

ENDORSED
FILED
ALAMEDA COUNTY

SEP 24 2012

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

12 ENVIRONMENTAL RESEARCH CENTER,)
13 a non-profit California corporation,)
14 Plaintiff,)
15 v.)
16 YERBA PRIMA, INC., an Oregon)
17 Corporation,)
18 Defendant.)

RG12649221

Case No.

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.5, *et seq.*

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

21 **INTRODUCTION**

22 1. This action seeks to remedy Defendant's continuing failure to warn consumers
23 in California that they are being exposed to lead and/or lead compounds, substances known to
24 the State of California to cause cancer, birth defects and other reproductive harm. Defendant
25 manufactures, packages, distributes, markets, and/or sells in California certain products
26

1 containing lead and/or lead compounds (the "PRODUCTS") including:

2 **Yerba Prima Great Plains Bentonite Detox**
3 **Yerba Prima Kalenite Cleansing Herbs**
4 **Yerba Prima Inc. Herbal Guard**
5 **Yerba Prima Inc. Daily Fiber Caps**
6 **Yerba Prima Inc. Colon Care**
7 **Yerba Prima Inc. Fiber Plus Caps**
8 **Yerba Prima Inc. Daily Fiber Formula Orange Flavor**
9 **Yerba Prima Colon Care Formula**
10 **Yerba Prima Fiber Plus Apple Spice Flavor**
11 **Yerba Prima Daily Fiber Formula**
12 **Yerba Prima Inc. Men's Rebuild**
13 **Yerba Prima Inc. Soluble Fiber Caps**
14 **Yerba Prima Inc. Psyllium Husks Caps**
15 **Yerba Prima Inc. Psyllium Husks Veg Caps**
16 **Yerba Prima Inc. Psyllium Husks Powder**
17 **Yerba Prima Inc. Soluble Fiber Formula**
18 **Yerba Prima Inc. Psyllium Whole Husks**

19 2. Lead and lead compounds (hereinafter, the "LISTED CHEMICALS") are
20 substances known to the State¹ of California to cause cancer, birth defects, and other
21 reproductive harm.

22 3. The use and/or handling of the PRODUCTS causes exposures to the LISTED
23 CHEMICALS at levels requiring a "clear and reasonable warning" under California's Safe
24 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code")
25 §25249.5, *et seq.* (also known as "Proposition 65"). Defendant has failed to provide the health
26 hazard warnings required by Proposition 65.

1 4. Defendant's continued manufacturing, packaging, distributing, marketing and/or
2 sales of the PRODUCTS without the required health hazard warnings, causes individuals to be
3 involuntarily and unwittingly exposed to levels of the LISTED CHEMICALS that violate
4 Proposition 65.

5 5. Plaintiff seeks injunctive relief enjoining Defendant from the continued
6 manufacturing, packaging, distributing, marketing and/or sales of the PRODUCTS in

¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 California without provision of clear and reasonable warnings regarding the risks of cancer,
2 birth defects and other reproductive harm posed by exposure to the LISTED CHEMICALS
3 through the use and/or handling of the PRODUCTS. Plaintiff seeks an injunctive order
4 compelling Defendant to bring its business practices into compliance with Proposition 65 by
5 providing a clear and reasonable warning to each individual who has been and who in the
6 future may be exposed to LISTED CHEMICALS from the use of the PRODUCTS. Plaintiff
7 also seeks an order compelling Defendant to identify and locate each individual person who in
8 the past has purchased the PRODUCTS, and to provide to each such purchaser a clear and
9 reasonable warning that the use of the PRODUCTS will cause exposures to the LISTED
10 CHEMICALS.

11 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties in
12 excess of \$15 million to remedy Defendant's failure to provide clear and reasonable warnings
13 regarding exposures to the LISTED CHEMICALS.

14 **JURISDICTION AND VENUE**

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

19 8. This Court has jurisdiction over Defendant because, based on information and
20 belief, Defendant is a business having sufficient minimum contacts with California, or
21 otherwise intentionally availing itself of the California market through the distribution and sale
22 of the PRODUCTS in the State of California to render the exercise of jurisdiction over it by the
23 California courts consistent with traditional notions of fair play and substantial justice.

24 9. Venue in this action is proper in the Alameda Superior Court because the
25 Defendant has violated California law in the County of Alameda.

26

1 **PARTIES**

2 10. PLAINTIFF Environmental Research Center (“PLAINTIFF” or “ERC”) is a
3 corporation organized under California’s Corporation Law. ERC is dedicated to, among other
4 causes, reducing the use and misuse of hazardous and toxic substances, consumer protection,
5 worker safety and corporate responsibility.

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

8 12. Defendant YERBA PRIMA, INC. (“DEFENDANT” or “Yerba Prima”) is
9 a corporation organized under Oregon’s Corporation Law and is a person doing business
10 within the meaning of H&S Code §25249.11 with an office at 740 Jefferson Avenue,
11 Ashland, OR, 97520. .

12 13. DEFENDANT manufactures, packages, distributes, markets and/or sells the
13 PRODUCTS for sale or use in California and in Alameda County.

14 **STATUTORY BACKGROUND**

15 14. 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 15. 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 16. Proposition 65 provides that any person “violating or threatening to violate” the
statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7). The phrase
“threatening to violate” is defined to mean creating “a condition in which there is a substantial

1 likelihood that a violation will occur.” (H&S Code §25249.11(e)). Violators are liable for civil
2 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

3 **FACTUAL BACKGROUND**

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

9 18. On October 1, 1992, the State of California officially listed the chemicals lead
10 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became
11 subject to the warning requirement one year later and were therefore subject to the "clear and
12 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR
13 § 25000, *et seq.*; H&S Code §25249.6, *et seq.*). Due to the high toxicity of lead, the maximum
14 allowable dose level for lead is 0.5 ug/day (micrograms a day) for reproductive toxicity.

15 19. To test Yerba Prima’s PRODUCTS for lead, Plaintiff hired a well-respected and
16 accredited testing laboratory that designed the testing protocol used and approved by the
17 California Attorney General years ago for testing heavy metals. The testing results undertaken
18 by PLAINTIFF of Yerba Prima’s PRODUCTS show that the PRODUCTS tested were in
19 violation of the 0.5 ug/day “safe harbor” daily dose limit set forth in Proposition 65’s
20 regulations. Very significant is the fact that people are being exposed to lead through ingestion
21 as opposed to other not as harmful methods of exposure such as dermal exposure. Ingestion of
22 lead produces much higher exposure levels and health risks than dermal exposure to this
23 chemical.

24 20. At all times relevant to this action, Yerba Prima therefore has knowingly and
25 intentionally exposed the users and/or handlers of the PRODUCTS to LISTED CHEMICALS
26 without first giving a clear and reasonable warning to such individuals.

1 given included, *inter alia*, the following information: the name, address, and telephone
2 number of the noticing individual; the name of the alleged violator; the statute violated; the
3 approximate time period during which violations occurred; and descriptions of the violations,
4 including the chemicals involved, the routes of toxic exposure, and the specific product or
5 type of product causing the violations, and was issued as follows:

- 6 a. DEFENDANT and the California Attorney General were provided copies
7 of the Notice by Certified Mail.
- 8 b. DEFENDANT was provided a copy of a document entitled "The Safe
9 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
10 Summary," which is also known as Appendix A to Title 27 of CCR
11 §25903.
- 12 c. The California Attorney General was provided with a Certificate of Merit
13 by the attorney for the noticing party, stating that there is a reasonable
14 and meritorious case for this action, and attaching factual information
15 sufficient to establish a basis for the certificate, including the identify of
16 the persons consulted with and relied on by the certifier, and the facts,
17 studies, or other data reviewed by those persons, pursuant to H&S Code
18 §25249.7(h) (2).

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

22 28. By committing the acts alleged in this Complaint DEFENDANT at all times
23 relevant to this action, and continuing through the present, has violated H&S Code §25249.6 by,
24 in the course of doing business, knowingly and intentionally exposing individuals who use or
25 handle the PRODUCTS set forth in the Notice to the LISTED CHEMICALS, without first
26 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6
and 25249.11(f).

1
2 **THE NEED FOR INJUNCTIVE RELIEF**

3 35. PLAINTIFF realleges and incorporates by this reference Paragraphs 1 through
4 34, as if set forth below.

5 36. By committing the acts alleged in this Complaint, DEFENDANT has caused
6 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
7 of equitable relief, DEFENDANT will continue to create a substantial risk of irreparable injury
8 by continuing to cause consumers to be involuntarily and unwittingly exposed to the LISTED
9 CHEMICALS through the use and/or handling of the PRODUCTS.

10 **PRAYER FOR RELIEF**

11 Wherefore, PLAINTIFF accordingly prays for the following relief:

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

17 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling
18 DEFENDANT to identify and locate each individual who has purchased the PRODUCTS since
19 May 9, 2012, and to provide a warning to such person that the use of the PRODUCTS will
20 expose the user to chemicals known to cause cancer, birth defects, and other reproductive
21 harm.

22 C. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
23 against DEFENDANT in the amount of \$2,500 per day for each violation of Proposition 65, in
24 an amount in excess of \$15 million;

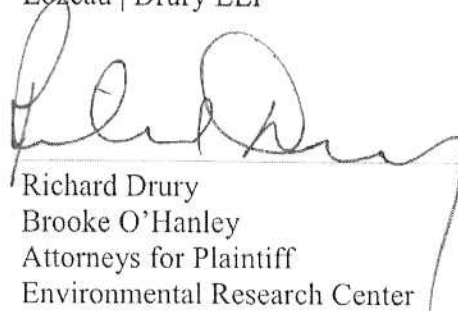
25 D. an award to PLAINTIFF of its reasonable attorneys fees and costs of suit
26 pursuant to California Code of Civil Procedure §1021.5, as PLAINTIFF shall specify in further

1 application to the Court; and,

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

3
4 DATED: September 24, 2012

Lozeau | Drury LLP

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6 
7 Richard Drury
8 Brooke O'Hanley
9 Attorneys for Plaintiff
10 Environmental Research Center