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Adams Broadwell

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7 Attorneys for Plaintiff
 8 ENVIRONMENTAL RESEARCH CENTER, INC.

FILED BY FAX
 ALAMEDA COUNTY
 October 05, 2016
 CLERK OF
 THE SUPERIOR COURT
 By Lynn Wiley, Deputy
 CASE NUMBER:
RG16833858

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

13 ENVIRONMENTAL RESEARCH CENTER,
 14 INC., a non-profit California corporation,
 15 Plaintiff,
 16 v.
 17 ORGAIN, INC., a California Corporation,
 18 Defendant.

Case No.

**COMPLAINT FOR INJUNCTIVE
 RELIEF AND CIVIL PENALTIES**

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

22 Plaintiff ENVIRONMENTAL RESEARCH CENTER, INC. ("Plaintiff" or "ERC")
 23 brings this action in the interests of the general public and hereby alleges:

INTRODUCTION

25 1. This action seeks to remedy the continuing failure of Defendant ORGAIN, INC.
 26 ("Defendant" or "ORGAIN") to warn consumers in California that they are being exposed to
 27 lead, a substance known to the State of California to cause cancer, birth defects, and other
 28 reproductive harm.

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8 ENVIRONMENTAL RESEARCH CENTER, INC.

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

13 ENVIRONMENTAL RESEARCH CENTER,
14 INC., a non-profit California corporation,

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**COMPLAINT FOR INJUNCTIVE
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Health & Safety Code §25249.5, *et seq.*

21
22 Plaintiff ENVIRONMENTAL RESEARCH CENTER, INC. (“Plaintiff” or “ERC”)
23 brings this action in the interests of the general public and hereby alleges:

24 **INTRODUCTION**

25 1. This action seeks to remedy the continuing failure of Defendant ORGAIN, INC.
26 (“Defendant” or “ORGAIN”) to warn consumers in California that they are being exposed to
27 lead, a substance known to the State of California to cause cancer, birth defects, and other
28 reproductive harm.

1 2. Defendant manufactures, packages, distributes, markets, and/or sells, in California,
2 certain PRODUCTS containing lead, including each of the following PRODUCTS:

- 3 1. Orgain Inc. Vegan Nutritional Shake Sweet Vanilla Bean
- 4 2. Orgain Inc. Vegan Nutritional Shake Smooth Chocolate
- 5 3. Orgain Inc. Organic Protein Plant Based Powder Creamy Chocolate Fudge
- 6 4. Orgain Inc. Organic Protein Plant Based Powder Vanilla Bean
- 7 5. Orgain Inc. Organic Meal All-In-One Nutrition Creamy Chocolate Fudge
- 8 6. Orgain Inc. Organic Meal All-In-One Nutrition Vanilla Bean
- 9 7. Orgain Inc. Organic Hydration Orange
- 10 8. Orgain Inc. Organic Hydration Lemon Ice
- 11 9. Orgain Inc. Organic Hydration Coconut
- 12 10. Orgain Inc. Organic Hydration Berry Punch

13 3. Lead and lead compounds (hereinafter, the “LISTED CHEMICALS”) are
14 substances known to the State¹ of California to cause cancer, birth defects, and other
15 reproductive harm. Proposition 65 requires that consumers must be warned before they are
16 exposed to LISTED CHEMICALS.

17 4. The use and/or handling of the PRODUCTS causes exposures to the LISTED
18 CHEMICALS at levels requiring a “clear and reasonable warning” under California's Safe
19 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code (“H&S Code”) *et seq.*
20 Section 25249.5, *et seq.* (also known and referred to herein as “Proposition 65”).

21 5. Defendant has failed to provide the health hazard warnings required by Proposition
22 65.

23 6. Defendant’s past and continuing manufacturing, packaging, distributing, marketing,
24 and/or sales of the PRODUCTS, without the required health hazard warnings, causes
25 individuals to be involuntarily and unwittingly exposed to levels of the LISTED CHEMICALS
26 that violate Proposition 65. As a proximate result of these actions, Defendant has violated, and
27 will continue to violate, Proposition 65.

28

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

1 **PARTIES**

2 12. Plaintiff ERC is a non-profit corporation organized under California’s Corporation
3 Law. ERC is dedicated to, among other causes, reducing the use and misuse of hazardous and
4 toxic substances, consumer protection, worker safety, and corporate responsibility.

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

7 14. Defendant ORGAIN is a corporation organized under the laws of the State of
8 California and is a person doing business within the meaning of H&S Code Section 25249.11.
9 Defendant manufactures, packages, distributes, markets, and/or sells the PRODUCTS for sale
10 or use in California and in Alameda County.

11 **STATUTORY BACKGROUND**

12 15. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute
13 passed as “Proposition 65” by a vote of the People of the State of California in 1986. In
14 passing Proposition 65, the People declared in their right “[t]o be informed about exposures to
15 chemicals that cause cancer, birth defects, or other reproductive harm.” Section 1(b) of
16 Initiative Measure, Proposition 65.

17 16. To effect this goal, Proposition 65 requires that individuals be provided with a
18 “clear and reasonable warning” before being exposed to substances listed by the State of
19 California as causing cancer or reproductive toxicity. H&S Code Section 25249.6 states, in
20 pertinent part:

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

24 17. “‘Knowingly’ refers only to knowledge of the fact that a discharge of, release of, or
25 exposure to a chemical listed pursuant to H&S Code Section 25249.8(a) of the Act is
26 occurring. No knowledge that the discharge, release, or exposure is unlawful is required.” 27
27 California Code of Regulations (“CCR”) § 25102(n).

1 18. Proposition 65 establishes a procedure by which the Governor lists chemical known
2 to the state to cause cancer or reproductive toxicity. H&S Code § 25249.8. The warning
3 requirements under Proposition 65 for a given chemical go into effect one year after the
4 Governor places that chemical on the list. H&S Code § 25249.10(b).

5 19. Proposition 65 provides that any person “violating or threatening to violate” the
6 warning requirements of the statute may be enjoined in a court of competent jurisdiction. H&S
7 Code § 25249.7. The phrase “threatening to violate” is defined to mean creating “a condition
8 in which there is a substantial likelihood that a violation will occur.” H&S Code §
9 25249.11(e).

10 20. Violators are liable for civil penalties of up to \$2,500 per day for each violation of
11 the Act. H&S Code § 25249.7.

12 **FACTUAL BACKGROUND**

13 21. On February 27, 1987, the State of California officially listed the chemical lead as a
14 chemical known to cause reproductive toxicity. Lead became subject to the warning
15 requirement one year later and was therefore subject to the “clear and reasonable” warning
16 requirements of Proposition 65 beginning on February 27, 1988. H&S Code § 25249.5, *et seq.*;
17 27 CCR § 25000, *et seq.* Due to the high toxicity of lead, the maximum allowable dose level
18 for lead is 0.5 micrograms a day (“µg/day”) for reproductive toxicity. 27 CCR § 25805(b).

19 22. On October 1, 1992, the State of California officially listed the chemicals lead and
20 lead compounds as chemicals known to cause cancer. Lead and lead compounds became
21 subject to the warning requirement one year later and were therefore subject to the “clear and
22 reasonable” warning requirements of Proposition 65 beginning on October 1, 1993. 27 CCR
23 § 25102, *et seq.*; H&S Code § 25249.6, *et seq.* Due to the carcinogenicity of lead, the no
24 significant risk level for lead is 15 µg/day. 27 CCR § 25705(b)(1).

25 23. The PRODUCTS have been sold by Defendant for use in California since at least
26 October 16, 2012.

27 24. To test Defendant’s PRODUCTS for lead, Plaintiff hired a well-respected and
28 accredited testing laboratory. The results of testing undertaken by Plaintiff of Defendant’s

1 PRODUCTS show that the PRODUCTS were in violation of the 0.5 µg/day "safe harbor" daily
2 dose limits for lead set forth in Proposition 65's regulations. Very significant is the fact that
3 people are being exposed to lead through ingestion as opposed to other, less harmful, methods
4 of exposure such as dermal exposure. Ingestion of lead and lead compounds produces much
5 higher exposure levels and health risks than does dermal exposure to these chemicals.

6 25. At all times relevant to this action, Defendant, therefore, has knowingly and
7 intentionally exposed the users and/or handlers of the PRODUCTS to the LISTED
8 CHEMICALS without first giving a clear and reasonable warning to such individuals.

9 26. On October 16, 2016, Plaintiff served Defendant and each of the appropriate public
10 enforcement agencies with a 60-Day Notice of Proposition 65 violations document entitled
11 "Notice of Violations of California Health & Safety Code §25249.5 ("Notices"). True and
12 correct copies of the Notices are attached hereto as Exhibit A and incorporated by reference.
13 The Notices were issued pursuant to, and in compliance with, the requirements of H&S Code
14 Section 25249.7(d) and the statute's implementing regulations regarding the notice of the
15 violations to be given to certain public enforcement agencies and to the violator. The Notices
16 included, *inter alia*, the following information: the name, address, and telephone number of the
17 noticing individual; the name of the alleged violator; the statute violated; the approximate time
18 period during which violations occurred; and descriptions of the violations, including the
19 chemicals involved, the routes of toxic exposure, and the specific product or type of product
20 causing the violations, and was issued as follows:

- 21 a. Defendant was provided a copy of the Notice by Certified Mail;
- 22 b. Defendant was provided a copy of a document entitled "The Safe
23 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
24 Summary," which is also known as Appendix A to Title 27 of CCR
25 Section 25903;
- 26 c. The California Attorney General was provided copies of the Notice via
27 online submission;
- 28 d. The California Attorney General was provided with a Certificate of Merit

1 by the attorney for the noticing party, stating that there is a reasonable
2 and meritorious case for this action, and attaching factual information
3 sufficient to establish a basis for the certificate, including the identity of
4 the persons consulted with and relied on by the certifier, and the facts,
5 studies, or other data reviewed by those persons, pursuant to H&S Code
6 Section 25249.7(h) (2); and

- 7 e. The District Attorneys, city attorneys or prosecutors of each jurisdiction
8 within which the PRODUCTS are offered for sale within California were
9 provided with copies of the Notice via priority mail or electronic
10 submission pursuant to H&S Code Section 25249.7(d)(1).

11 27. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
12 Vegan Nutritional Shake Sweet Vanilla Bean to a person in the State of California each day
13 since at least October 16, 2015. Each unit contains 1 serving of the PRODUCT. Therefore,
14 Defendant's sales have resulted in at least 365 individual exposures from Defendant's sales of
15 Orgain Inc. Vegan Nutritional Shake Sweet Vanilla Bean since at least October 16, 2015.

16 28. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
17 Vegan Nutritional Shake Smooth Chocolate to a person in the State of California each day since
18 at least October 16, 2015. Each unit contains 1 serving of the PRODUCT. Therefore,
19 Defendant's sales have resulted in at least 365 individual exposures from Defendant's sales of
20 Orgain Inc. Vegan Nutritional Shake Smooth Chocolate since at least October 16, 2015.

21 29. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
22 Organic Protein Plant Based Powder Creamy Chocolate Fudge to a person in the State of
23 California each day since at least October 16, 2015. Each unit contains 20 servings of the
24 PRODUCT. Therefore, Defendant's sales have resulted in at least 7,300 individual exposures
25 from Defendant's sales of Orgain Inc. Organic Protein Plant Based Powder Creamy Chocolate
26 Fudge since at least October 16, 2015.

27 30. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
28 Organic Protein Plant Based Powder Vanilla Bean to a person in the State of California each

1 day since at least October 16, 2015. Each unit contains 20 servings of the PRODUCT.

2 Therefore, Defendant's sales have resulted in at least 7,300 individual exposures from
3 Defendant's sales of Orgain Inc. Organic Protein Plant Based Powder Vanilla Bean since at
4 least October 16, 2015.

5 31. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
6 Organic Meal All-In-One Nutrition Creamy Chocolate Fudge to a person in the State of
7 California each day since at least October 16, 2015. Each unit contains 16 servings of the
8 PRODUCT. Therefore, Defendant's sales have resulted in at least 5,840 individual exposures
9 from Defendant's sales of Orgain Inc. Organic Meal All-In-One Nutrition Creamy Chocolate
10 Fudge since at least October 16, 2015.

11 32. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
12 Organic Meal All-In-One Nutrition Vanilla Bean to a person in the State of California each day
13 since at least October 16, 2015. Each unit contains 16 servings of the PRODUCT. Therefore,
14 Defendant's sales have resulted in at least 5,840 individual exposures from Defendant's sales of
15 Orgain Inc. Organic Meal All-In-One Nutrition Vanilla Bean since at least October 16, 2015.

16 33. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
17 Organic Hydration Orange to a person in the State of California each day since at least October
18 16, 2015. Each unit contains 25 servings of the PRODUCT. Therefore, Defendant's sales have
19 resulted in at least 9,125 individual exposures from Defendant's sales of Orgain Inc. Organic
20 Hydration Orange since at least October 16, 2015.

21 34. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
22 Organic Hydration Lemon Ice to a person in the State of California each day since at least
23 October 16, 2015. Each unit contains 25 servings of the PRODUCT. Therefore, Defendant's
24 sales have resulted in at least 9,125 individual exposures from Defendant's sales of Orgain Inc.
25 Organic Hydration Lemon Ice since at least October 16, 2015.

26 35. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
27 Organic Hydration Coconut to a person in the State of California each day since at least
28 October 16, 2015. Each unit contains 25 servings of the PRODUCT. Therefore, Defendant's

1 sales have resulted in at least 9,125 individual exposures from Defendant's sales of Orgain Inc.
2 Organic Hydration Coconut since at least October 16, 2015.

3 36. Defendant has sold at least one unit (one package) of the PRODUCT Orgain Inc.
4 Organic Hydration Berry Punch to a person in the State of California each day since at least
5 October 16, 2015. Each unit contains 25 servings of the PRODUCT. Therefore, Defendant's
6 sales have resulted in at least 9,125 individual exposures from Defendant's sales of Orgain Inc.
7 Organic Hydration Berry Punch since at least October 16, 2015.

8 37. Defendant's sales of the PRODUCTS have resulted in at least 63,510 individual
9 exposures without the warnings required by Proposition 65 since at least October 16, 2014, the
10 one-year period preceding the Notices. These exposures entitle the Court to award civil
11 penalties in excess of \$158 million for the applicable statutory penalty period, which is one year
12 prior to the date of the Notices of Violation. CCP § 340; *Consumer Advocacy Group, Inc.*, 150
13 Cal.App.4th at 981.

14 38. The imposition of a civil penalty award in excess of \$158 million will have a
15 deterrent economic effect in that it is likely to deter future conduct in violation of Proposition
16 65 by the Defendant and the regulated community as a whole.

17 39. The PRODUCTS continue to be distributed and sold in California without the
18 requisite warning information.

19 40. At least 60 days have elapsed since Plaintiff sent the Notices to the Defendant. The
20 appropriate public enforcement agencies have failed to commence and diligently prosecute a
21 cause of action under Proposition 65 against Defendant based on the allegations herein.

22 41. As a proximate result of acts by Defendant, as persons in the course of doing
23 business within the meaning of H&S Code Section 25249.11, individuals throughout the State
24 of California, including in the County of Alameda, have been exposed to the LISTED
25 CHEMICALS without a clear and reasonable warning. The individuals subject to the illegal
26 exposures include normal and foreseeable users of the PRODUCTS, as well as all other
27 persons exposed to the PRODUCTS.
28

1 **FIRST CAUSE OF ACTION**

2 **(Injunctive Relief for Violations of Health and Safety Code Section 25249.5, et seq.**
3 **Concerning the PRODUCTS Described in the October 16, 2015 Proposition 65 Notices**
4 **By Plaintiff Against Defendant)**

5 42. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as if fully
6 set forth herein.

7 43. By committing the acts alleged in this Complaint, Defendant, at all times relevant to
8 this action and continuing through the present, has violated H&S Code Section 25249.6 by, in
9 the course of doing business, knowingly and intentionally exposing individuals who use or
10 handle the PRODUCTS set forth in the Notices to the LISTED CHEMICALS, without first
11 providing a clear and reasonable warning to such individuals pursuant to H&S Code Sections
12 25249.6 and 25249.11(f).

13 44. By the above-described acts, Defendant has violated H&S Code Section 25249.6
14 and are therefore subject to an injunction ordering Defendant to stop violating Proposition 65,
15 to provide warnings to all present and future customers, and to provide warnings to
16 Defendant's past customers who purchased or used the PRODUCTS without receiving a clear
17 and reasonable warning.

18 45. An action for injunctive relief under Proposition 65 is specifically authorized by
19 H&S Code Section 25249.7(a).

20 46. Continuing commission by Defendant of the acts alleged above will irreparably
21 harm the citizens of the State of California, for which harm they have no plain, speedy, or
22 adequate remedy at law.

23 Wherefore, Plaintiff prays judgment against Defendant, as set forth hereafter.

24 **SECOND CAUSE OF ACTION**

25 **(Civil Penalties for Violations of Health and Safety Code Section 25249.5, et seq.**
26 **Concerning the PRODUCTS Described in the October 16, 2015 Proposition 65 Notices**
27 **By Plaintiff Against Defendant)**

28 47. Plaintiff realleges and incorporates by reference all preceding paragraphs as if fully
set forth herein.

1 D. An award to Plaintiff of its reasonable attorneys' fees and costs of suit pursuant
2 to California Code of Civil Procedure Section 1021.5, as Plaintiff shall specify in further
3 application to the Court; and

4 E. Such other and further relief as may be just and proper.

5 Dated: October 4, 2016

ADAMS BROADWELL JOSEPH & CARDOZO

6
7
8 By:  _____

TANYA A. GULESSERIAN
CHRISTINA M. CARO
Attorneys for Plaintiff,
ENVIRONMENTAL RESEARCH
CENTER, INC.

Exhibit A

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

801 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
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ADAM J. REGELE
ELLEN L. WEHR

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

VIA CERTIFIED MAIL

Andrew Abraham or Current CEO
Orgain, Inc.
Post Office Box 4918
Irvine, CA 92616

Andrew Abraham or Current CEO
Orgain, Inc.
8122 Scholarship
Irvine, CA 92612

Andrew Abraham or Current CEO
Orgain, Inc.
2450 Stanley
Tustin, CA 92782

Andrew Abraham
(Orgain, Inc.'s Registered
Agent for Service of Process)
2450 Stanley
Tustin, CA 92782

VIA ONLINE SUBMISSION

Office of the California Attorney General

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

Dear Addressees:

I represent the Environmental Research Center, Inc. ("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

VIA ELECTRONIC MAIL

Yolo County District Attorney
301 2nd Street
Woodland, CA 95695
cfepd@yolocounty.org

VIA PRIORITY MAIL

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

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:

Orgain, Inc.

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

- **Orgain Inc. Vegan Nutritional Shake Sweet Vanilla Bean - Lead**
- **Orgain Inc. Vegan Nutritional Shake Smooth Chocolate - Lead**
- **Orgain Inc. Organic Protein Plant Based Powder Creamy Chocolate Fudge - Lead**
- **Orgain Inc. Organic Protein Plant Based Powder Vanilla Bean - Lead**
- **Orgain Inc. Organic Meal All-In-One Nutrition Creamy Chocolate Fudge - Lead**
- **Orgain Inc. Organic Meal All-In-One Nutrition Vanilla Bean - Lead**
- **Orgain Inc. Organic Hydration Orange - Lead**
- **Orgain Inc. Organic Hydration Lemon Ice - Lead**
- **Orgain Inc. Organic Hydration Coconut - Lead**
- **Orgain Inc. Organic Hydration Berry Punch - 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

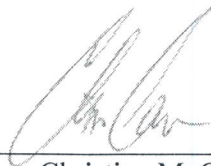
Notice of Violations of California Health & Safety Code §25249.5 *et seq.*
October 16, 2015
Page 3

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 October 16, 2012, 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 chemical; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three 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 chemical 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,



Christina M. Caro

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to Orgain, 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, Inc.'s Notice of Proposition 65 Violations
by Orgain, Inc.**

I, Christina Caro, 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: October 16, 2015



Christina M. Caro

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 October 16, 2015, 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:

Andrew Abraham or
Current CEO
Orgain, Inc.
Post Office Box 4918
Irvine, CA 92616

Andrew Abraham or
Current CEO
Orgain, Inc.
2450 Stanley
Tustin, CA 92782

Andrew Abraham or
Current CEO
Orgain, Inc.
8122 Scholarship
Irvine, CA 92612

Andrew Abraham
(Orgain, Inc.'s Registered
Agent for Service of Process)
2450 Stanley
Tustin, CA 92782

On October 16, 2015, I verified 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)** were served on the following party when a true and correct copy thereof was uploaded 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 October 16, 2015, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following party when a true and correct copy thereof was sent via electronic mail to the party listed below:

Yolo County District Attorney
301 2nd Street
Woodland, CA 95695
cfepd@yolocounty.org

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

October 16, 2015

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On October 16, 2015, 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 Priority Mail.

Executed on October 16, 2015, in Fort Oglethorpe, Georgia.


Phyllis Dunwoody

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*
October 16, 2015

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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 1800
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, 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

27 CCR Appendix A

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. Please refer 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.

The text of Proposition 65 (Health and Safety Code Sections 25249.5 through 25249.13) 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 “Proposition 65 List.” Under Proposition 65, the lead agency (OEHHA) publishes a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. 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 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 Proposition 65. 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. The warning given must be “clear and

reasonable.” This means that the warning must: (1) clearly say 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 to that chemical. 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 Periods. 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 under Proposition 65 as known to the State to cause cancer, a warning is not required if the business causing the exposure 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 causing the exposure 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 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 Food. Certain exposures to chemicals that naturally occur in foods (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 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.

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 Title 27 and sections 3100-3103 of Title 11. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an enforcement 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.

A private party may not file an enforcement action based on certain exposures if the alleged violator meets specific conditions. For the following types of exposures, the Act provides an opportunity for the business to correct the alleged violation:

- An exposure to alcoholic beverages that are consumed on the alleged violator's premises to the extent onsite consumption is permitted by law;
- An exposure to a Proposition 65 listed chemical in a food or beverage prepared and sold on the alleged violator's premises that is primarily intended for immediate consumption on- or off- premises. This only applies if the chemical was not intentionally added to the food, and was formed by cooking or similar preparation of food or beverage components necessary to render the food or beverage palatable or to avoid microbiological contamination;

- An exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises;
- An exposure to listed chemicals in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking non-commercial vehicles.

If a private party alleges that a violation occurred based on one of the exposures described above, the private party must first provide the alleged violator a notice of special compliance procedure and proof of compliance form.

A private party may not file an action against the alleged violator for these exposures, or recover in a settlement any payment in lieu of penalties any reimbursement for costs and attorney's fees, if the notice was served on or after October 5, 2013, and the alleged violator has done *all* of the following within 14 days of being served notice:

- Corrected the alleged violation;
- Agreed to pay a civil penalty of \$5B500 (subject to change as noted below) to the private party within 30 days; and
- Notified the private party serving the notice in writing that the violation has been corrected.

The written notification to the private-party must include a notice of special compliance procedure and proof of compliance form completed by the alleged violator as directed in the notice. On April 1, 2019, and every five years thereafter, the dollar amount of the civil penalty will be adjusted by the Judicial Council based on the change in the annual California Consumer Price Index. The Judicial Council will publish the dollar amount of the adjusted civil penalty at each five-year interval, together with the date of the next scheduled adjustment.

An alleged violator may satisfy these conditions only one time for a violation arising from the same exposure in the same facility or on the same premises. The satisfaction of these conditions does not prevent the Attorney General, a district attorney, a city attorney of a city of greater than 750,000 population, or any full-time city prosecutor with the consent of the district attorney, from filing an enforcement action against an alleged violator. The amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator for the same alleged violation to a private-party.

A copy of the notice of special compliance procedure and proof of compliance form is included with this notice and can be downloaded from OEHHA's website at: <http://oehha.ca.gov/prop65/law/p65law72003.html>.

The notice is reproduced here:

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Date: October 16, 2015

Name of Noticing Party or attorney for Noticing Party: Environmental Research Center, Inc.

Address: 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108

Phone number: 619-500-3090

SPECIAL COMPLIANCE PROCEDURE

PROOF OF COMPLIANCE

You are receiving this form because the Noticing Party listed above has alleged that you are violating California Health and Safety Code §25249.6 (Prop. 65).

The Noticing Party may not bring any legal proceedings against you for the alleged violation checked below if:

- 1. You have actually taken the corrective steps that you have certified in this form**
- 2. The Noticing Party has received this form at the address shown above, accurately completed by you, postmarked within 14 days of your receiving this notice**
- 3. The Noticing Party receives the required \$500 penalty payment from you at the address shown above postmarked within 30 days of your receiving this notice.**
- 4. This is the first time you have submitted a Proof of Compliance for a violation arising from the same exposure in the same facility on the same premises.**

PART 1: TO BE COMPLETED BY THE NOTICING PARTY OR ATTORNEY FOR THE NOTICING PARTY

The alleged violation is for an exposure to: (check one)

Alcoholic beverages that are consumed on the alleged violator's premises to the extent on-site consumption is permitted by law.

A chemical known to the state to cause cancer or reproductive toxicity in a food or beverage prepared and sold on the alleged violator's premises for immediate consumption on or off premises to the extent: (1) the chemical was not intentionally added; and (2) the chemical was formed by cooking or similar preparation of food or beverage components necessary to render the food or beverage palatable or to avoid microbiological contamination.

Environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises.

Chemicals known to the State to cause cancer or reproductive toxicity in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking noncommercial vehicles.

IMPORTANT NOTES:

1. You have no potential liability under California Health and Safety Code §25249.6 if your business has nine (9) or fewer employees.
2. Using this form will NOT prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action over the same alleged violations, and that in any such action, the amount of civil penalty shall be reduced to reflect any payment made at this time.

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Date: October 16, 2015

Name of Noticing Party or attorney for Noticing Party: Environmental Research Center, Inc.
Address: 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108
Phone number: 619-500-3090

PART 2: TO BE COMPLETED BY THE ALLEGED VIOLATOR OR AUTHORIZED REPRESENTATIVE

Certification of Compliance

Accurate completion of this form will demonstrate that you are now in compliance with California Health and Safety Code §25249.6 for the alleged violation listed above. You must complete and submit the form below to the Noticing Party at the address shown above, postmarked within 14 days of you receiving this notice.

I hereby agree to pay, within 30 days of completion of this notice, a civil penalty of \$500 to the Noticing Party only and certify that I have complied with Health and Safety Code §25249.6 by (check only one of the following):

- Posting a warning or warnings about the alleged exposure that complies with the law, and attaching a copy of that warning and a photograph accurately showing its placement on my premises;
- Posting the warning or warnings demanded in writing by the Noticing Party, and attaching a copy of that warning and a photograph accurately its placement on my premises; OR
- Eliminating the alleged exposure, and attaching a statement accurately describing how the alleged exposure has been eliminated.

Certification

My statements on this form, and on any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I have carefully read the instructions to complete this form. I understand that if I make a false statement on this form, I may be subject to additional penalties under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65).

Signature of alleged violator or authorized representative Date

Name and title of signatory

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS. . .

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

Revised: May 2014

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>.

² See Section 25501(a)(4).

Note: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11, Health and Safety Code.

HISTORY

1. New Appendix A filed 4-22-97; operative 4-22-97 pursuant to Government Code section 11343.4(d) (Register 97, No. 17).
2. Amendment filed 1-7-2003; operative 2-6-2003 (Register 2003, No. 2).
3. Change without regulatory effect renumbering title 22, section 12903 and Appendix A to title 27, section 25903 and Appendix A, including amendment of appendix, filed 6-18-2008 pursuant to section 100, title 1, California Code of Regulations (Register 2008, No. 25).
4. Amendment filed 11-19-2012; operative 12-19-2012 (Register 2012, No. 47).
5. Amendment of appendix and Note filed 11-19-2014; operative 1-1-2015 (Register 2014, No. 47).

This database is current through 9/18/15 Register 2015, No. 38

27 CCR Appendix A, 27 CA ADC Appendix A