

1 RICHARD DRURY (CBN 163559)  
2 LOZEAU | DRURY LLP  
3 410 12<sup>th</sup> Street, Suite 250  
4 Oakland, CA 94607  
5 Ph: 510-836-4200  
6 Fax: 510-836-4205  
7 Email: richard@lozeaudrury.com

8 Attorney for Plaintiff  
9 ENVIRONMENTAL RESEARCH CENTER

ENDORSED  
FILED  
ALAMEDA COUNTY

OCT 14 2014

CLERK OF THE SUPERIOR COURT  
By Alex Moyle

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

12 ENVIRONMENTAL RESEARCH CENTER, )  
13 a non-profit California corporation, )

14 Plaintiff,

15 v.

16 ATLANTIC PRO-NUTRIENTS, INC. dba )  
17 XYMOGEN, a Florida Corporation and )  
18 XYMOGEN, INC., an Illinois Corporation )

19 Defendants.

Case No. RG14722249

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

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

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

**INTRODUCTION**

22 1. This action seeks to remedy Defendants' 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. Defendants  
25 ATLANTIC PRO-NUTRIENTS, INC. dba XYMOGEN and XYMOGEN, INC. (collectively  
26 "Xymogen" or "Defendants") manufacture, package, distribute, market, and/or sell in  
California certain products containing lead and/or lead compounds (the "PRODUCTS"):

- 1 a. Xymogen Exclusive Professional Formulas i5 Creamy Chocolate
- 2 b. Xymogen Exclusive Professional Formulas FitFood Vegan Creamy
- 3 Chocolate
- 4 c. Xymogen Exclusive Professional Formulas FitFood Vegan Vanilla Delight
- 5 d. Xymogen Exclusive Professional Formulas TestoPlex
- 6 e. Xymogen Exclusive Professional Formulas Viragraphis
- 7 f. Xymogen Exclusive Professional Formulas SerenX
- 8 g. Xymogen Exclusive Professional Formulas LipotropiX
- 9 h. Xymogen Exclusive Professional Formulas MedCaps DPO
- 10 i. Xymogen Exclusive Professional Formulas OrganiX Green
- 11 j. Xymogen Exclusive Professional Formulas Xymogen EP BrainSustain
- 12 Creamy Chocolate
- 13 k. Xymogen Exclusive Professional Formulas Xymogen EP BrainSustain
- 14 Vanilla Delight
- 15 l. Xymogen Exclusive Professional Formulas Xymogen EP i5 Chai
- 16 m. Xymogen Exclusive Professional Formulas OptiCleanse GHI Original
- 17 n. Xymogen Exclusive Professional Formulas Xymogen EP ImmunoBar
- 18 Chocolate Fudge
- 19 o. Xymogen Exclusive Professional Formulas DJD Factors
- 20 p. Xymogen Exclusive Professional Formulas FitFood Lite Vegan Vanilla
- 21 Delight
- 22 q. Xymogen Exclusive Professional Formulas i5 Energize Vanilla Latte
- 23 r. Xymogen Exclusive Professional Formulas i5 Chocolate Mint
- 24 s. Xymogen Exclusive Professional Formulas i5 Vanilla Delight
- 25 t. Xymogen Exclusive Professional Formulas OptiCleanse GHI Chocolate
- 26 Mint

1 u. Xymogen Exclusive Professional Formulas OptiCleanse GHI Chai

2 2. Lead and lead compounds (hereinafter, the "LISTED CHEMICALS") are  
3 substances known to the State<sup>1</sup> of California to cause cancer, birth defects, and other  
4 reproductive harm.

5 3. The use and/or handling of the PRODUCTS causes exposures to the LISTED  
6 CHEMICALS at levels requiring a "clear and reasonable warning" under California's Safe  
7 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code")  
8 §25249.5, *et seq.* (also known as "Proposition 65"). Defendants have failed to provide the  
9 health hazard warnings required by Proposition 65.

10 4. Defendants' continued manufacturing, packaging, distributing, marketing and/or  
11 sales of the PRODUCTS without the required health hazard warnings, cause individuals to be  
12 involuntarily and unwittingly exposed to levels of the LISTED CHEMICALS that violate  
13 Proposition 65.

14 5. Plaintiff seeks injunctive relief enjoining Defendants from the continued  
15 manufacturing, packaging, distributing, marketing and/or sales of the PRODUCTS in  
16 California without provision of clear and reasonable warnings regarding the risks of cancer,  
17 birth defects, and other reproductive harm posed by exposure to the LISTED CHEMICALS  
18 through the use and/or handling of the PRODUCTS. Plaintiff seeks an injunctive order  
19 compelling Defendants to bring their business practices into compliance with Proposition 65  
20 by providing a clear and reasonable warning to each individual who has been and who in the  
21 future may be exposed to the LISTED CHEMICALS from the use of the PRODUCTS.  
22 Plaintiff also seeks an order compelling Defendants to identify and locate each individual  
23 person who in the past has purchased the PRODUCTS, and to provide to each such purchaser a  
24 clear and reasonable warning that the use of the PRODUCTS will cause exposures to the  
25 LISTED CHEMICALS.

26 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties in

---

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

1 excess of \$15 million to remedy Defendants' failure to provide clear and reasonable warnings  
2 regarding exposures to the LISTED CHEMICALS.

3 **JURISDICTION AND VENUE**

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

8 8. This Court has jurisdiction over Defendants because, based on information and  
9 belief, Defendants are businesses having sufficient minimum contacts with California, or  
10 otherwise intentionally availing itself of the California market through the distribution and sale  
11 of the PRODUCTS in the State of California to render the exercise of jurisdiction over it by the  
12 California courts consistent with traditional notions of fair play and substantial justice.

13 9. Venue in this action is proper in the Alameda Superior Court because the  
14 Defendants have violated California law in the County of Alameda.

15 **PARTIES**

16 10. Plaintiff Environmental Research Center ("Plaintiff" or "ERC") is a non-profit  
17 corporation organized under California's Corporation Law. ERC is dedicated to, among other  
18 causes, reducing the use and misuse of hazardous and toxic substances, consumer protection,  
19 worker safety, and corporate responsibility.

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

22 12. Defendant ATLANTIC PRO-NUTRIENTS dba XYMOGEN is a corporation  
23 organized under Florida's Corporation Law and is a person doing business within the meaning  
24 of H&S Code §25249.11 with an office at 6900 Kingspointe Parkway, Orlando, FL 32819.

25 13. Defendant XYMOGEN, INC. is a corporation organized under Illinois' Corporation  
26 Law and is a person doing business within the meaning of H&S Code §25249.11 with an office

1 at 5542 Shore Court, Orlando, FL 32819.

2 14. Defendants manufacture, package, distribute, market and/or sell the  
3 PRODUCTS for sale or use in California and in Alameda County.

4 **STATUTORY BACKGROUND**

5 15. The People of the State of California have declared in Proposition 65 their right  
6 "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other  
7 reproductive harm." (Section 1(b) of Initiative Measure, Proposition 65).

8 16. To effect this goal, Proposition 65 requires that individuals be provided with a  
9 "clear and reasonable warning" before being exposed to substances listed by the State of  
10 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent  
11 part:

12 No person in the course of doing business shall knowingly and intentionally  
13 expose any individual to a chemical known to the state to cause cancer or  
14 reproductive toxicity without first giving clear and reasonable warning to such  
individual....

15 17. Proposition 65 provides that any person "violating or threatening to violate" the  
16 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7). The  
17 phrase "threatening to violate" is defined to mean creating "a condition in which there is a  
18 substantial likelihood that a violation will occur." (H&S Code §25249.11(e)). Violators are  
19 liable for civil penalties of up to \$2,500 per day for each violation of the Act. (H&S Code  
20 §25249.7.)

21 **FACTUAL BACKGROUND**

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

1           19.     On October 1, 1992, the State of California officially listed the chemicals lead  
2 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became  
3 subject to the warning requirement one year later and were therefore subject to the "clear and  
4 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR  
5 § 25000, *et seq.*; H&S Code §25249.6, *et seq.*). Due to the high toxicity of lead, the maximum  
6 allowable dose level for lead is 0.5 ug/day (micrograms a day) for reproductive toxicity. (27  
7 CCR § 25805(b).)

8           20.     To test Defendants' PRODUCTS for lead, Plaintiff hired a well-respected and  
9 accredited testing laboratory that designed the testing protocol used and approved by the  
10 California Attorney General years ago for testing heavy metals. The results of testing  
11 undertaken by Plaintiff of Defendants' PRODUCTS show that the PRODUCTS tested were in  
12 violation of the 0.5 ug/day "safe harbor" daily dose limit set forth in Proposition 65's  
13 regulations. Very significant is the fact that people are being exposed to lead through ingestion  
14 as opposed to other not as harmful methods of exposure such as dermal exposure. Ingestion of  
15 lead produces much higher exposure levels and health risks than does dermal exposure to this  
16 chemical.

17           21.     At all times relevant to this action, Defendants, therefore, have knowingly and  
18 intentionally exposed the users and/or handlers of the PRODUCTS to the LISTED  
19 CHEMICALS without first giving a clear and reasonable warning to such individuals.

20           22.     The PRODUCTS have allegedly been sold by Defendants for use in California  
21 since at least January 31, 2011. The PRODUCTS continue to be distributed and sold in  
22 California without the requisite warning information.

23           23.     On January 31, 2014, ERC served Defendant ATLANTIC PRO NUTRIENTS,  
24 INC. dba XYMOGEN and each of the appropriate public enforcement agencies with a  
25 document entitled "Notice of Violations of California Health & Safety Code Section 25249.5"  
26 ("Prop. 65 Notice"). Subsequently, on July 1, 2014, ERC served Defendant XYMOGEN,

1 INC. and each of the appropriate public enforcement agencies with a Prop. 65 Notice. These  
2 documents provided Defendants and the public enforcement agencies with notice that  
3 Defendants were in violation of Proposition 65 for failing to warn purchasers and individuals  
4 using the PRODUCTS that the use of the PRODUCTS exposes them to lead, a chemical  
5 known to the State of California to cause cancer and/or reproductive toxicity. A copy of each  
6 Prop. 65 Notice is attached hereto as **Exhibit A and Exhibit B** and are hereinafter referred to  
7 individually as the “Notice” or collectively as the “Notices.”

8 24. As a proximate result of acts by Defendants, as persons in the course of doing  
9 business within the meaning of Health & Safety Code §25249.11, individuals throughout the  
10 State of California, including in the County of Alameda, have been exposed to the LISTED  
11 CHEMICALS without a clear and reasonable warning. The individuals subject to the violative  
12 exposures include normal and foreseeable users of the PRODUCTS, as well as all other  
13 persons exposed to the PRODUCTS.

14  
15 **FIRST CAUSE OF ACTION**  
16 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**  
17 **the PRODUCTS described in the January 31, 2014 and July 1, 2014 Prop. 65 Notices)**  
18 **Against Xymogen**

19 25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,  
20 inclusive, as if specifically set forth herein.

21 26. On January 31, 2014 and July 1, 2014, Plaintiff sent the Notices to the requisite  
22 public enforcement agencies, and to Defendants. The Prop 65 Notices were issued pursuant to,  
23 and in compliance with, the requirements of H&S Code §25249.7(d) and the statute's  
24 implementing regulations regarding the notice of the violations to be given to certain public  
25 enforcement agencies and to the violator. The Notices included, *inter alia*, the following  
26 information: the name, address, and telephone number of the noticing individuals; the name of  
the alleged violators; the statute violated; the approximate time period during which violations

1 occurred; and descriptions of the violations, including the chemicals involved, the routes of  
2 toxic exposure, and the specific product or type of product causing the violations, and was  
3 issued as follows:

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

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

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



1 29. By the above-described acts, Defendants have violated H&S Code § 25249.6  
2 and are therefore subject to an injunction ordering Defendants to stop violating Proposition 65,  
3 to provide warnings to all present and future customers, and to provide warnings to  
4 Defendants' past customers who purchased or used the PRODUCTS without receiving a clear  
5 and reasonable warning.

6 30. An action for injunctive relief under Proposition 65 is specifically authorized by  
7 Health & Safety Code §25249.7(a).

8 31. Continuing commission by Defendants of the acts alleged above will irreparably  
9 harm the citizens of the State of California, for which harm they have no plain, speedy, or  
10 adequate remedy at law.

11 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

12 **SECOND CAUSE OF ACTION**  
13 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the**  
14 **PRODUCTS described in Plaintiff's NOTICES)**  
15 **Against Xymogen**

16 32. Plaintiff realleges and incorporates by reference Paragraphs 1 through 31,  
17 inclusive, as if specifically set forth herein.

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

24 34. By the above-described acts, Defendants are liable, pursuant to H&S Code  
25 §25249.7(b), for a civil penalty of \$2,500 per day per violation for each unlawful exposure to  
26 the LISTED CHEMICALS from the PRODUCTS, in an amount in excess of \$15 million.

Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

1 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

9 **PRAYER FOR RELIEF**

10 Wherefore, Plaintiff accordingly prays for the following relief:

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

16 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling Defendants  
17 to identify and locate each individual who has purchased the PRODUCTS since January 31,  
18 2011, and to provide a warning to such person that the use of the PRODUCTS will expose the  
19 user to chemicals known to cause cancer, birth defects, and other reproductive harm.

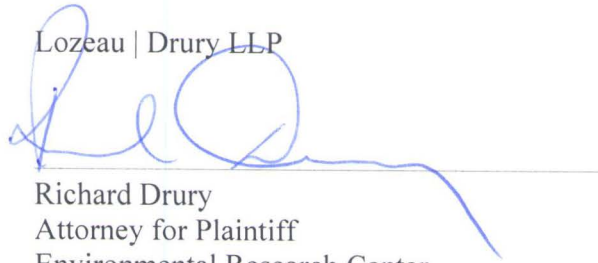
20 C. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),  
21 against Defendants in the amount of \$2,500 per day for each violation of Proposition 65, in an  
22 amount in excess of \$15 million;

23 D. an award to Plaintiff of its reasonable attorney's fees and costs of suit pursuant  
24 to California Code of Civil Procedure §1021.5, 1033.5, and any other applicable provisions of  
25 law, as Plaintiff shall specify in further application to the Court; and,  
26

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

2  
3 DATED: October 14, 2014

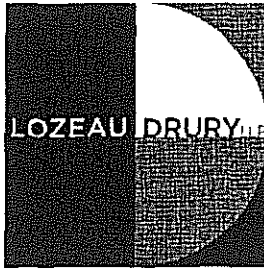
Lozeau | Drury LLP

4  
5 

6 Richard Drury  
7 Attorney for Plaintiff  
8 Environmental Research Center  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**Exhibit A**



T 510.836.4200  
F 510.836.4205

410 12th Street, Suite 250  
Oakland, Ca 94607

www.lozeaudrury.com  
richard@lozeaudrury.com

**VIA CERTIFIED MAIL**

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
6900 Kingspointe Parkway  
Orlando, FL 32819

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
725 S Kirkman Road  
Orlando, FL 32811

Brian Blackburn  
(Atlantic Pro-Nutrients, Inc. dba Xymogen's  
Registered Agent for Service of Process)  
6900 Kingspointe Parkway  
Orlando, FL 32819

**VIA ONLINE SUBMISSION**

Office of the California Attorney General

**VIA PRIORITY MAIL**

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

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

Dear Addressees:

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

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

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

**Atlantic Pro-Nutrients, Inc. dba Xymogen**

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

- **Xymogen Exclusive Professional Formulas i5 Creamy Chocolate - Lead**
- **Xymogen Exclusive Professional Formulas FitFood Vegan Creamy Chocolate- Lead**
- **Xymogen Exclusive Professional Formulas FitFood Vegan Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas TestoPlex - Lead**
- **Xymogen Exclusive Professional Formulas Viragraphis – Lead**
- **Xymogen Exclusive Professional Formulas SerenX - Lead**
- **Xymogen Exclusive Professional Formulas LipotropiX – Lead**
- **Xymogen Exclusive Professional Formulas MedCaps DPO - Lead**
- **Xymogen Exclusive Professional Formulas OrganiX Greens - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP BrainSustain Creamy Chocolate - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP BrainSustain Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP i5 Chai - Lead**
- **Xymogen Exclusive Professional Formulas OptiCleanse GHI Original - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP ImmunoBar Chocolate Fudge - Lead**
- **Xymogen Exclusive Professional Formulas DJD Factors - Lead**
- **Xymogen Exclusive Professional Formulas FitFood Lite Vegan Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas i5 Energize Vanilla Latte - Lead**
- **Xymogen Exclusive Professional Formulas i5 Chocolate Mint - Lead**
- **Xymogen Exclusive Professional Formulas i5 Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas OptiCleanse GHI Chocolate Mint- Lead**
- **Xymogen Exclusive Professional Formulas OptiCleanse GHI Chai - Lead**

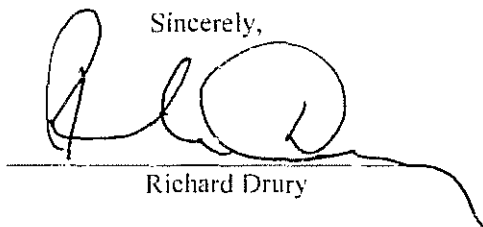
On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

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

The Violator has manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemical, lead. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and/or recommended use of these products by consumers. The primary route of exposure to lead has been through ingestion, but may have also occurred through inhalation and/or dermal contact. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to lead. The method of warning should be a warning that appears on the product's label. The Violator violated Proposition 65 because it failed to provide an appropriate warning to persons using and/or handling these products that they are being exposed to lead. Each of these ongoing violations has occurred on every day since January 31, 2011, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users.

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

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

Sincerely,  
  
Richard Drury

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Atlantic Pro-Nutrients, Inc. dba Xymogen and its Registered Agent for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)

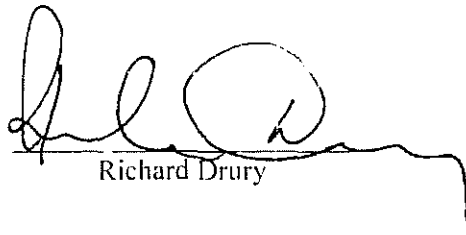
**CERTIFICATE OF MERIT**

**Re: Environmental Research Center's Notice of Proposition 65 Violations by  
Atlantic Pro-Nutrients, Inc. dba Xymogen**

I, Richard Drury, declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am an attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemical that is 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: January 31, 2014

  
Richard Drury



**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 U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
6900 Kingspointe Parkway  
Orlando, FL 32819

Brian Blackburn  
(Atlantic Pro-Nutrients, Inc. dba Xymogen’s  
Registered Agent for Service of Process)  
6900 Kingspointe Parkway  
Orlando, FL 32819

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
725 S Kirkman Road  
Orlando, FL 32811

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

Page 6

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 <sup>nd</sup> 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 <sup>rd</sup> 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 3rd 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 <sup>th</sup> 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 <sup>th</sup> 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 <sup>th</sup> 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 <sup>nd</sup> 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.<sup>1</sup> 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

---

<sup>1</sup> 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](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 contaminant<sup>2</sup> 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.

---

<sup>2</sup> 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...*

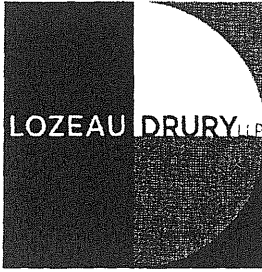
Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov).

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.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**Exhibit B**



T 510.836.4200  
F 510.836.4205

410 12th Street, Suite 250  
Oakland, Ca 94607

www.lozeaudrury.com  
richard@lozeaudrury.com

**VIA CERTIFIED MAIL**

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
6900 Kingspointe Parkway  
Orlando, FL 32819

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
725 S Kirkman Road  
Orlando, FL 32811

Brian Blackburn  
(Atlantic Pro-Nutrients, Inc. dba Xymogen's  
Registered Agent for Service of Process)  
6900 Kingspointe Parkway  
Orlando, FL 32819

Current CEO or President  
Xymogen, Inc.  
5542 Shore Court  
Orlando, FL 32819

John E Blackburn  
(Xymogen, Inc.'s Registered Agent  
for Service of Process)  
8426 Glencyre Road  
Darien, IL 60561

**VIA ONLINE SUBMISSION**

Office of the California Attorney General

**VIA FIRST CLASS MAIL**

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

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

Dear Addressees:



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

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

The names of the Companies covered by this notice that violated Proposition 65 (hereinafter the “Violators”) are:

**Atlantic Pro-Nutrients, Inc. dba Xymogen  
Xymogen, Inc.**

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

- **Xymogen Exclusive Professional Formulas i5 Creamy Chocolate - Lead**
- **Xymogen Exclusive Professional Formulas FitFood Vegan Creamy Chocolate- Lead**
- **Xymogen Exclusive Professional Formulas FitFood Vegan Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas TestoPlex - Lead**
- **Xymogen Exclusive Professional Formulas Viragraphis – Lead**
- **Xymogen Exclusive Professional Formulas SerenX - Lead**
- **Xymogen Exclusive Professional Formulas LipotropiX – Lead**
- **Xymogen Exclusive Professional Formulas MedCaps DPO - Lead**
- **Xymogen Exclusive Professional Formulas OrganiX Greens - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP BrainSustain Creamy Chocolate - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP BrainSustain Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP i5 Chai - Lead**
- **Xymogen Exclusive Professional Formulas OptiCleanse GHI Original - Lead**
- **Xymogen Exclusive Professional Formulas Xymogen EP ImmunoBar Chocolate Fudge - Lead**
- **Xymogen Exclusive Professional Formulas DJD Factors - Lead**
- **Xymogen Exclusive Professional Formulas FitFood Lite Vegan Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas i5 Energize Vanilla Latte - Lead**
- **Xymogen Exclusive Professional Formulas i5 Chocolate Mint - Lead**
- **Xymogen Exclusive Professional Formulas i5 Vanilla Delight - Lead**
- **Xymogen Exclusive Professional Formulas OptiCleanse GHI Chocolate Mint- Lead**
- **Xymogen Exclusive Professional Formulas OptiCleanse GHI Chai - 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.

July 1, 2014

Page 3

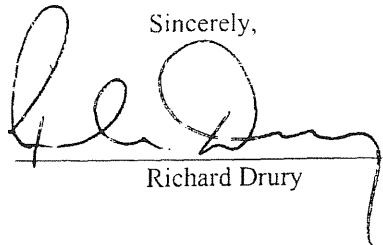
This letter is a notice to the Violators and the appropriate governmental authorities of the Proposition 65 violations concerning the listed products. This notice covers all violations of Proposition 65 involving the Violators currently known to ERC from the information now available. ERC may continue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

The Violators have manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemical, lead. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and/or recommended use of these products by consumers. The primary route of exposure to lead has been through ingestion, but may have also occurred through inhalation and/or dermal contact. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to lead. The method of warning should be a warning that appears on the product's label. The Violators violated Proposition 65 because they failed to provide an appropriate warning to persons using and/or handling these products that they are being exposed to lead. Each of these ongoing violations has occurred on every day since January 31, 2011, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users.

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

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

Sincerely,



Richard Drury

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Atlantic Pro-Nutrients, Inc. dba Xymogen, Xymogen, Inc. and their Registered Agents for Service of Process only)

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

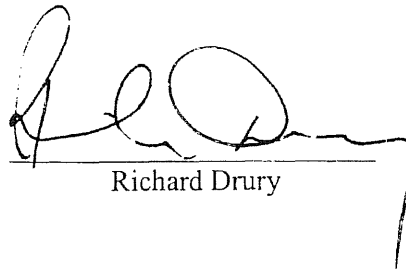
**CERTIFICATE OF MERIT**

**Re: Environmental Research Center's Notice of Proposition 65 Violations by  
Atlantic Pro-Nutrients, Inc. dba Xymogen and Xymogen, Inc.**

I, Richard Drury, declare:

1. This Certificate of Merit accompanies the attached sixty-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 chemical that is the subject of the notice.
4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violators will be able to establish any of the affirmative defenses set forth in the statute.
5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: July 1, 2014

  
Richard Drury

**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 July 1, 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 U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
6900 Kingspointe Parkway  
Orlando, FL 32819

Current CEO or President  
Xymogen, Inc.  
5542 Shore Court  
Orlando, FL 32819

Current CEO or President  
Atlantic Pro-Nutrients, Inc.  
dba Xymogen  
725 S Kirkman Road  
Orlando, FL 32811

John E Blackburn  
(Xymogen, Inc.’s Registered Agent  
for Service of Process)  
8426 Gleneyre Road  
Darien, IL 60561

Brian Blackburn  
(Atlantic Pro-Nutrients, Inc. dba Xymogen’s  
Registered Agent for Service of Process)  
6900 Kingspointe Parkway  
Orlando, FL 32819

On July 1, 2014, I electronically served the following documents: **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** 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 July 1, 2014, I served the following documents: **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties **on the Service List attached hereto**, and depositing it with the U.S. Postal Service with the postage fully prepaid for delivery by First Class Mail.

Executed on July 1, 2014, in Fort Oglethorpe, Georgia.

  
\_\_\_\_\_  
Tiffany Capehart

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

July 1, 2014

Page 6

**Service List**

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Los Angeles County 210 West Temple Street, Suite 1800 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 <sup>nd</sup> 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 <sup>rd</sup> 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 3rd 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 <sup>th</sup> 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 <sup>th</sup> 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 <sup>th</sup> 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 <sup>nd</sup> 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.<sup>1</sup> 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

---

<sup>1</sup> 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](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 contaminant<sup>2</sup> 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.

---

<sup>2</sup> 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](mailto: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.