

ENDORSED  
FILED  
ALAMEDA COUNTY

APR 11 2016

CLERK OF THE SUPERIOR COURT  
By Jamie M. May  
Deputy

MATTHEW C. MACLEAR (SBN 209228)  
ANTHONY M. BARNES (SBN 199048)  
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Attorneys for Plaintiff  
ENVIRONMENTAL RESEARCH CENTER, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

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

Plaintiff,

v.

SUPPLEMENTALWAREHOUSE.COM INC., a Wisconsin Corporation, and DOES 1-25,

Defendants.

Case No. **RG16810946**

**COMPLAINT FOR PERMANENT  
INJUNCTION, CIVIL PENALTIES AND  
OTHER RELIEF**

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

Plaintiff Environmental Research Center, Inc. ("PLAINTIFF" or "ERC") brings this action in the interests of the general public and, on information and belief, hereby alleges:

**INTRODUCTION**

1. This action seeks to remedy the continuing failure of Defendants SUPPLEMENTALWAREHOUSE.COM INC. ("SUPPLEMENTAL WAREHOUSE") and DOES 1-25 (hereinafter individually referred to as "DEFENDANT" or collectively as "DEFENDANTS") to warn consumers in California that they are being exposed to lead and cadmium, substances known to the State of California to cause cancer, birth defects, and other reproductive harm. According to the Safe Drinking Water and Toxics Enforcement Act of

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1 1986, Health and Safety Code (“H&S Code”) §25249.5 (also known as and referred to  
2 hereinafter as “Proposition 65”), businesses must provide persons with a “clear and reasonable  
3 warning” before exposing individuals to chemicals known to the state to cause cancer or  
4 reproductive harm. DEFENDANTS manufacture, package, distribute, market, and/or sell in  
5 California certain products containing lead and/or cadmium (the “SUBJECT PRODUCTS”):

6 **SUPPLEMENTAL WAREHOUSE**

- 7 • Myogenix Inc. After Shock Critical Mass Vanilla Milk Shake - Lead
- 8 • Myogenix Inc. After Shock Critical Mass Cookies N' Cream Milk Shake – Lead,  
9 Cadmium
- 10 • Myogenix Inc. After Shock Critical Mass Chocolate Milk Shake – Lead, Cadmium
- 11 • Myogenix Inc. Adipro Appetite Control + Adrenal A2 - Lead
- 12 • Myogenix Inc. Liver Support Extra Strength – Lead

13 2. Lead and cadmium (hereinafter, the “LISTED CHEMICALS”) are substances  
14 known to the State of California to cause cancer, birth defects, and other reproductive harm.

15 3. The use and/or handling of the SUBJECT PRODUCTS causes exposures to the  
16 LISTED CHEMICALS at levels requiring a “clear and reasonable warning” under Proposition  
17 65. DEFENDANTS exposed consumers, users, and handlers to the LISTED CHEMICALS and  
18 have failed to provide the health hazard warnings required by Proposition 65.

19 4. DEFENDANTS’ continued manufacturing, packaging, distributing, marketing  
20 and/or sales of the SUBJECT PRODUCTS without the required health hazard warnings,  
21 causes, or threatens to cause, individuals to be involuntarily, unknowingly and unwittingly  
22 exposed to levels of the LISTED CHEMICALS that violate Proposition 65.

23 **PARTIES**

24 5. PLAINTIFF is a non-profit corporation organized under California law. ERC is  
25 dedicated to, among other causes, reducing the use and misuse of hazardous and toxic  
26 substances, consumer protection, worker safety, and corporate responsibility.

27 6. ERC is a person within the meaning of H&S Code §25249.11 and brings this  
28 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code

1 §25249.7 (d) specifies that actions to enforce Proposition 65 may be brought by a person in the  
2 public interest, provided certain notice requirements and no other public prosecutor is  
3 diligently prosecuting an action for the same violation(s).

4 7. SUPPLEMENTALWAREHOUSE is now, and was at all times relevant herein, a  
5 corporation organized under the laws of Wisconsin and is doing business in California within  
6 the meaning of H&S Code §25249.11.

7 8. DEFENDANTS own, administer, direct, control and/or operate facilities and/or  
8 agents, distributors sellers, marketers or other retail operations who place its SUBJECT  
9 PRODUCTS into the stream of commerce in California (including but not limited to Alameda  
10 County) under the brand name MYOGENIX INC. and other brand names, which contain the  
11 LISTED CHEMICALS without first giving clear and reasonable warnings.

12 9. DEFENDANTS, separately and each of them, are or were, at all times relevant to the  
13 claims in this Complaint and continuing through the present, legally responsible for compliance  
14 with the provisions of Proposition 65. Whenever an allegation regarding any act of a  
15 DEFENDANT is made herein, such allegation shall be deemed to mean that DEFENDANT, or  
16 its agent, officer, director, manager, supervisor or employee did or so authorized such acts while  
17 engaged in the affairs of DEFENDANT's business operations and/or while acting within the  
18 course and scope of their employment or while conducting business for DEFENDANT(S) for a  
19 commercial purpose.

20 10. In this Complaint, when reference is made to any act of a DEFENDANT, such  
21 allegation shall mean that the owners, officers, directors, agents, employees, contractors, or  
22 representatives of DEFENDANT acted or authorized such actions, and/or negligently failed  
23 and omitted to act or adequately and properly supervise, control or direct its employees and  
24 agents while engaged in the management, direction, operation or control of the affairs of the  
25 business organization. Whenever reference is made to any act of any DEFENDANT, such  
26 allegation shall be deemed to mean the act of each DEFENDANT acting individually, jointly  
27 and severally as defined by Civil Code Section 1430 *et seq.*

1 11. PLAINTIFF does not know the true names, capacities and liabilities of  
2 DEFENDANTS' DOES Nos. 1-25, inclusive, and therefore sues them under fictitious names.  
3 PLAINTIFF will amend this Complaint to allege the true name and capacities of the DOE  
4 Defendants upon being ascertained. Each of these Defendants was in some way legally  
5 responsible for the acts, omissions and/or violations alleged herein.

6 **JURISDICTION AND VENUE**

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

11 13. This Court has jurisdiction over DEFENDANTS because they are business entities  
12 that do sufficient business, have sufficient minimum contacts in California or otherwise  
13 intentionally avail themselves of the California market, through the sale, marketing and use of  
14 their SUBJECT PRODUCTS in California, to render the exercise of jurisdiction over them by  
15 the California courts consistent with traditional notions of fair play and substantial justice.

16 14. Venue in this action is proper in the Alameda County Superior Court because the  
17 cause, or part thereof, arises in the County of Alameda since DEFENDANTS' products are  
18 marketed, offered for sale, sold, used, and/or consumed in this county.

19 **STATUTORY BACKGROUND**

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

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

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

1 17. An exposure to a chemical in a consumer product is one “which results from a  
2 person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a  
3 consumer good, or any exposure that results from receiving a consumer service.” (Cal. Code  
4 Regs., tit. 22, § 12601, subd. (b).)

5 18. Proposition 65 provides that any “person who violates or threatens to violate” the  
6 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7). The phrase  
7 “threaten to violate” is defined to mean creating “a condition in which there is a substantial  
8 probability that a violation will occur” (H&S Code §25249.11(e)). Violators are liable for civil  
9 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

### 10 FACTUAL BACKGROUND

11 19. On February 27, 1987, the State of California officially listed lead as a chemical  
12 known to cause reproductive toxicity. Lead became subject to the warning requirement one  
13 year later and was therefore subject to the “clear and reasonable” warning requirements of  
14 Proposition 65 beginning on February 27, 1988. (27 California Code of Regulations (“CCR”)  
15 §25000, *et seq.*; H&S Code §25249.5, *et seq.*).

16 20. On October 1, 1992, the State of California officially listed lead and lead  
17 compounds as chemicals known to cause cancer. Lead and lead compounds became subject to  
18 the warning requirement one year later and were therefore subject to the "clear and reasonable"  
19 warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR § 25000, *et*  
20 *seq.*; H&S Code §25249.6, *et seq.*). Due to the high toxicity of lead, the maximum allowable  
21 dose level for lead is 0.5 ug/day (micrograms a day) for reproductive toxicity and the no  
22 significant risk level for carcinogens is 15ug/day (oral).

23 21. On May 1, 1997, the State of California officially listed the chemical cadmium as a  
24 chemical known to cause reproductive toxicity. Cadmium became subject to the warning  
25 requirement one year later and was therefore subject to the “clear and reasonable” warning  
26 requirements of Proposition 65 beginning on May 1, 1998. (27 CCR §25000, *et seq.*; H&S Code  
27 §25249.5, *et seq.*). Due to the high toxicity of cadmium, the maximum allowable dose level for  
28 cadmium is 4.1 ug/day (micrograms a day) for reproductive toxicity. (27 CCR § 25805(b).)

1           22. On October 1, 1987, the State of California officially listed the chemicals cadmium  
2 and cadmium compounds as chemicals known to cause cancer. Cadmium and cadmium  
3 compounds became subject to the warning requirement one year later and were therefore subject  
4 to the “clear and reasonable” warning requirements of Proposition 65 beginning on October 1,  
5 1988 (27 CCR §25000, et seq.; H&S Code §25249.6 et seq.).

6           23. To test DEFENDANTS’ SUBJECT PRODUCTS for lead and cadmium,  
7 PLAINTIFF hired a well-respected and accredited testing laboratory that designed the testing  
8 protocol used and approved by the California Attorney General years ago for testing heavy  
9 metals. The results of testing undertaken by PLAINTIFF of DEFENDANTS’ SUBJECT  
10 PRODUCTS show that the SUBJECT PRODUCTS tested were in violation of the 0.5 ug/day  
11 and/or 15 ug/day “safe harbor” daily dose limits for lead, and/or the 4.1 µg/day “safe harbor”  
12 daily dose limits for cadmium, set forth in Proposition 65’s regulations. Very significant is the  
13 fact that people are being exposed to lead and cadmium through ingestion as opposed to other  
14 not as harmful methods of exposure such as dermal exposure. Ingestion of lead produces much  
15 higher exposure levels and health risks than does dermal exposure to this chemical.

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

20           25. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use  
21 in California since at least January 29, 2013. The SUBJECT PRODUCTS continue to be  
22 distributed and sold in California without the requisite warning information.

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

1           27. On January 29, 2016, ERC served each of the DEFENDANTS and each of the  
2 appropriate public enforcement agencies with a document entitled "Notice of Violations of  
3 California Health & Safety Code Section 25249.5" that provided DEFENDANTS and the  
4 public enforcement agencies with notice that DEFENDANTS were in violation of Proposition  
5 65 for failing to warn purchasers and individuals using the SUBJECT PRODUCTS that the use  
6 of the SUBJECT PRODUCTS exposes them to lead and/or cadmium, chemicals known to the  
7 State of California to cause cancer and/or reproductive toxicity ("Prop. 65 Notice"). A true and  
8 correct copy of the 60-Day Notice ("NOTICE") is attached hereto as Exhibit A, and are hereby  
9 incorporated by reference, and are available on the Attorney General's website located at  
10 <http://oag.ca.gov/prop65>.

11           28. The NOTICE was issued pursuant to, and in compliance with, the requirements of  
12 H&S Code §25249.7(d) and the statute's implementing regulations regarding the notice of the  
13 violations to be given to certain public enforcement agencies and to the violator. The NOTICE  
14 included, *inter alia*, the following information: the name, address, and telephone number of the  
15 noticing individual; the name of the alleged violator; the statute violated; the approximate time  
16 period during which violations occurred; and descriptions of the violations including the  
17 chemicals involved, the routes of toxic exposure, and the specific product or type of product  
18 causing the violations.

19           29. SUPPLEMENTAL WAREHOUSE was also provided copies of the document  
20 entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A  
21 Summary," which is also known as Appendix A to Title 27 of CCR §25903, via Certified Mail.

22           30. The California Attorney General was provided a copy of the NOTICE and a  
23 Certificate of Merit by the attorney for the noticing party, stating that there is a reasonable and  
24 meritorious case for this action, and attaching factual information sufficient to establish a basis  
25 for the certificate, including the identity of the persons consulted with and relied on by the  
26 certifier, and the facts, studies, or other data reviewed by those persons, pursuant to H&S Code  
27 §25249.7(h) (2) via online submission.

28           31. After expiration of the sixty (60) day notice period, the appropriate public

1 enforcement agencies have failed to commence and diligently prosecute a cause of action under  
2 H&S Code §25249.5, *et seq.* against DEFENDANTS based on the allegations herein.

3 **FIRST CAUSE OF ACTION**  
4 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning**  
5 **the PRODUCTS described in the January 29, 2016, Prop. 65 Notice of Violation)**  
6 **Against DEFENDANTS**

7 32. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 32,  
8 inclusive, as if specifically set forth herein.

9 33. By committing the acts alleged in this Complaint, DEFENDANTS at all times  
10 relevant to this action, and continuing through the present, have violated, or threaten to violate,  
11 H&S Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing  
12 individuals in California to chemicals known to the State of California to cause cancer or  
13 reproductive toxicity without first giving clear and reasonable warnings to such persons who  
14 use, consume or handle the SUBJECT PRODUCTS containing the LISTED CHEMICALS,  
15 pursuant to H&S Code §§25249.6 and 25249.11(f).

16 34. By the above-described acts, DEFENDANTS have violated, or threaten to violate,  
17 H&S Code §25249.6 and are therefore subject to preliminary and permanent injunctions  
18 ordering DEFENDANTS to stop violating Proposition 65, to provide warnings to all present  
19 and future customers, and to provide warnings to DEFENDANTS' past customers who  
20 purchased or used the SUBJECT PRODUCTS without receiving a clear and reasonable  
21 warning.

22 35. An action for injunctive relief under Proposition 65 is specifically authorized by  
23 H&S Code §25249.7(a).

24 36. Continuing commission by DEFENDANTS of the acts alleged above will  
25 irreparably harm the citizens of the State of California, for which harm they have no plain,  
26 speedy, or adequate remedy at law.

27 37. In the absence of preliminary and then permanent injunctive relief, DEFENDANTS  
28 will continue to create a substantial risk of irreparable injury by continuing to cause consumers  
to be involuntarily, unknowingly and unwittingly exposed to the LISTED CHEMICALS

1 through the use, consumption and/or handling of the PRODUCTS.

2 **SECOND CAUSE OF ACTION**

3 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, et seq. concerning the**  
4 **PRODUCTS described in the January 29, 2016, Prop. 65 Notice of Violation)**

4 **Against DEFENDANTS**

5 38. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 37,  
6 inclusive, as if specifically set forth herein.

7 39. By committing the acts alleged in this Complaint, DEFENDANTS at all times  
8 relevant to this action, and continuing through the present, have violated H&S Code §25249.6  
9 by, in the course of doing business, knowingly and intentionally exposing individuals in  
10 California to chemicals known to the State of California to cause cancer or reproductive toxicity  
11 without first giving clear and reasonable warnings to such persons who use, consume or handle  
12 the SUBJECT PRODUCTS containing the LISTED CHEMICALS, pursuant to H&S Code §§  
13 25249.6 and 25249.11(f).

14 40. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code  
15 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure  
16 to the LISTED CHEMICALS from the SUBJECT PRODUCTS, in an amount in excess of \$1  
17 million.

18 **THE NEED FOR INJUNCTIVE RELIEF**

19 41. PLAINTIFF re-alleges and incorporates by this reference Paragraphs 1 through  
20 40, as if set forth below.

21 42. By committing the acts alleged in this Complaint, DEFENDANTS have caused  
22 or threaten to cause irreparable harm for which there is no plain, speedy or adequate remedy at  
23 law. In the absence of equitable relief, DEFENDANTS will continue to create a substantial risk  
24 of irreparable injury by continuing to cause consumers to be involuntarily and unwittingly  
25 exposed to the LISTED CHEMICALS through the use and/or handling of the SUBJECT  
26 PRODUCTS.

27 **PRAYER FOR RELIEF**

28 Wherefore, PLAINTIFF prays for the following relief:

1           A.     A preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),  
2 enjoining DEFENDANTS, their agents, employees, assigns and all persons acting in concert  
3 or participating with DEFENDANTS, from manufacturing, distributing, marketing or selling  
4 the SUBJECT PRODUCTS in California without first providing a clear and reasonable  
5 warning, within the meaning of Proposition 65, that the users and/or handlers of the SUBJECT  
6 PRODUCTS are exposed to the LISTED CHEMICALS;

7           B.     An injunctive order, pursuant to H&S Code §25249.7(b), compelling  
8 DEFENDANTS to identify and locate each individual who has purchased the PRODUCTS  
9 since January 29, 2013, and to provide a warning to such person that the use of the SUBJECT  
10 PRODUCTS will expose the user to chemicals known to cause cancer, birth defects, and other  
11 reproductive harm;

12           C.     An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),  
13 against DEFENDANTS in the amount of \$2,500 per day for each violation of Proposition 65,  
14 in an amount in excess of \$1 million, according to proof;

15           D.     An award to PLAINTIFF of its reasonable attorney's fees and costs of suit  
16 pursuant to California Code of Civil Procedure §§1032 *et. seq* and 1021.5, as PLAINTIFF shall  
17 specify in further applications to the Court; and,

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

19  
20 DATED: April 11, 2016

AQUA TERRA AERIS LAW GROUP

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23 Matthew C. Maclear  
24 Anthony M. Barnes  
25 Attorneys for Plaintiff  
26 Environmental Research Center, Inc.  
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**EXHIBIT A**



Matthew M. Maclear  
[mcm@atalawgroup.com](mailto:mcm@atalawgroup.com)  
415.568.5200

January 29, 2016

**NOTICE OF VIOLATION OF  
CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET SEQ.  
(PROPOSITION 65)**

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Environmental Research Center, Inc. ("ERC"), 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. (619) 500-3090. ERC's Executive Director is Chris Heptinstall. ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

ERC has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), which is codified at California Health & Safety Code §25249.5 *et seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with these products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Health and Safety Code Section 25249.7(d), ERC intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

**General Information about Proposition 65.** A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with this letter served to the alleged Violator identified below.

**Alleged Violator.** The name of the company covered by this notice that violated Proposition 65 (hereinafter the "Violator") is:

**SupplementWarehouse.com Inc.**

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

- **Myogenix Inc. After Shock Critical Mass Vanilla Milk Shake - Lead**
- **Myogenix Inc. After Shock Critical Mass Cookies N' Cream Milk Shake – Lead, Cadmium**
- **Myogenix Inc. After Shock Critical Mass Chocolate Milk Shake – Lead, Cadmium**
- **Myogenix Inc. Adipro Appetite Control + Adrenal A2 - Lead**
- **Myogenix Inc. Liver Support Extra Strength – 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.



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

January 29, 2016

Page 2

Cadmium was officially listed as a chemical known to cause developmental toxicity and male reproductive toxicity on May 1, 1997 while Cadmium and Cadmium Compounds were listed as chemicals known to the State of California to cause cancer on October 1, 1987.

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

**Route of Exposure.** The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least January 29, 2013, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; (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. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time consuming litigation.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violation to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,

A handwritten signature in black ink that reads "Matthew Maclear". The signature is written in a cursive style and is positioned above a horizontal line.

Matthew Maclear  
AQUA TERRA AERIS LAW GROUP

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to SupplementWarehouse.com Inc. and its Registered Agent for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
January 29, 2016  
Page 3

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by SupplementWarehouse.com Inc.**

I, Matthew Maclear, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemicals that are the subject of the notice.

4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.

5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

A handwritten signature in black ink that reads "Matthew Maclear". The signature is written in a cursive style with a large, stylized initial "M".

Dated: January 29, 2016

\_\_\_\_\_  
Matthew Maclear



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

January 29, 2016

Page 4

**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 29, 2016, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO  
SupplementWarehouse.com Inc.  
2440 Corporate Preserve Drive  
Oak Creek, WI 53154

Kelly Kutnyak  
(SupplementWarehouse.com Inc.'s Registered Agent for  
Service of Process)  
2440 Corporate Preserve Drive  
Oak Creek, WI 53154

On January 29, 2016, 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 January 29, 2016, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to the party listed below:

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

January 29, 2016

Page 5

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On January 29, 2016, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.;** **CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Priority Mail.

Executed on January 29, 2016, in Fort Oglethorpe, Georgia.

Phyllis Dunwoody



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

January 29, 2016

Page 6

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2 **Appendix A**

3 OFFICE OF ENVIRONMENTAL HEALTH  
4 HAZARD ASSESSMENT  
5 CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
6 THE SAFE DRINKING WATER AND TOXIC  
7 ENFORCEMENT ACT OF 1986  
8 (PROPOSITION 65): A SUMMARY

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

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

19 Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through  
20 25249.13. The statute is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>.  
21 Regulations that provide more specific guidance on compliance, and that specify procedures to  
22 be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the  
23 California Code of Regulations, sections 25102 through 27001.<sup>1</sup> These implementing regulations  
24 are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

25 *WHAT DOES PROPOSITION 65 REQUIRE?*

26 **The "Governor's List."** Proposition 65 requires the Governor to publish a list of chemicals that  
27 are known to the State of California to cause cancer and/or reproductive toxicity. This means that  
28 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](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 those 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 CHEMICALS 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

1 exposures are exempt from the warning requirement under certain circumstances discussed  
2 below.

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

7 **DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?**

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

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

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

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

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

28 **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 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

1 requirements of the law. If the chemical is a contaminant<sup>2</sup> it must be reduced to the lowest level  
2 feasible. Regulations explaining this exemption can be found in Section 25501.

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

#### 9 *HOW IS PROPOSITION 65 ENFORCED?*

10 Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney  
11 General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private  
12 parties acting in the public interest, but only after providing notice of the alleged violation to the  
13 Attorney General, the appropriate district attorney and city attorney, and the business accused of  
14 the violation. The notice must provide adequate information to allow the recipient to assess the  
15 nature of the alleged violation. The notice must comply with the information and procedural  
16 requirements specified in Section 25903 of the regulations and in Title 11, sections 3100-3103. A  
17 private party may not pursue an independent enforcement action under Proposition 65 if one of  
18 the governmental officials noted above initiates an action within sixty days of the notice.  
19 A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500  
20 per day for each violation. In addition, the business may be ordered by a court of law to stop  
21 committing the violation.

#### 18 *FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS. . .*

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

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

24 <sup>2</sup> See Section 25501(a)(4).

25 Note: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5  
26 25249.6, 25249.9, 25249.10 and 25249.11, Health and Safety Code.

#### 25 **HISTORY**

- 26 1. New Appendix A filed 4-22-97; operative 4-22-97 pursuant to Government Code section  
27 11343.4(d) (Register 97, No. 17).
- 28 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).

1 This database is current through 10/17/14 Register 2014, No. 42  
2 27 CCR Appendix A, 27 CA ADC Appendix A

3 **END OF**  
4 **DOCUMENT**

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6 **Documents In Sequence**

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