

ENDORSED
FILED
ALAMEDA COUNTY

DEC 26 2018

SUE PESKO

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8 Attorneys for Plaintiff
9 ENVIRONMENTAL RESEARCH CENTER, INC.

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

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

14 Plaintiff,

15 vs.

16 PERFORMANCE FOOD CENTERS CORP.,
17 individually and dba SIMPLE AGAIN and
18 SWIIG, a Pennsylvania corporation; and DOES
19 1-25,

20 Defendants.

Case No.

RG18933461

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

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

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

INTRODUCTION

23 1. This action seeks to remedy the continuing failure of Defendants PERFORMANCE
24 FOOD CENTERS CORP., individually and dba SIMPLE AGAIN and SWIIG ("SWIIG") and
25 DOES 1-25 (hereinafter individually referred to as "DEFENDANT" or collectively as
26 "DEFENDANTS") to warn consumers in California that they are being exposed to lead and/or
27 cadmium, chemicals known to the State of California to cause cancer, birth defects, and other
28 reproductive harm. According to the Safe Drinking Water and Toxic Enforcement Act of 1986,

1 Health and Safety Code (“H&S Code”) section 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 a chemical known to the state to cause cancer or
4 reproductive harm. DEFENDANTS manufacture, package, distribute, market, and/or sell in
5 California certain consumer products, as defined in Cal. Code Regs., tit. 27, § 25600.1, subd. (d)
6 and (e), containing lead and/or cadmium (the “SUBJECT PRODUCTS”):

- 7 • **Swiig Daily Mass Protein Builder Yum! Chocolate - Lead**
- 8 • **Swiig Ancient Grains Plant Protein Vegan Raw Chocolate - Lead**
- 9 • **Swiig Ancient Grains Plant Protein Vegan Raw Madagascar Vanilla -**
10 **Lead**
- 11 • **Swiig Get Essentials Live Core - Lead**
- 12 • **Swiig Get Recovered Perform Core - Lead**
- 13 • **Swiig Daily Soy Protein Vegan Yum! Chocolate - Lead, Cadmium**
- 14 • **Swiig Daily Soy Protein Vegan Yum! Madagascar Vanilla - Lead**
- 15 • **Swiig Get Greens Protect Core - Lead**
- 16 • **Swiig Daily Whey Protein Matrix Yum! Chocolate - Lead**
- 17 • **Swiig PREcovery Trainers Only - Lead**
- 18 • **Swiig Get Energized Perform Core - Lead**
- 19 • **Swiig Get Youthful Protect Core - Lead**
- 20 • **Swiig Get Regular Live Core - Lead**
- 21 • **Swiig Get Resistance Protect Core - Lead**
- 22 • **Swiig Get Cardio Live Core - Lead**
- 23 • **Swiig Get Berries Protect Core - Lead**
- 24 • **Swiig Healthy Gut Thyroid - Lead**
- 25 • **Swiig Vital Support Thyroid - Lead**
- 26 • **Swiig The Energy Source Trainers Only - Lead**
- 27 • **Swiig Get Brainy Live Core – Lead**
- 28

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

3 3. Consumption of the SUBJECT PRODUCTS causes exposures to the LISTED
4 CHEMICALS at levels requiring a “clear and reasonable warning” under Proposition 65.
5 DEFENDANTS exposed consumers to the LISTED CHEMICALS and have failed to provide
6 the health hazard warnings required by Proposition 65.

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

11 **PARTIES**

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

15 6. ERC is a person within the meaning of H&S Code §25249.11 and brings this
16 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code §
17 25249.7(d) specifies that actions to enforce Proposition 65 may be brought by a person in the
18 public interest, provided certain notice requirements are met and no other public prosecutor is
19 diligently prosecuting an action for the same violation(s).

20 7. PERFORMANCE FOOD CENTERS CORP., individually and dba SIMPLE AGAIN
21 and SWIIG, is now, and was at all times relevant herein, a corporation organized under the laws
22 of Pennsylvania and is a person in the course of doing business within the meaning of H&S Code
23 §25249.11.

24 8. DEFENDANTS own, administer, direct, control and/or operate facilities and/or
25 agents, distributors, sellers, marketers or other retail operations who place their SUBJECT
26 PRODUCTS into the stream of commerce in California (including but not limited to Alameda
27 County) under the brand name SWIIG and other brand names, which contain the LISTED
28 CHEMICALS without first giving clear and reasonable warnings.

1 9. DEFENDANTS, separately and each of them, are or were, at all times relevant to the
2 claims in this Complaint and continuing through the present, legally responsible for compliance
3 with the provisions of Proposition 65. Whenever an allegation regarding any act or omission of
4 a DEFENDANT is made herein, such allegation shall be deemed to mean that DEFENDANT, or
5 its agent, officer, director, manager, supervisor, or employee did, or so authorized, or failed to do,
6 such acts while engaged in the affairs of DEFENDANT’s business operations and/or while acting
7 within the course and scope of their employment or while conducting business for
8 DEFENDANT(S) for a commercial purpose.

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

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

22 **JURISDICTION AND VENUE**

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

27 13. This Court has jurisdiction over DEFENDANTS because they are business entities
28 that do sufficient business in California, have sufficient minimum contacts in California or

1 otherwise intentionally avail themselves of the California market, through the sale, marketing
2 and use of their SUBJECT PRODUCTS in California, to render the exercise of jurisdiction over
3 them by the California courts consistent with traditional notions of fair play and substantial
4 justice.

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

8 **STATUTORY BACKGROUND**

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

12 16. To effectuate this goal, Proposition 65 requires that individuals be provided with a
13 "clear and reasonable warning" before being exposed to chemicals listed by the State of
14 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
15 part:

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

20 17. An exposure to a chemical in a consumer product is one "that results from a person's
21 acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer
22 product, including consumption of food." (Cal. Code Regs., tit. 27, § 25600.1, subd. (e).) A
23 "consumer product" includes "any article, or component part thereof, including food, that is
24 produced, distributed, or sold for the personal use, consumption or enjoyment of a consumer,"
25 and the term "food" is further defined to include dietary supplements. (Cal. Code Regs., tit. 27, §
26 25600.1, subd. (d) and (g).)

27 18. Proposition 65 provides that any "person who violates or threatens to violate" the
28 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7). The phrase
"threaten to violate" is defined to mean creating "a condition in which there is a substantial

1 probability that a violation will occur” (H&S Code §25249.11(e)). Violators are liable for civil
2 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

3 **FACTUAL BACKGROUND**

4 19. On February 27, 1987, the State of California officially listed lead as a chemical
5 known to cause reproductive toxicity. Lead became subject to the warning requirement one year
6 later and was therefore subject to the “clear and reasonable” warning requirements of Proposition
7 65 beginning on February 27, 1988. (27 California Code of Regulations (“CCR”) §25600, *et*
8 *seq.*; H&S Code §25249.5, *et seq.*).

9 20. On October 1, 1992, the State of California officially listed lead and lead compounds
10 as chemicals known to cause cancer. Lead and lead compounds became subject to the warning
11 requirement one year later and were therefore subject to the “clear and reasonable” warning
12 requirements of Proposition 65 beginning on October 1, 1993. (27 CCR § 25600, *et seq.*; H&S
13 Code §25249.6, *et seq.*). Due to the high toxicity of lead, the maximum allowable dose level for
14 lead is 0.5 µg/day (micrograms a day) for reproductive toxicity and the no significant risk level
15 for carcinogens is 15µg/day (oral).

16 21. Cadmium was officially listed as a chemical known to cause developmental
17 toxicity and male reproductive toxicity on May 1, 1997, while cadmium and cadmium
18 compounds were listed as chemicals known to the State of California to cause cancer on
19 October 1, 1987. (State of California EPA OEHHA Safe Drinking Water and Toxic
20 Enforcement Act of 1986 Chemicals Known to the State to Cause Cancer and
21 Reproductive Toxicity.) The MADL for cadmium as a chemical known to cause
22 reproductive toxicity is 4.1 micrograms per day. (Cal. Code Regs., tit. 27, §25805, subd.
23 (b).)

24 22. To test DEFENDANTS’ SUBJECT PRODUCTS for lead and cadmium, PLAINTIFF
25 hired a well-respected and accredited testing laboratory. The results of testing undertaken by
26 PLAINTIFF of DEFENDANTS’ SUBJECT PRODUCTS show that the SUBJECT PRODUCTS
27 tested were in violation of the 0.5 µg/day “safe harbor” daily dose limits set forth for lead and/or
28

1 the 4.1 µg/day “safe harbor” daily dose limits set forth for cadmium in Proposition 65’s
2 regulations. Very significant is the fact that people are being exposed to lead and/or cadmium
3 through ingestion as opposed to other not as harmful methods of exposure.

4 23. At all times relevant to this action, DEFENDANTS, therefore, have knowingly and
5 intentionally exposed the consumers of the SUBJECT PRODUCTS to the LISTED
6 CHEMICALS without first giving a clear and reasonable warning to such individuals.

7 24. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use
8 in California since at least October 12, 2015. The SUBJECT PRODUCTS continue to be
9 distributed and sold in California without the requisite warning information.

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

16 26. On October 12, 2018, ERC served SWIIG and each of the appropriate public
17 enforcement agencies with a document entitled “Notice of Violations of California Health &
18 Safety Code Section 25249.5” that provided SWIIG and the public enforcement agencies with
19 notice that SWIIG was in violation of Proposition 65 for failing to warn purchasers and
20 individuals using the SUBJECT PRODUCTS that the consumption of the SUBJECT
21 PRODUCTS exposes them to lead and/or cadmium, chemicals known to the State of California
22 to cause cancer and/or reproductive toxicity (“NOTICE”). A true and correct copy of the 60-
23 Day NOTICE is attached hereto as **Exhibit A** and is hereby incorporated by reference, and is
24 available on the Attorney General’s website located at <http://oag.ca.gov/prop65>.

25 27. The NOTICE was issued pursuant to, and in compliance with, the requirements of
26 H&S Code §25249.7(d) and the statute’s implementing regulations regarding the notice of the
27 violations to be given to certain public enforcement agencies and to the violator. The NOTICE
28 included, *inter alia*, the following information: the name, address, and telephone number of the

1 noticing individual; the name of the alleged violator; the statute violated; the approximate time
2 period during which violations occurred; and descriptions of the violations including the
3 chemicals involved, the route of toxic exposure, and the specific products or type of products
4 causing the violations.

5 28. SWIIG was also provided a copy of the document entitled “The Safe Drinking Water
6 and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is also known as
7 Appendix A to Title 27 of CCR §25903, via Certified Mail.

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

14 30. After expiration of the sixty (60) day notice period, the appropriate public enforcement
15 agencies failed to commence and diligently prosecute a cause of action under H&S Code
16 §25249.5, *et seq.* against DEFENDANTS based on the allegations herein.

17 **FIRST CAUSE OF ACTION**
18 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the**
19 **SUBJECT PRODUCTS described in the October 12, 2018, Proposition 65 Notice of**
Violation) Against DEFENDANTS

20 31. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 30,
21 inclusive, as if specifically set forth herein.

22 32. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant
23 to this action, and continuing through the present, have violated H&S Code §25249.6 by, in the
24 course of doing business, knowingly and intentionally exposing individuals in California to
25 chemicals known to the State of California to cause cancer or reproductive toxicity without first
26 giving clear and reasonable warnings to such persons who consume the SUBJECT PRODUCTS
27 containing the LISTED CHEMICALS, pursuant to H&S Code §§ 25249.6 and 25249.11(f).

28 33. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code

1 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure
2 to the LISTED CHEMICALS from the SUBJECT PRODUCTS, in an amount in excess of \$1
3 million.

4 **THE NEED FOR INJUNCTIVE RELIEF**

5 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**
6 **the SUBJECT PRODUCTS described in the October 12, 2018 Proposition 65 Notice of**
7 **Violation) Against DEFENDANTS**

8 34. PLAINTIFF re-alleges and incorporates by this reference Paragraphs 1 through 33,
9 as if set forth below.

10 35. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant
11 to this action, and continuing through the present, have violated, or threaten to violate, H&S Code
12 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals
13 in California to a chemical known to the State of California to cause cancer or reproductive
14 toxicity without first giving clear and reasonable warnings to such persons who consume the
15 SUBJECT PRODUCTS containing the LISTED CHEMICALS, pursuant to H&S Code §§
16 25249.6 and 25249.11(f).

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

22 37. A remedy of injunctive relief under Proposition 65 is specifically authorized by H&S
23 Code §25249.7(a).

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

27 39. 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

1 to be involuntarily, unknowingly and unwittingly exposed to the LISTED CHEMICALS through
2 the consumption of the SUBJECT PRODUCTS.

3 **PRAYER FOR RELIEF**

4 Wherefore, PLAINTIFF prays for the following relief:

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

11 B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling
12 DEFENDANTS to identify and locate each individual who has purchased the SUBJECT
13 PRODUCTS since October 12, 2015, and to provide a warning to such person that the
14 consumption of the SUBJECT PRODUCTS will expose the consumer to chemicals known to
15 cause cancer, birth defects, and other reproductive harm;

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

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

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1 E. Such other and further relief as may be just and proper.
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3 DATED: December 26, 2018

AQUA TERRA AERIS LAW GROUP

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7 _____
8 Matthew C. Maclear
9 Anthony M. Barnes
10 Attorneys for Plaintiff
11 Environmental Research Center, Inc.
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EXHIBIT A



Matthew Maclear
mcm@atalawgroup.com
415-568-5200

Anthony Barnes
amb@atalawgroup.com
415-326-3173

October 12, 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:

Performance Food Centers Corp., individually and dba Simple Again and Swiig



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
October 12, 2018
Page 2

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:

1. **Swiig Daily Mass Protein Builder Yum! Chocolate - Lead**
2. **Swiig Ancient Grains Plant Protein Vegan Raw Chocolate - Lead**
3. **Swiig Ancient Grains Plant Protein Vegan Raw Madagascar Vanilla - Lead**
4. **Swiig Get Essentials Live Core - Lead**
5. **Swiig Get Recovered Perform Core - Lead**
6. **Swiig Daily Soy Protein Vegan Yum! Chocolate - Lead, Cadmium**
7. **Swiig Daily Soy Protein Vegan Yum! Madagascar Vanilla - Lead**
8. **Swiig Get Greens Protect Core - Lead**
9. **Swiig Daily Whey Protein Matrix Yum! Chocolate - Lead**
10. **Swiig PREcovery Trainers Only - Lead**
11. **Swiig Get Energized Perform Core - Lead**
12. **Swiig Get Youthful Protect Core - Lead**
13. **Swiig Get Regular Live Core - Lead**
14. **Swiig Get Resistance Protect Core - Lead**
15. **Swiig Get Cardio Live Core - Lead**
16. **Swiig Get Berries Protect Core - Lead**
17. **Swiig Healthy Gut Thyroid - Lead**
18. **Swiig Vital Support Thyroid - Lead**
19. **Swiig The Energy Source Trainers Only - Lead**
20. **Swiig Get Brainy Live Core - 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.

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 recommended use of these products. Consequently, the route of exposure to these chemicals has been and continues to be through ingestion.



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
October 12, 2018
Page 3

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least October 12, 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 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 ingesting 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 ATA Law Group as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violation to my attention, or the attention of ATA partner Anthony Barnes, using the address or contact information 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 Performance Food Centers Corp., individually and dba Simple Again and Swiig, 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.*
October 12, 2018
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CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Performance Food Centers Corp., individually and dba Simple Again and Swiig

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 cursive script that reads "Matthew Maclear".

Dated: October 12, 2018

Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
October 12, 2018
Page 5

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 October 12, 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
Performance Food Centers Corp., individually
and dba Simple Again and Swiig
59 Airport Road
Pottstown, PA 19464

CT Corporation System
(Registered Agent for Performance Food Centers Corp.,
individually and dba Simple Again and Swiig)
818 W 7th St., Ste 930
Los Angeles, CA 90017

Current President or CEO
Performance Food Centers Corp., individually
and dba Simple Again and Swiig
1231 Greenwich St.
Reading, PA 19604

On October 12, 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 October 12, 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:



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
October 12, 2018
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Notice of Violation of California Health & Safety Code §25249.5 *et seq.*

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On October 12, 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 October 12, 2018, in Fort Oglethorpe, Georgia.

Phyllis Dunwoody



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

October 12, 2018

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Service List

District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	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, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	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, 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, 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	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, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	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 Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Sierra County 100 Courthouse Square, 2 nd Floor Downieville, CA 95936	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Humboldt County 825 5th Street 4 th Floor Eureka, CA 95501	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	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, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Sutter County 463 2 nd Street Yuba City, CA 95991	
District Attorney, Inyo County P.O. Drawer D Independence, CA 93526	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093	

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 27001.¹ 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

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>.

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 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 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.

² See Section 25501(a)(4).

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of 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.

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.