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ENDORSED
FILED
ALAMEDA COUNTY

AUG 18 2014

CLERK OF THE SUPERIOR COURT
By Maria Carrera

8 Attorneys for Plaintiff Environmental Research Center

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

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

13 **Plaintiff,**

14 **vs.**

15 **ULTIMATE NUTRITION, INC. and DOES**
16 **1-100**

17 **Defendants.**

CASE NO. RB 14-737474

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

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

18
19 Plaintiff Environmental Research Center hereby alleges:

20 **I**

21 **INTRODUCTION**

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

1 Toxic Enforcement Act of 1986 (Health & Safety Code section 25249.5 *et seq.*) also known as
2 “Proposition 65,” businesses with ten or more employees must provide a “clear and reasonable
3 warning” prior to exposing people to this chemical.

4 II

5 PARTIES

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

10 3. Defendant Ultimate Nutrition is a business that develops, manufactures, distributes
11 and/or sells nutritional health products that have exposed users to lead in the State of California
12 within the relevant statute of limitations period. These “Covered Products” are Ultimate Nutrition
13 Inc. Platinum Series Protein Isolate Chocolate Crème, Ultimate Nutrition Inc. ISO Sensation 93
14 Vanilla Bean, Ultimate Nutrition Inc. Platinum Series Protein Isolate Vanilla Crème, Ultimate
15 Nutrition Inc. ISO Sensation 93 Strawberry, and Ultimate Nutrition Inc. ISO Sensation 93
16 Chocolate Fudge. Ultimate Nutrition is a company subject to Proposition 65 as it employs ten or
17 more persons, and has employed ten or more persons at all times relevant to this action.

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

25 III

26 JURISDICTION AND VENUE

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

1 individual may come into contact with a listed chemical through water, air, food, consumer products
2 and any other environmental exposure as well as occupational exposures.” (Cal. Code Regs., tit. 27,
3 § 25102, subd. (i).)

4 11. In this case, the exposures at issue are caused by consumer products. Implementing
5 regulations for Proposition 65 define a consumer product exposure as “ an exposure which results
6 from a person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of
7 a consumer good, or any exposure that results from receiving a consumer service.” (Cal. Code
8 Regs., tit. 27, § 25602, subd. (b).)

9 12. Whenever a clear and reasonable warning is required under Health & Safety Code
10 section 25249.6, the “method employed to transmit the warning must be reasonably calculated
11 considering the alternative methods available under the circumstances, to make the warning
12 message available prior to exposure.” (Cal. Code Regs., tit. 27, § 25601.) The warning requirement
13 may be satisfied by a warning that appears on a product’s label or other labeling, shelf labeling,
14 signs, a system of signs, public advertising identifying the system and toll-free information services,
15 or any other system, that provides clear and reasonable warnings. (Cal. Code Regs., tit. 27, §
16 25603.1, subd. (a)-(d).)

17 13. Proposition 65 establishes a procedure by which the State is to develop a list of
18 chemicals “known to the State to cause cancer or reproductive toxicity.” (Health & Safety Code,
19 § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months after the
20 chemical was published on the State list. (Health & Safety Code, § 25249.10, subd. (b).) Lead
21 was listed as a chemical known to the State of California to cause developmental toxicity in the
22 fetus and male and female reproductive toxicity on February 27, 1987. Lead was listed as a
23 chemical known to the State of California to cause cancer on October 1, 1992. (Cal. Code Regs., tit.
24 27, § 27001.)

25 14. The Maximum Allowable Dose Level for lead as a chemical known to cause
26 reproductive toxicity is 0.5 micrograms per day. (Cal. Code Regs., tit. 27, § 25805.) The No
27 Significant Risk Level for lead as a carcinogen is 15 micrograms per day. (Cal. Code Regs., tit.
28 27, § 25705.)

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

5 16. Proposition 65 provides that any person "violating or threatening to violate" Proposition
6 65 may be enjoined in any court of competent jurisdiction. (Health & Safety Code, § 25249.7,
7 subd. (a).) To "threaten to violate" means "to create a condition in which there is a substantial
8 probability that a violation will occur." (Health & Safety Code, § 25249.11, subd. (e).)
9 Furthermore, violators are subject to a civil penalty of up to \$2,500 per day for each violation.
10 (Health & Safety Code, § 25249.7, subd. (b)(1).)

11 V

12 **STATEMENT OF FACTS**

13 17. Ultimate Nutrition has developed, manufactured, distributed and/or sold the Covered
14 Products containing lead into the State of California. Consumers have been ingesting these
15 products for many years, without any knowledge of their exposure to lead, a very dangerous
16 chemical.

17 18. For many years, Ultimate Nutrition has knowingly and intentionally exposed numerous
18 persons to lead, without providing a Proposition 65 warning. Prior to ERC's Notice of Violation,
19 Ultimate Nutrition failed to provide a warning on the label of the Covered Products. Ultimate
20 Nutrition has at all times relevant hereto been aware that the Covered Products contained lead and
21 that persons using these products have been exposed to the chemical. Through its website, Ultimate
22 Nutrition has made various representations regarding the quality, purity, and beneficial nature of the
23 company's products, as well as the steps purportedly taken to ensure these qualities:

24 With respect to the company history, the website states that the founder of the company
25 Victor Rubino, "decided to launch his own company Ultimate Nutrition. Victor's goal was to create
26 high quality, thoroughly researched products at affordable prices for everyone... Ultimate Nutrition
27 is still owned and operated by the Rubino family to this day. Our commitment to Victor's vision
28 remains the same, to create high quality, highly researched products at affordable prices."

1 In regard to the ISO Sensation 93 Covered Products, the company website states “[I]t is
2 derived from sweet whey, membrane-filtered and spray –dried by indirect heat to ensure the highest
3 product quality.”

4 In regard to Protein Isolate Covered Products, the company states “Ultimate Nutrition
5 utilizes only the highest-grade protein isolate.... Protein Isolate is beneficial to athletes,
6 bodybuilders, and all those looking to improve their overall health through a healthy diet.”

7 Given the company’s attention to product formulation, the team of nutritional experts employed
8 during the manufacturing process, and the testing purportedly conducted on the ingredients used in
9 the company’s products, Ultimate Nutrition has been aware of the presence of lead in the Covered
10 Products since at least 2010 when ERC served the company with Notices of Violation on other
11 products on October 3, 2010, October 22, 2010 and January 14, 2011. Nevertheless, the company’s
12 website touts Ultimate Nutrition’s commitment to consumers, and represents to the public that’s its
13 products are of the highest quality with no mention that lead is contained in the Covered Products.
14 Ultimate Nutrition has been aware of the lead in the Covered Products and has failed to disclose the
15 presence of this chemical to the public, who undoubtedly believe they have been ingesting totally
16 healthy and pure products pursuant to the company’s statements.

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

21 **FIRST CAUSE OF ACTION**

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

24 20. ERC refers to paragraphs 1-19, inclusive, and incorporates them herein by this
25 reference.

26 21. By committing the acts alleged above, Ultimate Nutrition has, in the course of doing
27 business, knowingly and intentionally exposed users of the Covered Products to lead, a chemical
28 known to the State of California to cause cancer, birth defects and other reproductive harm without

1 first giving clear and reasonable warning to such individuals, within the meaning of Health & Safety
2 Code section 25249.6.

3 22. Said violations render Ultimate Nutrition liable for civil penalties up to \$2,500 per
4 day, for each violation.

5 **SECOND CAUSE OF ACTION**

6 **(Declaratory Relief)**

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

9 24. There exists an actual controversy relating to the legal rights and duties of the parties,
10 within the meaning of Code of Civil Procedure section 1060, between ERC and Ultimate Nutrition
11 concerning whether Ultimate Nutrition has exposed individuals to a chemical known to the State of
12 California to cause cancer, birth defects and other reproductive harm without providing clear and
13 reasonable warning.

14
15 **VI**

16 **PRAYER**

17 WHEREFORE ERC prays for relief as follows:

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

20 2. On the First Cause of Action, and pursuant to Health & Safety Code section 25249.7,
21 subdivision (a), for such temporary restraining orders, preliminary and permanent injunctive orders,
22 or other orders as are necessary to prohibit Ultimate Nutrition from exposing persons to lead
23 without providing clear and reasonable warning;

24 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil
25 Procedure section 1060 declaring that Ultimate Nutrition has exposed individuals to a chemical
26 known to the State of California to cause birth defects and other reproductive harm without
27 providing clear and reasonable warning; and
28

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Michael Freund, Esq.
Ryan Hoffman, Esq.

OF COUNSEL:
Denise Ferkich Hoffman, Esq.

April 4, 2014

**NOTICE OF VIOLATION 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 Health and Safety Code Section 25249.7(d), 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 enclosed with 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:

Ultimate Nutrition, Inc.

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:

- a. **Ultimate Nutrition Inc. Platinum Series Protein Isolate Chocolate Crème – Lead**
- b. **Ultimate Nutrition Inc. ISO Sensation 93 Vanilla Bean - Lead**
- c. **Ultimate Nutrition Inc. Platinum Series Protein Isolate Vanilla Crème - Lead**
- d. **Ultimate Nutrition Inc. ISO Sensation 93 Strawberry - Lead**
- e. **Ultimate Nutrition Inc. ISO Sensation 93 Chocolate Fudge - 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.

EXHIBIT A

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

April 4, 2014

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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 April 4, 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 Violation to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Ultimate Nutrition, 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's Notice of Proposition 65 Violations by Ultimate Nutrition, Inc.

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that 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.

Dated: April 4, 2014



Michael Freund

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
April 4, 2014
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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 April 4, 2014, I served the following documents: **NOTICE OF VIOLATION 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 at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO
Ultimate Nutrition, Inc.
PO Box 643
Farmington, CT 06034

CT Corporation System
(Ultimate Nutrition, Inc.'s Registered
Agent for Service of Process)
One Corporate Center
Hartford, CT 06103

Current President or CEO
Ultimate Nutrition, Inc.
21 Hyde Road
Farmington, CT 06032

Current President or CEO
Ultimate Nutrition, Inc.
7 Corporate Avenue
Farmington, CT 06032

On April 4, 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 April 4, 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 at a U.S. Postal Service Office with the postage fully prepaid for delivery by Priority Mail.

Executed on April 4, 2014, in Fort Oglethorpe, Georgia.



Tiffany Capehart

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

April 4, 2014

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Service List

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

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

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

District Attorney, Butte County
25 County Center Drive, Suite 245
Oroville, CA 95965

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

District Attorney, Colusa County
346 Fifth Street Suite 101
Colusa, CA 95932

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

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

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

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

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

District Attorney, Humboldt County
825 5th Street 4th Floor
Eureka, CA 95501

District Attorney, Imperial County
940 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

District Attorney, Los Angeles County
210 West Temple Street, Suite 18000
Los Angeles, CA 90012

District Attorney, Madera County
209 West Yosemite Avenue
Madera, CA 93637

District Attorney, Marin County
3501 Civic Center Drive, Room 130
San Rafael, CA 94903

District Attorney, Mariposa County
Post Office Box 730
Mariposa, CA 95338

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

District Attorney, Merced County
550 W. Main Street
Merced, CA 95340

District Attorney, Modoc County
204 S Court Street, Room 202
Alturas, CA 96101-4020

District Attorney, Mono County
Post Office Box 617
Bridgeport, CA 93517

District Attorney, Monterey County
Post Office Box 1131
Salinas, CA 93902

District Attorney, Napa County
931 Parkway Mall
Napa, CA 94559

District Attorney, Nevada County
201 Commercial Street
Nevada City, CA 95959

District Attorney, Orange County
401 West Civic Center Drive
Santa Ana, CA 92701

District Attorney, Placer County
10810 Justice Center Drive, Ste 240
Roseville, CA 95678

District Attorney, Plumas County
520 Main Street, Room 404
Quincy, CA 95971

District Attorney, Riverside County
3960 Orange Street
Riverside, CA 92501

District Attorney, Sacramento County
901 "G" Street
Sacramento, CA 95814

District Attorney, San Benito County
419 Fourth Street, 2nd Floor
Hollister, CA 95023

District Attorney, San Bernardino County
316 N. Mountain View Avenue
San Bernardino, CA 92415-0004

District Attorney, San Diego County
330 West Broadway, Suite 1300
San Diego, CA 92101

District Attorney, San Francisco County
850 Bryant Street, Suite 322
San Francisco, CA 94103

District Attorney, San Joaquin County
222 E. Weber Ave. Rm. 202
Stockton, CA 95202

District Attorney, San Luis Obispo County
1035 Palm St, Room 450
San Luis Obispo, CA 93408

District Attorney, San Mateo County
400 County Ctr., 3rd Floor
Redwood City, CA 94063

District Attorney, Santa Barbara County
1112 Santa Barbara Street
Santa Barbara, CA 93101

District Attorney, Santa Clara County
70 West Hedding Street
San Jose, CA 95110

District Attorney, Santa Cruz County
701 Ocean Street, Room 200
Santa Cruz, CA 95060

District Attorney, Shasta County
1355 West Street
Redding, CA 96001

District Attorney, Sierra County
PO Box 457
Downieville, CA 95936

District Attorney, Siskiyou County
Post Office Box 986
Yreka, CA 96097

District Attorney, Solano County
675 Texas Street, Ste 4500
Fairfield, CA 94533

District Attorney, Sonoma County
600 Administration Drive,
Room 212J
Santa Rosa, CA 95403

District Attorney, Stanislaus County
832 12th Street, Ste 300
Modesto, CA 95354

District Attorney, Sutter County
446 Second Street
Yuba City, CA 95991

District Attorney, Tehama County
Post Office Box 519
Red Bluff, CA 96080

District Attorney, Trinity County
Post Office Box 310
Weaverville, CA 96093

District Attorney, Tulare County
221 S. Mooney Blvd., Room 224
Visalia, CA 93291

District Attorney, Tuolumne County
423 N. Washington Street
Sonora, CA 95370

District Attorney, Ventura County
800 South Victoria Ave, Suite 314
Ventura, CA 93009

District Attorney, Yolo County
301 2nd Street
Woodland, CA 95695

District Attorney, Yuba County
215 Fifth Street, Suite 152
Marysville, CA 95901

Los Angeles City Attorney's Office
City Hall East
200 N. Main Street, Suite 800
Los Angeles, CA 90012

San Diego City Attorney's Office
1200 3rd Avenue, Ste 1620
San Diego, CA 92101

San Francisco, City Attorney
City Hall, Room 234
1 Dr Carlton B Goodlett PL
San Francisco, CA 94102

San Jose City Attorney's Office
200 East Santa Clara Street,
16th Floor
San Jose, CA 95113

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.

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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.