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 8 Attorneys for Plaintiff Environmental Research Center, Inc.

**FILED BY FAX**  
 ALAMEDA COUNTY  
 March 22, 2018  
 CLERK OF  
 THE SUPERIOR COURT  
 By Alicia Espinoza, Deputy  
 CASE NUMBER:  
**RG18898232**

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

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

12 **Plaintiff,**

13 **vs.**

14 **ENDURANCE MARKETING GROUP, INC.,**  
 15 **individually and doing business as HAMMER**  
 16 **NUTRITION DIRECT; and DOES 1-100**

17 **Defendants.**

**CASE NO.**

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

Toxic Tort/Environmental (30)  
 Proposition 65, Health & Safety Code  
 Section 25249.5 et seq.]

19  
 20 Plaintiff Environmental Research Center, Inc. hereby alleges:

21 **I**

22 **INTRODUCTION**

23 1. Plaintiff Environmental Research Center, Inc. (hereinafter "Plaintiff" or "ERC") brings  
 24 this action as a private attorney general enforcer and in the public interest pursuant to Health &  
 25 Safety Code section 25249.7, subdivision (d). The Safe Drinking Water and Toxic Enforcement  
 26 Act of 1986 (Health & Safety Code section 25249.5 *et seq.*) also known as "Proposition 65,"  
 27 mandates that businesses with ten or more employees must provide a "clear and reasonable  
 28 warning" prior to exposing any individual to a chemical known to the state to cause cancer or

21 Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Orange Vanilla, (2) Hammer  
 22 Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Chocolate, and (3) Hammer  
 23 Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Strawberry Lemonade

1 hereinafter referred to, either through said Does' conduct, or through the conduct of its agents,  
2 servants or employees, or in some other manner, causing the harms alleged by ERC in this  
3 complaint. When said true names and capacities of Does are ascertained, ERC will seek leave  
4 to amend this complaint to set forth the same.

### 5 III

#### 6 JURISDICTION AND VENUE

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

11 6. This Court has jurisdiction over Hammer Nutrition because Hammer Nutrition has  
12 sufficient minimum contacts with California, and otherwise intentionally avails itself of the  
13 California market through the marketing, distribution, and/or sale of the SUBJECT  
14 PRODUCTS in the State of California so as to render the exercise of jurisdiction over it by the  
15 California courts consistent with traditional notions of fair play and substantial justice.

16 7. The Complaint is based on allegations contained in the Notice of Violation dated  
17 January 10, 2018, served on the California Attorney General, other public enforcers, and  
18 Hammer Nutrition. The Notice of Violation constitutes adequate notice to Hammer Nutrition  
19 because it provided adequate information to allow Hammer Nutrition to assess the nature of the  
20 alleged violations, consistent with Proposition 65 and its implementing regulations. A  
21 certificate of merit and a certificate of service accompanied each copy of the Notice of  
22 Violation, and both certificates comply with Proposition 65 and its implementing regulations.  
23 The Notice of Violation served on Hammer Nutrition also included a copy of "The Safe  
24 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary." Service of  
25 the Notice of Violation and accompanying documents complied with Proposition 65 and its  
26 implementing regulations. Attached hereto as **Exhibit A** is a true and correct copy of this  
27 Notice of Violation and associated documents. More than 60 days have passed since ERC  
28 mailed the Notice of Violation and no public enforcement entity has filed a complaint in this

1 section 25249.6, the “method employed to transmit the warning must be reasonably calculated  
2 considering the alternative methods available under the circumstances, to make the warning  
3 message available prior to exposure.” (Cal. Code Regs., tit. 27, §25601.) The warning  
4 requirement may be satisfied by a warning that appears on a product’s label or other labeling,  
5 shelf labeling, signs, a system of signs, public advertising identifying the system and toll-free  
6 information services, or any other system, that provides clear and reasonable warnings. (Cal.  
7 Code Regs., tit. 27, §25603.1, subd. (a)-(d).)

8 14. Proposition 65 establishes a procedure by which the State is to develop a list of  
9 chemicals “known to the State to cause cancer or reproductive toxicity.” (Health & Safety Code,  
10 § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months after  
11 the chemical is published on the State list. (Health & Safety Code, § 25249.10, subd. (b).)

12 15. Lead was listed as a chemical known to the State of California to cause developmental  
13 toxicity in the fetus and male and female reproductive toxicity on February 27, 1987. Lead was  
14 listed as a chemical known to the State of California to cause cancer on October 1, 1992. (State  
15 of California EPA OEHHA Safe Drinking Water and Toxic Enforcement Act of 1986  
16 Chemicals Known to the State to Cause Cancer and Reproductive Toxicity.) The MADL for  
17 lead as a chemical known to cause reproductive toxicity is 0.5 micrograms per day. (Cal. Code  
18 Regs., tit. 27, §25805, subd. (b).) The No Significant Risk Level for lead as a carcinogen is 15  
19 micrograms per day. (Cal. Code Regs., tit. 27, §25705, subd. (b).)

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

26 17. Proposition 65 may be enforced by any person in the public interest who provides notice  
27 sixty days before filing suit to both the violator and designated law enforcement officials. The  
28 failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed

1 pursuant to Health & Safety Code section 25249.7, subdivisions (c) and (d).

2 V

3 **STATEMENT OF FACTS**

4 18. Hammer Nutrition has developed, manufactured, marketed, distributed, and/or sold the  
5 SUBJECT PRODUCTS containing lead into the State of California. Consumption of the  
6 SUBJECT PRODUCTS according to the directions and/or recommendations provided for said  
7 products causes consumers to be exposed to lead at levels exceeding the 0.5 micrograms per day  
8 MADL and requiring a warning. Consumers have been ingesting these products for many  
9 years, without any knowledge of their exposure to lead, a very dangerous chemical.

10 19. For many years, Hammer Nutrition has knowingly and intentionally exposed numerous  
11 persons to lead without providing a Proposition 65 warning. Prior to ERC's Notice of Violation  
12 and this Complaint, Hammer Nutrition failed to provide a warning on the labels of the  
13 SUBJECT PRODUCTS. Hammer Nutrition has at all times relevant hereto been aware that the  
14 SUBJECT PRODUCTS contained lead and that persons using these products have been  
15 exposed to this chemical. Hammer Nutrition has been aware of the presence of lead in the  
16 SUBJECT PRODUCTS and has failed to disclose the presence of this chemical to the public,  
17 who undoubtedly believe they have been ingesting totally healthy and pure products pursuant to  
18 the company's statements. On the company's website, (<https://www.hammernutrition.com>)  
19 various representations are conveyed regarding the quality and beneficial nature of its products  
20 without any mention that the SUBJECT PRODUCTS contain lead, including but not limited to  
21 the following:

22 • "THE HAMMER DIFFERENCE

23 At Hammer it is our goal to help people attain the highest degree of health and  
24 performance using a holistic approach to nutrition and fueling. We support our products  
25 and the athletes who use them with honest information and the best customer care."

26 • "PRODUCTS

27 SERIOUSLY Powerful, safe, natural and undeniably effective! They will do exactly  
28 what we say they will and outperform the competition every time.... Guaranteed!"

1 • “KNOWLEDGE

2 Using our time-tested, science-based fueling protocols will provide you with the best  
3 possible performance... Guaranteed!”

4 • “RECOVERY

5 Our recovery fuels and supplements are precisely formulated to optimize your training  
6 efforts and keep you healthy.”

7 20. Both prior and subsequent to ERC’s Notice of Violation, Hammer Nutrition failed to  
8 provide consumers of the SUBJECT PRODUCTS with a clear and reasonable warning that they  
9 have been exposed to a chemical known to the State of California to cause cancer, birth defects  
10 and other reproductive harm. This failure to warn is ongoing.

11 **FIRST CAUSE OF ACTION**  
12 **(Violation of Section 25249.6 of the Health and Safety Code, Failure to Provide Clear and**  
13 **Reasonable Warning under Proposition 65)**

14 21. ERC refers to paragraphs 1-20, inclusive, and incorporates them herein by this  
15 reference.

16 22. By committing the acts alleged above, Hammer Nutrition has, in the course of doing  
17 business, knowingly and intentionally exposed users of the SUBJECT PRODUCTS to lead, a  
18 chemical known to the State of California to cause cancer, birth defects, and other reproductive  
19 harm, without first giving clear and reasonable warning to such individuals within the meaning  
20 of Health & Safety Code section 25249.6. In doing so, Hammer Nutrition has violated Health  
21 & Safety Code section 25249.6, and continues to violate the statute with each successive sale of  
22 the SUBJECT PRODUCTS.

23 23. Said violations render Hammer Nutrition liable for civil penalties, up to \$2,500 per day  
24 for each violation, and subject Hammer Nutrition to injunction.

25 **SECOND CAUSE OF ACTION**  
26 **(Declaratory Relief)**

27 24. ERC refers to paragraphs 1-23, inclusive, and incorporates them herein by this  
28 reference.

1 25. There exists an actual controversy relating to the legal rights and duties of the Parties,  
2 within the meaning of Code of Civil Procedure section 1060, between ERC and Hammer  
3 Nutrition, concerning whether Hammer Nutrition has exposed individuals to a chemical known  
4 to the State of California to cause cancer, birth defects, and other reproductive harm without  
5 providing clear and reasonable warning.

6  
7 **VI**  
**PRAYER**

8 WHEREFORE ERC prays for relief as follows:

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

11 2. On the First Cause of Action, and pursuant to Health & Safety Code section 25249.7,  
12 subdivision (a), for such temporary restraining orders, preliminary and permanent injunctive  
13 orders, or other orders as are necessary to prevent Hammer Nutrition from exposing persons to  
14 lead without providing clear and reasonable warning;

15 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil  
16 Procedure section 1060 declaring that Hammer Nutrition has exposed individuals to lead  
17 without providing clear and reasonable warning; and

18 4. On all Causes of Action, for reasonable attorneys' fees pursuant to Code of Civil  
19 Procedure section 1021.5 or the substantial benefit theory;

20 5. For costs of suit herein; and

21 6. For such other relief as the Court may deem just and proper.

22  
23 DATED: March 21, 2018

MICHAEL FREUND & ASSOCIATES

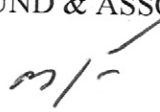
24  
25   
26 \_\_\_\_\_  
27 Michael Freund  
28 Ryan Hoffman  
Attorneys for Plaintiff  
ENVIRONMENTAL RESEARCH CENTER, INC.

EXHIBIT A

**Michael Freund & Associates**

1919 Addison Street, Suite 105  
Berkeley, CA 94704  
Voice: 510.540.1992 • Fax: 510.540.5543

Michael Freund, Esq.  
Ryan Hoffman, Esq.

OF COUNSEL:  
Denise Ferkich Hoffman, Esq.

January 10, 2018

**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:

**Endurance Marketing Group, Inc., individually and doing business as Hammer Nutrition Direct**

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

- 1. Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Orange Vanilla - Lead**
- 2. Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Chocolate - Lead**
- 3. Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Strawberry - Lead**

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

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

**Route of Exposure.** The consumer exposures that are the subject of this notice result from the recommended use of these products. Consequently, the route of exposure to this chemical has been and continues to be through ingestion.



January 10, 2018

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**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least January 10, 2015, 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 this known toxic chemical is 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 chemical. 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 this chemical.

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 chemical, 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 chemical, as well as an expensive and time-consuming litigation.

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

Sincerely,



---

Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Endurance Marketing Group, Inc., individually and doing business as Hammer Nutrition Direct, 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 Endurance Marketing Group, Inc., individually and doing business as Hammer Nutrition Direct**

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

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



---

Michael Freund

Dated: January 10, 2018

**CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903**

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 and over the age of 18 years of age. 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 10, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, 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 each of the parties 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  
Endurance Marketing Group, Inc., individually  
and doing business as Hammer Nutrition Direct  
4952 Whitefish Stage Road  
Whitefish, MT 59937

Sallie A. Foley  
(Endurance Marketing Group, Inc. individually  
and doing business as Hammer Nutrition Direct's  
Registered Agent for Service of Process)  
Post Office Box 1398  
Whitefish, MT 59937

Current President or CEO  
Endurance Marketing Group, Inc., individually  
and doing business as Hammer Nutrition Direct  
Post Office Box 337  
Whitefish, MT 59937

On January 10, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, 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 10, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, 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 each of the parties listed below:

Stacey Grassini, Deputy District Attorney  
Contra Costa County  
900 Ward Street  
Martinez, CA 94553  
[sgrassini@contracostada.org](mailto:sgrassini@contracostada.org)

Michelle Latimer, Program Coordinator  
Lassen County  
220 S. Lassen Street  
Susanville, CA 96130  
[mlatimer@co.lassen.ca.us](mailto:mlatimer@co.lassen.ca.us)

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

January 10, 2018

Page 5

Dije Ndreu, Deputy District Attorney  
Monterey County  
1200 Aguajito Road  
Monterey, CA 93940  
Prop65DA@co.monterey.ca.us

Eric J. Dobroth, Deputy District Attorney  
San Luis Obispo County  
County Government Center Annex, 4<sup>th</sup> Floor  
San Luis Obispo, CA 93408  
edobroth@co.slo.ca.us

Allison Haley, District Attorney  
Napa County  
931 Parkway Mall  
Napa, CA 94559  
CEPD@countyofnapa.org

Yen Dang, Supervising Deputy District Attorney  
Santa Clara County  
70 W Hedding St  
San Jose, CA 95110  
EPU@da.sccgov.org

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Riverside, CA 92501  
Prop65@rivcoda.org

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Prop65DA@santacruzcounty.us

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901 G Street  
Sacramento, CA 95814  
Prop65@sacda.org

Stephan R. Passalacqua, District Attorney  
Sonoma County  
600 Administration Dr  
Sonoma, CA 95403  
jbarnes@sonoma-county.org

Gregory Alker, Assistant District Attorney  
San Francisco County  
732 Brannan Street  
San Francisco, CA 94103  
gregory.alker@sfgov.org

Phillip J. Cline, District Attorney  
Tulare County  
221 S Mooney Blvd  
Visalia, CA 95370  
Prop65@co.tulare.ca.us

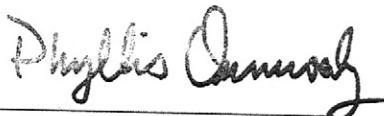
Tori Verber Salazar, District Attorney  
San Joaquin County  
222 E. Weber Avenue, Room 202  
Stockton, CA 95202  
DAConsumer.Environmental@sjcda.org

Gregory D. Totten, District Attorney  
Ventura County  
800 S Victoria Ave  
Ventura, CA 93009  
daspecialops@ventura.org

Jeff W. Reisig, District Attorney  
Yolo County  
301 Second Street  
Woodland, CA 95695  
cfepd@yolocounty.org

On January 10, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, 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 First Class Mail.

Executed on January 10, 2018, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

Service List

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012	District Attorney, San Bernardino County 303 West Third Street San Bernadino, CA 92415	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, San Mateo County 400 County Ctr., 3rd Floor Redwood City, CA 94063	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Shasta County 1355 West Street Redding, CA 96001	San Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Sierra County 100 Courthouse Square, 2 <sup>nd</sup> Floor Downieville, CA 95936	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Sutter County 463 2 <sup>nd</sup> Street Yuba City, CA 95991	
District Attorney, Inyo County P.O. Drawer D Independence, CA 93526	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301			

## APPENDIX A

### OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and OEHHA 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.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

#### *WHAT DOES PROPOSITION 65 REQUIRE?*

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

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

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

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

**Exposures that pose no significant risk of cancer.** For chemicals that are listed 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 contaminant<sup>2</sup> it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

**Discharges that do not result in a “significant amount” of the listed chemical entering 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

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



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 copy of the notice of special compliance procedure and proof of compliance form is included in Appendix B and can be downloaded from OEHHA's website at:

<http://oehha.ca.gov/prop65/law/p65law72003.html>.

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

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

Revised: May 2017

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.