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7 Attorney for Plaintiff Environmental Research Center, Inc.

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

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

13 **Plaintiff,**

14 vs.

15 **EXCELSIOR NUTRITION INC, individually**
16 **and dba 4EXCELSIOR; FRESH**
17 **NUTRITION INC.; and DOES 1-100**

18 **Defendants.**

CASE NO. 22CV007440

FIRST AMENDED 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

1 reproductive toxicity. Lead is a chemical known to the State of California to cause cancer, birth
2 defects, and other reproductive harm. This First Amended Complaint seeks injunctive and
3 declaratory relief and civil penalties to remedy the ongoing failure of Defendants Excelsior
4 Nutrition Inc, individually and dba 4Excelsior (“Excelsior Nutrition”) and Fresh Nutrition Inc.
5 (“Fresh Nutrition”) and Does 1-100 (hereinafter individually referred to as “Defendant” or
6 collectively as “Defendants”), to warn consumers that they have been exposed to lead from a
7 number of Excelsior Nutrition and Fresh Nutrition’s nutritional health products as set forth in
8 paragraph 3 at levels exceeding the applicable Maximum Allowable Dose Level (“MADL”) and
9 requiring a warning pursuant to Health & Safety Code section 25249.6.

10 **II**

11 **PARTIES**

12 2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes,
13 helping safeguard the public from health hazards by reducing the use and misuse of hazardous
14 and toxic chemicals, facilitating a safe environment for consumers and employees, and
15 encouraging corporate responsibility.

16 3. Defendants Excelsior Nutrition and Fresh Nutrition are each businesses that develop,
17 manufacture, market, distribute, and/or sell nutritional health products that have exposed users
18 to lead in the State of California within the relevant statute of limitations period. These
19 “SUBJECT PRODUCTS” (as identified in the Notice of Violation dated December 14, 2021
20 attached hereto as **Exhibit A**) are: (1) Fresh Nutrition All Natural Green Lipped Mussels, (2)
21 Fresh Nutrition Ceylon Cinnamon, (3) Fresh Nutrition All Natural Turkey Tail Mushroom, (4)
22 Fresh Nutrition All Natural Organic Ginger Root, (5) Fresh Nutrition All Natural Echinacea,
23 and (6) Fresh Nutrition All Natural Red Reishi Mushroom.

24 4. Excelsior Nutrition Inc, individually and dba 4Excelsior is subject to Proposition 65 as it
25 employs ten or more persons and has employed ten or more persons at all times relevant to this
26 action. Fresh Nutrition Inc. is subject to Proposition 65 as it employs ten or more persons and
27 has employed ten or more persons at all times relevant to this action.

28 5. While organized as separate legal entities, Excelsior Nutrition and Fresh Nutrition are

1 inter-connected and/or collaborated with one another and each plays a role in the promotion,
2 referral, logistical support, development, manufacture, marketing, distribution and/or sales of
3 the SUBJECT PRODUCTS. Excelsior Nutrition has listed on its website that Fresh Nutrition is
4 one of its partners. Lin Yisheng is the President and CEO of Excelsior Nutrition and was listed
5 as the Secretary of Fresh Nutrition in a Secretary of State filing in Oregon. Excelsior Nutrition
6 and Fresh Nutrition have, at times, shared the same Secretary named Steve Flipse. Excelsior
7 Nutrition and Fresh Nutrition have also, at times, shared the same address. Upon information
8 and belief, ERC alleges that Excelsior Nutrition was the lessee of premises used by Fresh
9 Nutrition. Some of the SUBJECT PRODUCTS list on their label that they are manufactured by
10 Excelsior Nutrition while other SUBJECT PRODUCTS are represented in a promotional video
11 used by Excelsior Nutrition. Additionally, all but one of the SUBJECT PRODUCTS state on
12 their label that they are domestically manufactured in a cGMP facility and made in the U.S.A.
13 Excelsior Nutrition is a domestic manufacturer of, among other things, dietary supplements and
14 sports nutrition products, and its facility is a cGMP facility. According to Excelsior Nutrition’s
15 website, as part of its contract manufacturing service Excelsior Nutrition “will work with you
16 side by side from formulation and R&D, to testing and manufacturing.” Excelsior Nutrition’s
17 website also states that it provides Design and Packaging services that help its customers
18 “connect with your audience emotionally.” Excelsior Nutrition’s website also boasts that its
19 R&D and Quality Assurance team “will guide you through the formulation and regulatory
20 checks to ensure complete assurance that your product is in compliance with current industry
21 standards.” At the time of filing this First Amended Complaint, these services were outlined at
22 <https://www.4excelsior.com/services>.

23 6. Defendants Does 1-100, are named herein under fictitious names, as their true names
24 and capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that
25 each of said Does is responsible, in some actionable manner, for the events and happenings
26 hereinafter referred to, either through said Does’ conduct, or through the conduct of its agents,
27 servants or employees, or in some other manner, causing the harms alleged by ERC in this First
28 Amended Complaint. When said true names and capacities of Does are ascertained, ERC will

1 seek leave to amend this First Amended Complaint to set forth the same.

2 **III**

3 **JURISDICTION AND VENUE**

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

8 8. This Court has jurisdiction over Excelsior Nutrition and Fresh Nutrition because
9 Defendants have sufficient minimum contacts with California, and otherwise intentionally avail
10 themselves of the California market through the marketing, distribution, and/or sale of the
11 SUBJECT PRODUCTS in the State of California so as to render the exercise of jurisdiction
12 over them by the California courts consistent with traditional notions of fair play and substantial
13 justice.

14 9. The First Amended Complaint is based on allegations contained in the Notice of
15 Violation dated December 14, 2021, served on the California Attorney General, other public
16 enforcers, Excelsior Nutrition, and Fresh Nutrition. The Notice of Violation constitutes
17 adequate notice to Excelsior Nutrition and Fresh Nutrition because it provided adequate
18 information to allow Excelsior Nutrition and Fresh Nutrition to assess the nature of the alleged
19 violations, consistent with Proposition 65 and its implementing regulations. A certificate of
20 merit and a certificate of service accompanied each copy of the Notice of Violation, and both
21 certificates comply with Proposition 65 and its implementing regulations. The Notice of
22 Violation served on Excelsior Nutrition and Fresh Nutrition also included a copy of “The Safe
23 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary.” Service of
24 the Notice of Violation and accompanying documents complied with Proposition 65 and its
25 implementing regulations. Attached hereto as **Exhibit A** is a true and correct copy of the
26 Notice of Violation and associated documents. More than 60 days have passed since ERC
27 mailed the Notice of Violation and no public enforcement entity has filed a Complaint in this
28 case.

1 10. This Court is the proper venue for the action because the causes of action have arisen in
2 the County of Alameda where some of the violations of law have occurred, and will continue to
3 occur, due to the ongoing sale of Excelsior Nutrition and Fresh Nutrition’s products.
4 Furthermore, venue is proper in this Court under Code of Civil Procedure section 395.5 and
5 Health & Safety Code section 25249.7.

6 **IV**

7 **STATUTORY BACKGROUND**

8 11. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute
9 passed as “Proposition 65” by an overwhelming majority vote of the people in November of
10 1986.

11 12. The warning requirement of Proposition 65 is contained in Health & Safety Code
12 section 25249.6, which provides:

13 No person in the course of doing business shall knowingly and
14 intentionally expose any individual to a chemical known to the state to
15 cause cancer or reproductive toxicity without first giving clear and
16 reasonable warning to such individual, except as provided in Section
17 25249.10.

18 13. The Office of Environmental Health Hazard Assessment (“OEHHA”), a division of Cal
19 EPA, is the lead agency in charge of the implementation of Proposition 65. OEHHA
20 administers the Proposition 65 program and administers regulations that govern Proposition 65
21 in general, including warnings to comply with the statute. The warning regulations are found at
22 Title 27 of the California Code of Regulations, Article 6. The regulations define expose as “to
23 cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed
24 chemical. An individual may come into contact with a listed chemical through water, air, food,
25 consumer products and any other environmental exposure as well as occupational exposures.”
(Cal. Code Regs., tit. 27, § 25102, subd. (i).)

26 14. In this case, the exposures are caused by consumer products. A consumer product is
27 defined as “any article, or component part thereof, including food, that is produced, distributed,
28 or sold for the personal use, consumption or enjoyment of a consumer.” (Cal. Code Regs., tit.

1 27, § 25600.1, subd. (d).) Food “includes ‘dietary supplements’ as defined in California Code
2 of Regulations, title 17, section 10200.” (*Id.* at subd. (g).) A consumer product exposure is “an
3 exposure that results from a person’s acquisition, purchase, storage, consumption, or any
4 reasonably foreseeable use of a consumer product, including consumption of a food.” (*Id.* at
5 subd. (e).)

6 15. On August 30, 2016, the Office of Administrative Law approved the adoption of
7 OEHHA’s amendments to Article 6, Clear and Reasonable Warnings of the California Code of
8 Regulations. This action repealed virtually all of the regulatory provisions of Title 27 of the
9 California Code of Regulations, Article 6 (sections 25601 *et seq.*) and replaced the repealed
10 sections with new regulations set forth in two new Subarticles to Article 6 that became
11 operative on August 30, 2018 (the “New Warning Regulations”). The New Warning
12 Regulations provide, among other things, methods of transmission and content of warnings
13 deemed to comply with Proposition 65. Excelsior Nutrition and Fresh Nutrition are subject to
14 the warning requirements set forth in the New Warning Regulations that became operative on
15 August 30, 2018.

16 16. Health & Safety Code section 25249.6 provides that “No person in the course of doing
17 business shall knowingly and intentionally expose any individual to a chemical known to the
18 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
19 to such individual” The New Warning Regulations apply when clear and reasonable
20 warnings are required under Section 25249.6. Pursuant to the New Warning Regulations,
21 consumer product warnings “must be prominently displayed on a label, labeling, or sign, and
22 must be displayed with such conspicuousness as compared with other words, statements,
23 designs or devices on the label, labeling, or sign, as to render the warning likely to be seen,
24 read, and understood by an ordinary individual under customary conditions of purchase or use.”
25 (*Id.* at § 25601, subd. (c).)

26 17. Proposition 65 establishes a procedure by which the State is to develop a list of
27 chemicals “known to the State to cause cancer or reproductive toxicity.” (Health & Safety Code,
28 § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months after

1 the chemical is published on the State list. (Health & Safety Code, § 25249.10, subd. (b).)

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

10 19. Proposition 65 provides that any person “violating or threatening to violate” Proposition
11 65 may be enjoined in any court of competent jurisdiction. (Health & Safety Code, §25249.7,
12 subd. (a).) To “threaten to violate” means “to create a condition in which there is a substantial
13 probability that a violation will occur.” (Health & Safety Code, § 25249.11, subd. (e).)
14 Furthermore, violators are subject to a civil penalty of up to \$2,500 per day for each violation.
15 (Health & Safety Code, § 25249.7, subd. (b)(1).)

16 20. Proposition 65 may be enforced by any person in the public interest who provides notice
17 sixty days before filing suit to both the violator and designated law enforcement officials. The
18 failure of law enforcement officials to file a timely Complaint enables a citizen suit to be filed
19 pursuant to Health & Safety Code section 25249.7, subdivisions (c) and (d).

20 V

21 **STATEMENT OF FACTS**

22 21. Excelsior Nutrition and Fresh Nutrition have each developed, manufactured, marketed,
23 distributed, and/or sold the SUBJECT PRODUCTS containing lead into the State of California.
24 Consumption of the SUBJECT PRODUCTS according to the directions and/or
25 recommendations provided for said products causes consumers to be exposed to lead at levels
26 exceeding the 0.5 micrograms per day MADL and requiring a warning. Consumers have been
27 ingesting these products for many years, without any knowledge of their exposure to this very
28 dangerous chemical.

1 22. For many years, Excelsior Nutrition and Fresh Nutrition have knowingly and
2 intentionally exposed numerous persons to lead without providing any type of Proposition 65
3 warning. Prior to ERC's Notice of Violation and this Complaint, Defendants failed to provide a
4 warning on the labels of the SUBJECT PRODUCTS or provide any other legally acceptable
5 warning. Excelsior Nutrition and Fresh Nutrition have, at all times relevant hereto, been aware
6 that the SUBJECT PRODUCTS contained lead and that persons using these products have been
7 exposed to this chemical. Excelsior Nutrition and Fresh Nutrition have been aware of the
8 presence of lead in the SUBJECT PRODUCTS and have failed to disclose the presence of this
9 chemical to the public, who undoubtedly believe they have been ingesting totally healthy and
10 pure products pursuant to the company's statements.

11 23. Both prior and subsequent to ERC's Notice of Violation, Excelsior Nutrition and Fresh
12 Nutrition failed to provide consumers of the SUBJECT PRODUCTS with a clear and
13 reasonable warning that they have been exposed to a chemical known to the State of California
14 to cause cancer, birth defects and other reproductive harm. This failure to warn is ongoing.

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

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

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

27 26. Said violations render Excelsior Nutrition and Fresh Nutrition liable for civil penalties,
28 up to \$2,500 per day for each violation, and subject Excelsior Nutrition and Fresh Nutrition to

1 injunction.

2 **SECOND CAUSE OF ACTION**
3 **(Declaratory Relief)**

4 27. ERC refers to paragraphs 1-26, inclusive, and incorporates them herein by this
5 reference.

6 28. There exists an actual controversy relating to the legal rights and duties of the Parties,
7 within the meaning of Code of Civil Procedure section 1060, between ERC and Excelsior
8 Nutrition and Fresh Nutrition, concerning whether Excelsior Nutrition and Fresh Nutrition have
9 exposed individuals to a chemical known to the State of California to cause cancer, birth
10 defects, and other reproductive harm without providing clear and reasonable warning.

11 **VI**

12 **PRAYER**

13 WHEREFORE ERC prays for relief as follows:

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

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

20 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil
21 Procedure section 1060 declaring that Excelsior Nutrition and Fresh Nutrition have exposed
22 individuals to lead without providing clear and reasonable warning; and

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

25 5. For costs of suit herein; and

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

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1 DATED: November 22, 2022

ENVIRONMENTAL RESEARCH CENTER, INC.

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3 _____
Charles W. Poss
4 In-House Counsel for Plaintiff

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EXHIBIT A



Environmental Research Center

3111 Camino Del Rio North, Suite 400
San Diego, CA 92108
619-500-3090

December 14, 2021

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

Dear Alleged Violators and the Appropriate Public Enforcement Agencies:

I am the Executive Director of Environmental Research Center, Inc. (“ERC”). 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 Violators 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 Violators and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d) of the statute, 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 attached with the copy of this letter served to the alleged Violators identified below.

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

**Excelsior Nutrition Inc, individually and dba 4Excelsior and dba Fresh Nutrition
Fresh Nutrition Inc.**

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. Fresh Nutrition All Natural Green Lipped Mussels - Lead**
- 2. Fresh Nutrition Ceylon Cinnamon - Lead**
- 3. Fresh Nutrition All Natural Turkey Tail Mushroom - Lead**
- 4. Fresh Nutrition All Natural Organic Ginger Root - Lead**
- 5. Fresh Nutrition All Natural Echinacea - Lead**

6. Fresh Nutrition All Natural Red Reishi Mushroom – 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.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least December 14, 2018, 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 Violators violated Proposition 65 because they failed to provide persons ingesting 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.

Please direct all questions concerning this notice to ERC at the above listed address and telephone number.

Sincerely,



Chris Heptinstall
Executive Director
Environmental Research Center

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Excelsior Nutrition Inc, individually and dba 4Excelsior and dba Fresh Nutrition; Fresh Nutrition Inc.; and their Registered Agents for Service of Process only)

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

CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Excelsior Nutrition Inc, individually and dba 4Excelsior and dba Fresh Nutrition; Fresh Nutrition Inc.

I, Chris Heptinstall, declare:

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

2. I am the Executive Director for the noticing party.

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

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

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



Dated: December 14, 2021

Chris Heptinstall

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 December 14, 2021, between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; “THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY”** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it in a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO
Excelsior Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition
1206 N Miller St, Ste D
Anaheim, CA 92806

Current President or CEO
Excelsior Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition
1601 Dove St
Newport Beach, CA 92660

Current President or CEO
Fresh Nutrition Inc.
155 N Riverview Dr
Anaheim, CA 92808

Benjamin Painter
(Registered Agent for Fresh Nutrition Inc.)
155 N Riverview Dr
Anaheim, CA 92808

Current President or CEO
Fresh Nutrition Inc.
23860 Nicole Way
Yorba Linda, CA 92887

Steven Jon Flipse
(Registered Agent for Excelsior
Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition)
1206 N Miller St, Ste D
Anaheim, CA 92806

Current President or CEO
Fresh Nutrition Inc.
5305 River Rd N, Ste B
Keizer, OR 97303

Ying Chen
(Registered Agent for Excelsior
Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition)
1 Chapin Rd, Unit 1
Pine Brook, NJ 07058

Current President or CEO
Fresh Nutrition Inc.
1601 Dove St
Newport Beach, CA 92660

Northwest Registered Agent LLC
(Registered Agent for Fresh Nutrition Inc.)
5305 River Rd N Ste B
Keizer, OR 97303

On December 14, 2021, 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
Post Office Box 70550
Oakland, CA 94612-0550

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

December 14, 2021

Page 5

On December 14, 2021, between 8:00 a.m. and 5:00 p.m. Eastern Time, 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:

Nancy O'Malley, District Attorney
Alameda County
7677 Oakport Street, Suite 650
Oakland, CA 94621
CEPDProp65@acgov.org

Allison Haley, District Attorney
Napa County
1127 First Street, Ste C
Napa, CA 94559
CEPD@countyofnapa.org

Barbara Yook, District Attorney
Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249
Prop65Env@co.calaveras.ca.us

Clifford H. Newell, District Attorney
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201 Commercial St
Nevada City, CA 95959
DA.Prop65@co.nevada.ca.us

Stacey Grassini, Deputy District Attorney
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sgrassini@contracostada.org

Morgan Briggs Gire, District Attorney
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Thomas L. Hardy, District Attorney
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Paul E. Zellerbach, District Attorney
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Riverside, CA 92501
Prop65@rivcoda.org

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Mariposa, CA 95338
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Anne Marie Schubert, District Attorney
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901 G Street
Sacramento, CA 95814
Prop65@sacda.org

Kimberly Lewis, District Attorney
Merced County
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Merced, CA 95340
Prop65@countyofmerced.com

Summer Stephan, District Attorney
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330 West Broadway
San Diego, CA 92101
SanDiegoDAProp65@sdca.org

Jeannine M. Pacioni, District Attorney
Monterey County
1200 Aguajito Road
Monterey, CA 93940
Prop65DA@co.monterey.ca.us

Mark Ankcorn, Deputy City Attorney
San Diego City Attorney
1200 Third Avenue
San Diego, CA 92101
CityAttyProp65@sandiego.gov

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*
December 14, 2021
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San Francisco District Attorney's Office
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North Building, Suite 400N
San Francisco, CA 94103
alethea.sargent@sfgov.org

Valerie Lopez, Deputy City Attorney
San Francisco City Attorney
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On December 14, 2021, between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it with the U.S. Postal Service with the postage fully prepaid for delivery by First Class Mail.

Executed on December 14, 2021, in Fort Oglethorpe, Georgia.


Phyllis Dunwoody

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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.