

ENDORSED
FILED
San Francisco County Superior Court

JAN 22 2013

CLERK OF THE COURT
BY: DENNIS TOYAMA
Deputy Clerk

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8 Attorney for Plaintiff Environmental Research Center

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

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

Case No. CGC-13-528133

13 Plaintiff,

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF AND
CIVIL PENALTIES

14 v.

15 GBG OF NEVADA, and
16 DOES 1-100

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

17 Defendants.

18
19 _____ /
20
21 Plaintiff Environmental Research Center hereby alleges:

22 I
23 INTRODUCTION

24
25 1. Plaintiff Environmental Research Center (hereinafter "Plaintiff" or "ERC") brings this
26 action as a private attorney general enforcer and in the public interest pursuant to Health & Safety
27 Code Section 25249.7 (d). This complaint seeks injunctive and declaratory relief and civil penalties
28

1 to remedy Defendant GBG of Nevada, Inc. and Defendant GBG of Nevada, LLC (hereinafter
2 "GBG of Nevada")'s failure to warn consumers that they have been exposed to lead from one of
3 GBG of Nevada's nutritional health products. Lead is a chemical known to the State of California to
4 cause cancer, birth defects and other reproductive harm. Based on the Safe Drinking Water and
5 Toxic Enforcement Act of 1986 (Health & Safety Code Section 25249.5 *et seq.*) also known as
6 "Proposition 65," businesses with ten or more employees must provide a "clear and reasonable
7 warning" prior to exposing persons to these chemicals.
8

9 II

10 PARTIES

11
12 2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes, helping
13 safeguard the public from health hazards by reducing the use and misuse of hazardous and toxic
14 chemicals, facilitating a safe environment for consumers and employees and encouraging corporate
15 responsibility.
16

17 3. Defendant GBG of Nevada is a business that manufactures, distributes and/or sells a nutritional
18 health product that has exposed users to lead in the State of California within the relevant statute of
19 limitations period. This Covered Product is Protein Matrix Chocolate Crème Flavor. GBG of
20 Nevada is a company subject to Proposition 65 as it employs ten or more persons.
21

22 4. Defendants Does I-100, are named herein under fictitious names, as their true names and
23 capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that each of
24 said Does is responsible, in some actionable manner, for the events and happenings hereinafter
25 referred to, either through said Defendant's conduct, or through the conduct of its agents, servants or
26 employees, or in some other manner, causing the harms alleged by ERC in this complaint. When
27
28

1 said true names and capacities of Does are ascertained, ERC will seek leave to amend this complaint
2 to set forth the same.

3
4 **III**

5 **JURISDICTION AND VENUE**

6 5. This Court has jurisdiction pursuant to California Constitution Article VI, Section 10 because
7 this case is a cause not given by statute to other trial courts.

8 6. The Complaint is based on allegations contained in a Notice of Violation dated August 5,
9 2011, served on the California Attorney General, other public enforcers and GBG of Nevada. A
10 true and correct copy of the Notice of Violation is attached as Exhibit A. More than 60 days
11 have passed since the Notice of Violation was mailed and no public enforcement entity has filed
12 a complaint in this case.

13
14 7. This Court is the proper venue for the action because the causes of action have arisen in the
15 County of San Francisco where some of the violations of law have occurred. Furthermore, this
16 Court is the proper venue under Code of Civil Procedure Section 395.5 and Health & Safety Code
17 Section 25249.7.
18

19 **IV**

20 **STATUTORY BACKGROUND**

21
22 **A. Proposition 65**

23 8. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as
24 "Proposition 65" by an overwhelming majority vote of the people in November of 1986.

25 9. The warning requirement of Proposition 65 is contained in Health & Safety Code Section
26 25249.6, which provides:
27

28 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

1 giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

2 10. Implementing regulations for Proposition 65 provide that warnings are required for consumer
3 product exposures. A “consumer product exposure is an exposure which results from a person’s
4 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer
5 good, or any exposure that results from receiving a consumer service.” 27 CCR Section 25601 (b).
6

7 11. Whenever a clear and reasonable warning is required under Health & Safety Code Section
8 25249.6, the “method employed to transmit the warning must be reasonably calculated considering
9 the alternative methods available under the circumstances, to make the warning message available
10 prior to exposure.” 27 CCR Section 25601. The warning requirement may be satisfied by a
11 warning that appears on a product’s label or other labeling, shelf labeling, signs, a system of signs,
12 public advertising identifying the system and toll-free information services, or any other, system,
13 that provides clear and reasonable warnings. *Id.*, Section 25603.1 (a) – (d).
14

15 12. Proposition 65 establishes a procedure by which the State is to develop a list of
16 chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code
17 Section 25249.8. There is no duty to provide a clear and reasonable warning until 12-months after
18 the chemical was published on the State list. *Id.*, Section 25249.10 (b). Lead was listed as a
19 chemical known to the State of California to cause developmental toxicity and male and female
20 reproductive toxicity on February 27, 1987. Lead was listed as a chemical known to the State of
21 California to cause cancer on October 1, 1992. Title 27, Cal. Code Regs., Section 27001.
22

23 13. Proposition 65 may be enforced by any person in the public interest who provides notice
24 sixty days before filing suit to both the violator and designated law enforcement officials. The
25 failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed
26 pursuant to Health & Safety Code Section 25249.7 (c) and (d).
27
28

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

STATEMENT OF FACTS

15. GBG of Nevada has manufactured, distributed and/or sold the Covered Product containing lead to the State of California. Consumers have been ingesting this product for many years, without any knowledge of their exposure to lead, a very dangerous chemical.

16. For many years, GBG of Nevada has knowingly and intentionally exposed numerous persons to lead, without providing a Proposition 65 warning. Prior to ERC’s Notice of Violation, GBG of Nevada failed to provide a warning on the label of the Covered Product. GBG of Nevada has at all times relevant hereto been aware that the Covered Product contained lead and that persons using this product have been exposed to the chemical. GBG of Nevada has been aware of the lead in the Covered Product and has failed to disclose the presence of this chemical to the public, who undoubtedly believed they have been ingesting a totally healthy and pure product.

17. Both prior and subsequent to ERC’s Notice of Violation, GBG of Nevada failed to provide consumers of the Covered Product with a clear and reasonable warning that they have been exposed to a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

1 **FIRST CAUSE OF ACTION**

2 **(Violation of Section 25249.6 of the Health and Safety Code, Failure to Provide Clear**
3 **and Reasonable Warning under Proposition 65)**

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

5 19. By committing the acts alleged above, GBG of Nevada has, in the course of doing business,
6 knowingly and intentionally exposed users of the Covered Product to lead, a chemical known to the
7 State of California to cause cancer, birth defects and other reproductive harm without first giving
8 clear and reasonable warning to such individuals, within the meaning of Health & Safety Code
9 Section 25249.6.
10

11 20. Said violations render GBG of Nevada liable for civil penalties up to \$2,500 per day, for
12 each violation.
13

14 **SECOND CAUSE OF ACTION**

15 **(Declaratory Relief)**

16 21. ERC refers to paragraphs 1-20, inclusive, and incorporates them herein by this reference.

17 22. There exists an actual controversy relating to the legal rights and duties of the parties, within
18 the meaning of Code of Civil Procedure Section 1060, between ERC and GBG of Nevada
19 concerning whether GBG of Nevada has exposed individuals to a chemical known to the State of
20 California to cause cancer, birth defects and other reproductive harm without providing clear and
21 reasonable warning.
22

23 **VI**

24 **PRAYER**

25 WHEREFORE ERC prays for relief as follows:

26 1. On the First Cause of Action, for civil penalties for each and every violation according to
27 proof;
28

1 2. On the First Cause of Action, and pursuant to Health & Safety Code Section 25249.7 (a), for
2 such temporary restraining orders, preliminary and permanent injunctive orders, or other orders,
3 prohibiting GBG of Nevada from exposing persons to lead without providing clear and reasonable
4 warning;
5

6 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil
7 Procedure Section 1060 declaring:

8 a. that GBG of Nevada has exposed individuals to a chemical known to the State of
9 California to cause, birth defects and other reproductive harm without providing clear and
10 reasonable warning; and
11

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

14 5. For costs of suit herein; and

15 6. For such other relief as the Court may deem just and proper.
16
17

18 Dated: January 22, 2013
19

20 By Michael Freund by RRA

21 Michael Freund
22 Attorney for Environmental Research Center
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MICHAEL FREUND

ATTORNEY AT LAW
1915 ADDISON STREET
BERKELEY, CALIFORNIA 94704-101

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FAX 510/540-5543
EMAIL FREUND1@AOL.COM

August 5, 2011

**NOTICE OF VIOLATIONS OF
CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET SEQ.
(PROPOSITION 65)**

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Environmental Research Center ("ERC"), 5694 Mission Center Road #199, San Diego, CA 92108; Tel. (619) 309- 4194. ERC's Executive Director is Chris Heptinstall. 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.

ERC has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), which is codified at California Health & Safety Code §25249.5 *et seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with these products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d) of the statute, ERC intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

General Information about Proposition 65. A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is an attachment with the copy of this letter served to the alleged Violator identified below.

Alleged Violator. The name of the company covered by this notice that violated Proposition 65 (hereinafter "the Violator") is:

GBG of Nevada

Consumer Product and Listed Chemical. The product that is the subject of this notice and the chemical in that product identified as exceeding allowable levels is:

GBG of Nevada Protein Matrix Chocolate Crème Flavor - Lead

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.

Exhibit A

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

Route of Exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least August 5, 2008, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; and (2) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time consuming litigation.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



Michael Freund, Esq.

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to GBG of Nevada 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's Notice of Proposition 65 Violations by GBG of Nevada

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged the parties 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 Violator 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: August 5, 2011



Michael Freund

CERTIFICATE OF SERVICE

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, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742

On August 5, 2011 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 the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Current CEO or President
GBG of Nevada
47 Union Way Suite A
Vacaville, CA 95687

Paracorp Incorporated
GBG of Nevada's
(Registered Agent for Service of Process)
318 N. Carson Street #208
Carson City, NV 89701

On August 5, 2011 I served the following documents: **NOTICE OF VIOLATION, 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)** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, CA 94612-0550

On August 5, 2011 I served the following documents: **NOTICE OF VIOLATION, 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 for delivery by Priority Mail.

Executed on August 5, 2011 in Fort Oglethorpe, Georgia.



Chris Heptinstall

Service List

District Attorney, Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612

District Attorney, Alpine County
P.O. Box 248
Markleeville, CA 96120

District Attorney, Amador County
708 Court Street, #202
Jackson, CA 95642

District Attorney, Butte County
25 County Center Drive
Oroville, CA 95965

District Attorney, Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

District Attorney, Colusa County
547 Market Street
Colusa, CA 95932

District Attorney, Contra Costa County
900 Ward Street
Martinez, CA 94553

District Attorney, Del Norte County
450 H Street, Ste. 171
Crescent City, CA 95531

District Attorney, El Dorado County
515 Main Street
Placerville, CA 95667

District Attorney, Fresno County
2220 Tulare Street, #1000
Fresno, CA 93721

District Attorney, Glenn County
Post Office Box 430
Willows, CA 95988

District Attorney, Humboldt County
825 5th Street
Eureka, CA 95501

District Attorney, Imperial County
939 West Main Street, Ste 102
El Centro, CA 92243

District Attorney, Inyo County
230 W. Line Street
Bishop, CA 93514

District Attorney, Kern County
1215 Truxtun Avenue
Bakersfield, CA 93301

District Attorney, Kings County
1400 West Lacey Boulevard
Hanford, CA 93230

District Attorney, Lake County
255 N. Forbes Street
Lakeport, CA 95453

District Attorney, Lassen County
220 South Lassen Street, Ste. 8
Susanville, CA 96130

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210 West Temple Street, Rm 345
Los Angeles, CA 90012

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209 West Yosemite Avenue
Madera, CA 93637

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3501 Civic Center, Room 130
San Rafael, CA 94903

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Post Office Box 730
Mariposa, CA 95338

District Attorney, Mendocino County
Post Office Box 1000
Ukiah, CA 95482

District Attorney, Merced County
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Merced, CA 95340

District Attorney, Modoc County
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Alturas, CA 96101-4020

District Attorney, Mono County
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Salinas, CA 93901

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Napa, CA 94559

District Attorney, Nevada County
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Nevada City, CA 95959

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401 Civic Center Drive West
Santa Ana, CA 92701

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

August 5, 2011

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Ventura, CA 93009

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Woodland, CA 95695

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Marysville, CA 95901

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Los Angeles, CA 90012

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1200 3rd Avenue, Ste 1620
San Diego, CA 92101

San Francisco City Attorney's Office
City Hall, Room 234
1 Drive Carlton B Goodlett Place
San Francisco, CA 94102

San Jose City Attorney's Office
200 East Santa Clara Street
San Jose, CA 95113