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FILED
Superior Court of California
County of San Francisco

OCT 08 2014

CLERK OF THE COURT
BY: [Signature]
Deputy Clerk

SUMMONS ISSUED

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN FRANCISCO**

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

13 **Plaintiff,**

14 v.

15 **SUNFOOD CORPORATION and**
16 **DOES 1-100,**

17 **Defendants.**

C G C - 14 - 542110
CASE NO.

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF AND
CIVIL PENALTIES**

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

18 Plaintiff Environmental Research Center hereby alleges:

19 **I**

20 **INTRODUCTION**

21 1. Plaintiff Environmental Research Center (hereinafter "Plaintiff" or "ERC") brings this
22 action as a private attorney general enforcer and in the public interest pursuant to Health & Safety
23 Code section 25249.7, subdivision (d). This complaint seeks injunctive and declaratory relief and
24 civil penalties to remedy Defendants Sunfood Corporation and Does 1-100 (hereinafter
25 "SUNFOOD")'s failure to warn consumers that they have been exposed to lead from a number of
26 SUNFOOD's nutritional health products. Lead is a chemical known to the State of California to
27 cause cancer, birth defects and other reproductive harm. Based on the Safe Drinking Water and
28 Toxic Enforcement Act of 1986 (Health & Safety Code section 25249.5 et seq.) also known as

1 “Proposition 65,” businesses with ten or more employees must provide a “clear and reasonable
2 warning” prior to exposing persons to these chemicals.

3 **II**

4 **PARTIES**

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

9 3. Defendant SUNFOOD is a business that manufactures, distributes and/or sells
10 nutritional health products that have exposed users to lead in the State of California within the
11 relevant statute of limitations period. These “Covered Products” are:

- 12 a. Sunfood Super Foods Nutrient-Rich Chlorella Tablets
- 13 b. Sunfood Super Foods Green SuperFood Sun Is Shining
- 14 c. Sunfood Single Plantation Maca
- 15 d. Sunfood Super Foods Mangosteen Fruit Powder
- 16 e. Sunfood Super Foods Nutrient-Rich Red Maca Powder
- 17 f. Sunfood Super Foods Nutrient-Rich Maca Powder
- 18 g. Sunfood Super Foods Sacha Jergon
- 19 h. HealthForce Nutritionals HealthForce SuperFoods Spirulina Manna
- 20 i. HealthForce Nutritionals HealthForce SuperFoods Vitamineral Earth v3.2
- 21 j. HealthForce SuperFoods Greener Grasses Alkalizer Version 2.0
- 22 k. SunWarrior Activated Barley
- 23 l. SunWarrior Ormus SuperGreens
- 24 m. HealthForce Nutritionals Nopal Blood Sugar
- 25 n. HealthForce Detox Liver Rescue 4+
- 26 o. HealthForce Nutritionals Fruits Of The Earth Version 2.0
- 27 p. SunWarrior Classic Protein Raw Vegan Vanilla
- 28 q. SunWarrior Protein Raw Vegan Natural
- r. SunWarrior Classic Protein Raw Vegan Chocolate

4. SUNFOOD is a company subject to Proposition 65 as it employs ten or more persons,
and has employed ten or more persons at all times relevant to this action.

5. Defendants Does 1-100, are named herein under fictitious names, as their true names
and capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that each
of said Does is responsible, in some actionable manner, for the events and happenings hereinafter
referred to, either through said Defendant’s conduct, or through the conduct of its agents, servants

1 or employees, or in some other manner, causing the harms alleged by ERC in this complaint.
2 When said true names and capacities of Does are ascertained, ERC will seek leave to amend this
3 complaint to set forth the same.

4 **III**

5 **JURISDICTION AND VENUE**

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

10 7. This Court has jurisdiction over SUNFOOD because, based on information and
11 belief, SUNFOOD is a business having sufficient minimum contacts with California, or
12 otherwise intentionally availing itself of the California market through the distribution and sale
13 of the Covered Products in the State of California to render the exercise of jurisdiction over it
14 by the California courts consistent with traditional notions of fair play and substantial justice.

15 8. The Complaint is based on allegations contained in a Notice of Violation dated
16 January 31, 2014, served on the California Attorney General, other public enforcers and
17 SUNFOOD. The Notice of Violation constitutes adequate notice to SUNFOOD because it
18 provided adequate information to allow SUNFOOD to assess the nature of the alleged violation,
19 consistent with Proposition 65 and its implementing regulations. Each copy of the Notice of
20 Violation was accompanied by a certificate of merit and a certificate of service, both of which
21 comply with Proposition 65 and its implementing regulations. The Notice of Violation served on
22 SUNFOOD also included a copy of "The Safe Drinking Water and Toxic Enforcement Act of
23 1986 (Proposition 65): A Summary". Service of the Notice of Violation and accompanying
24 documents complied with Proposition 65 and its implementing regulations. A true and correct
25 copy of this Notice of Violation and associated documents is attached hereto as Exhibit A. More
26 than 60 days have passed since the Notice of Violation was mailed and no public enforcement
27 entity has filed a complaint in this case.

28 9. This Court is the proper venue for the action because the causes of action have arisen in
the County of San Francisco where some of the violations of law have occurred. Furthermore, this

1 Court is the proper venue under Code of Civil Procedure section 395.5 and Health & Safety Code
2 section 2524

3 IV

4 **STATUTORY BACKGROUND**

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

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

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

12 12. Implementing regulations for Proposition 65 define expose as "to cause to ingest,
13 inhale, contact via body surfaces or otherwise come into contact with a listed chemical." An
14 individual may come into contact with a listed chemical through water, air, food, consumer
15 products and any other environmental exposure as well as occupational exposures." (Cal. Code
16 Regs., tit. 27, § 25102, subd. (i).)

17 13. In this case, the exposures at issue are caused by consumer products. Implementing
18 regulations for Proposition 65 define a consumer product exposure as "an exposure which results
19 from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use
20 of a consumer good, or any exposure that results from receiving a consumer service." (Cal. Code
21 Regs., tit. 27, § 25602, subd. (b).)

22 14. Whenever a clear and reasonable warning is required under Health & Safety Code
23 section 25249.6, the "method employed to transmit the warning must be reasonably calculated
24 considering the alternative methods available under the circumstances, to make the warning
25 message available prior to exposure." (Cal. Code Regs., tit. 27, § 25601.) The warning
26 requirement may be satisfied by a warning that appears on a product's label or other labeling, shelf
27 labeling, signs, a system of signs, public advertising identifying the system and toll-free
28 information services, or any other, system, that provides clear and reasonable warnings. (Cal.

1 Code Regs., tit. 27, § 25603.1, subd. (a)-(d).)

2 15. Proposition 65 establishes a procedure by which the State is to develop a list of
3 chemicals "known to the State to cause cancer or reproductive toxicity." (Health & Safety
4 Code, § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months
5 after the chemical was published on the State list. (Health & Safety Code, § 25249.10, subd. (b).)
6 Lead was listed as a chemical known to the State of California to cause developmental toxicity in
7 the fetus and male and female reproductive toxicity on February 27, 1987. Lead was listed as a
8 chemical known to the State of California to cause cancer on October 1, 1992. (Cal. Code Regs.,
9 tit. 27, § 27001.)

10 16. The Maximum Allowable Dose Level for lead as a chemical known to cause
11 developmental toxicity is 0.5 micrograms per day. (Cal. Code Regs., tit. 27, § 25805.) The No
12 Significant Risk Level for lead as a carcinogen is 15 micrograms per day. (Cal. Code Regs., tit.
13 27, § 25705.)

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

18 18. Proposition 65 provides that any person "violating or threatening to violate"
19 Proposition 65 may be enjoined in any court of competent jurisdiction. (Health & Safety Code, §
20 25249.7, subd. (a).) To "threaten to violate" means "to create a condition in which there is a
21 substantial probability that a violation will occur." (Health & Safety Code, § 25249.11, subd. (e).)
22 Furthermore, violators are subject to a civil penalty of up to \$2,500 per day for each violation.
23 (Health & Safety Code, § 25249.7, subd. (b)(1).

24 V

25 **STATEMENT OF FACTS**

26 19. SUNFOOD has manufactured, distributed and/or sold the Covered Products
27 containing lead to the State of California. Consumers have been ingesting these products for
28 many years, without any knowledge of their exposure to lead, a very dangerous chemical.

1 Dated: October 7, 2014

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3 By



4 Ryan Hoffman

5 Attorney for Environmental Research Center
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LAW OFFICE OF
KAREN A. EVANS
4218 Biona Place
San Diego, CA 92116
Tel: (619) 640-8100
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January 31, 2014

**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"), 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. (619) 500-3090. 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:

Sunfood Corporation

Consumer Products and Listed Chemicals. The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

1. Sunfood Super Foods Nutrient-Rich Chlorella Tablets - Lead
2. Sunfood Super Foods Green SuperFood Sun Is Shining - Lead
3. Sunfood Single Plantation Maca - Lead
4. Sunfood Super Foods Mangosteen Fruit Powder - Lead
5. Sunfood Super Foods Nutrient-Rich Red Maca Powder - Lead
6. Sunfood Super Foods Nutrient-Rich Maca Powder - Lead
7. Sunfood Super Foods Sacha Jergon - Lead
8. HealthForce Nutritionals HealthForce SuperFoods Spirulina Manna - Lead
9. HealthForce Nutritionals HealthForce SuperFoods Vitamineral Earth v3.2 - Lead
10. HealthForce SuperFoods Greener Grasses Alkalizer Version 2.0 - Lead
11. SunWarrior Activated Barley - Lead
12. SunWarrior Ormus SuperGreens - Lead

Exhibit A

January 31, 2014

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13. HealthForce Nutritionals Nopal Blood Sugar - Lead
14. HealthForce Detox Liver Rescue 4+ - Lead
15. HealthForce Nutritionals Fruits Of The Earth Version 2.0 - Lead
16. SunWarrior Classic Protein Raw Vegan Vanilla - Lead
17. SunWarrior Protein Raw Vegan Natural - Lead
18. SunWarrior Classic Protein Raw Vegan Chocolate- 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.

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 January 31, 2011, 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,



Karen A. Evans

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Sunfood Corporation 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 Sunfood Corporation

I, Karen A. Evans, declare:

1. This Certificate of Merit accompanies the attached 60-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 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.

Karen A. Evans

Dated: January 31, 2014

Karen A. Evans

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. 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 January 31, 2014, 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 with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President
Sunfood Corporation
1830 Gillespie Way, Suite 101
El Cajon, CA 92020

InCorp Services, Inc.
(Sunfood Corporation's Registered
Agent for Service of Process)
5716 Corsa Avenue, Suite 110
Westlake Village, CA 91362

On January 31, 2014, I electronically 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 party by uploading a true and correct copy thereof 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 January 31, 2014, 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 with the postage fully prepaid for delivery by Priority Mail.

Executed on January 31, 2014, in Fort Oglethorpe, Georgia.



Tiffany Capehart

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

January 31, 2014

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Service List

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Los Angeles County 210 West Temple Street, Suite 18000 Los Angeles, CA 90012	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Francisco County 850 Bryant Street, Suite 322 San Francisco, CA 94103	District Attorney, Ventura County 800 South Victoria Ave, Suite 314 Ventura, CA 93009
District Attorney, Amador County 708 Court Street Jackson, CA 95642	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, San Joaquin County 222 E. Weber Ave. Rm. 202 Stockton, CA 95202	District Attorney, Yolo County 301 2 nd Street Woodland, CA 95695
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, San Luis Obispo County 1035 Palm St, Room 450 San Luis Obispo, CA 93408	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, San Mateo County 400 County Ctr., 3 rd Floor Redwood City, CA 94063	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101	San Diego City Attorney's Office 1200 3 rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Contra Costa County 900 Ward Street Martinez, CA 94553	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Santa Clara County 70 West Hedding Street San Jose, CA 95110	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060	San Jose City Attorney's Office 200 East Santa Clara Street, 16 th Floor San Jose, CA 95113
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Monterey County Post Office Box 1131 Salinas, CA 93902	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Napa County 931 Parkway Mall Napa, CA 94559	District Attorney, Sierra County PO Box 457 Downieville, CA 95936	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Nevada County 110 Union Street Nevada City, CA 95959	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Humboldt County 825 5th Street 4 th Floor Eureka, CA 95501	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Sonoma County 600 Administration Drive, Room 212J Santa Rosa, CA 95403	
District Attorney, Inyo County 230 W. Line Street Bishop, CA 93514	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Stanislaus County 832 12 th Street, Ste 300 Modesto, CA 95354	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Riverside County 3960 Orange Street Riverside, CA 92501	District Attorney, Sutter County 446 Second Street Yuba City, CA 95991	
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Sacramento County 901 "G" Street Sacramento, CA 95814	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Benito County 419 Fourth Street, 2 nd Floor Hollister, CA 95023	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093	
District Attorney, Lassen County 220 South Lassen Street, Ste. 8 Susanville, CA 96130	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92415-0004	District Attorney, Tulare County 221 S. Mooney Blvd., Room 224 Visalia, CA 93291	

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and OEHHA's implementing regulations (see citations below) for further information.

FOR INFORMATION CONCERNING THE BASIS FOR THE ALLEGATIONS IN THE NOTICE RELATED TO YOUR BUSINESS, CONTACT THE PERSON IDENTIFIED ON THE NOTICE.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. The statute is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.¹ These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List." Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. This means that chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as

¹ All further regulatory references are to sections of Title 27 of the California Code of Regulations unless otherwise indicated. The statute, regulations and relevant case law are available on the OEHHA website at: <http://www.oehha.ca.gov/prop65/law/index.html>.

damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at:

http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release or otherwise engage in activities involving listed chemicals must comply with the following:

Clear and reasonable warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical unless an exemption applies; for example, when exposures are sufficiently low (see below). The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Some discharges are exempt from this requirement under certain circumstances discussed below.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. You should consult the current version of the statute and regulations (<http://www.oehha.ca.gov/prop65/law/index.html>) to determine all applicable exemptions, the most common of which are the following:

Grace Period. Proposition 65 warning requirements do not apply until 12 months after the chemical has been listed. The Proposition 65 discharge prohibition does not apply to a discharge or release of a chemical that takes place less than 20 months after the listing of the chemical.

Governmental agencies and public water utilities. All agencies of the federal, state or local government, as well as entities operating public water systems, are exempt.

Businesses with nine or fewer employees. Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. This includes all employees, not just those present in California.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "No Significant Risk Levels" (NSRLs) for many listed carcinogens. Exposures below these levels are exempt from the warning requirement. See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of NSRLs, and Section 25701 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level" divided by a 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures to Naturally Occurring Chemicals in a Food. Certain exposures to chemicals that occur in foods naturally (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant² it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

Discharges that do not result in a "significant amount" of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" level for chemicals that cause cancer or that is 1,000 times below the "no observable effect" level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

² See Section 25501(a)(4)

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of the regulations and in Title 11, sections 3100-3103. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court to stop committing the violation.

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at P65Public.Comments@oehha.ca.gov.

Revised: July, 2012

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.9, 25249.10 and 25249.11, Health and Safety Code.