations should be directed to my attention at the above listed law office address and telephone number.

Sincerely,



Rebecca Davis

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to biOptimizers USA, Inc. and its Registered Agent for Service of Process only)

Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

**Re: Environmental Research Center, Inc.’s Notice of Proposition 65 Violations by
biOptimizers USA, Inc.**

I, Rebecca Davis, declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am an attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemicals that are the subject of the notice.
4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiff’s case can be established and that the information did not prove that the alleged Violators will be able to establish any of the affirmative defenses set forth in the statute.
5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: May 26, 2022



Rebecca Davis

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States and over the age of 18 years of age. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On May 26, 2022, between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; “THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY”** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it in a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President
biOptimizers USA, Inc.
5470 Kietzke Lane, Ste 300
Reno, NV 89511

Jonn Morningstaur
(Registered Agent for biOptimizers USA, Inc.)
5470 Kietzke Lane, Ste 300
Reno, NV 89511

Current CEO or President
biOptimizers USA, Inc.
19655 E 35th Dr, Ste 100
Aurora, CO 80011

On May 26, 2022, between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General’s website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Oakland, CA 94612-0550

On May 26, 2022, between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

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Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

May 26, 2022

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Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

May 26, 2022

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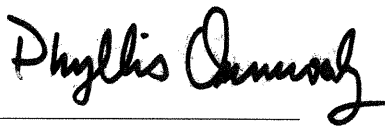
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On May 26, 2022, between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties **on the Service List attached hereto**, and depositing it with the U.S. Postal Service with the postage fully prepaid for delivery by First Class Mail.

Executed on May 26, 2022, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

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