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 5 Attorney for Plaintiff Environmental Research Center, Inc.

**ELECTRONICALLY FILED**  
 Superior Court of California,  
 County of Alameda  
**02/16/2023 at 04:36:32 PM**  
 By: Angela Linhares,  
 Deputy Clerk

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

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

**CASE NO. 23CV028038**

12 **Plaintiff,**  
 13 **vs.**

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

14 **THE FEED.COM, INC.; KYOKU**  
 15 **SUPERFOODS LLC; and DOES 1-100**

[Miscellaneous Civil Complaint (42)]  
 Proposition 65, Health & Safety Code  
 Section 25249.5 et seq.]

16 **Defendants.**  
 17

18  
 19 Plaintiff Environmental Research Center, Inc. hereby alleges:

20 **I**

21 **INTRODUCTION**

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

1 California to cause cancer and/or birth defects and other reproductive harm. This Complaint  
2 seeks injunctive and declaratory relief and civil penalties to remedy the ongoing failure of  
3 Defendants The Feed.com, Inc. and Kyoku Superfoods LLC (collectively “The Feed”) and  
4 Does 1-100 (hereinafter individually referred to as “Defendant” or collectively as  
5 “Defendants”), to warn consumers that they have been exposed to lead and/or cadmium and/or  
6 mercury from a number of The Feed’s nutritional health products as set forth in paragraph 3 at  
7 levels exceeding the applicable Maximum Allowable Dose Level (“MADL”) and requiring a  
8 warning pursuant to Health & Safety Code section 25249.6.

## 9 II

### 10 PARTIES

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

15 3. Defendant The Feed is a business that develops, manufactures, markets, distributes,  
16 and/or sells nutritional health products that have exposed users to lead and/or cadmium and/or  
17 mercury in the State of California within the relevant statute of limitations period. These  
18 “SUBJECT PRODUCTS” (as identified in the Notices of Violation dated September 29, 2022  
19 and October 25, 2022 attached hereto as **Exhibits A** and **B**) are: (1) Swiss RX Total Recovery  
20 Chocolate Mint (lead, cadmium, mercury), (2) Kyoku Daily Superfood Shake (lead, mercury),  
21 (3) Swiss RX Total Recovery Vanilla Chai (lead, cadmium), (4) Swiss RX Total Recovery  
22 Strawberry (lead, cadmium, and mercury), and (5) Swiss RX Nitric Oxide (lead). The  
23 Feed.com, Inc. and Kyoku Superfoods LLC are companies subject to Proposition 65 as they  
24 employ ten or more persons and have employed ten or more persons at all times relevant to this  
25 action.

26 4. Defendants Does 1-100, are named herein under fictitious names, as their true names  
27 and capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that  
28 each of said Does is responsible, in some actionable manner, for the events and happenings

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

16 7. The Complaint is based on allegations contained in the Notices of Violation dated  
17 September 29, 2022 and October 25, 2022, served on the California Attorney General, other  
18 public enforcers, and The Feed. The Notices of Violation constitute adequate notice to The  
19 Feed because they provided adequate information to allow The Feed 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 Notices of  
22 Violation, and both certificates comply with Proposition 65 and its implementing regulations.  
23 The Notices of Violation served on The Feed also included a copy of "The Safe Drinking Water  
24 and Toxic Enforcement Act of 1986 (Proposition 65): A Summary." Service of the Notices of  
25 Violation and accompanying documents complied with Proposition 65 and its implementing  
26 regulations. Attached hereto as **Exhibits A** and **B** are true and correct copies of the Notices of  
27 Violation and associated documents. More than 60 days have passed since ERC mailed the  
28 Notices of Violation and no public enforcement entity has filed a Complaint in this case.

1 8. 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 The Feed's products. Furthermore, venue is proper in this  
4 Court under Code of Civil Procedure section 395.5 and Health & Safety Code section 25249.7.

5 **IV**

6 **STATUTORY BACKGROUND**

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

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

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

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

25 12. In this case, the exposures are caused by consumer products. A consumer product is  
26 defined as "any article, or component part thereof, including food, that is produced, distributed,  
27 or sold for the personal use, consumption or enjoyment of a consumer." (Cal. Code Regs., tit.  
28 27, § 25600.1, subd. (d).) Food "includes 'dietary supplements' as defined in California Code

1 of Regulations, title 17, section 10200.” (*Id.* at subd. (g).) A consumer product exposure is “an  
2 exposure that results from a person’s acquisition, purchase, storage, consumption, or any  
3 reasonably foreseeable use of a consumer product, including consumption of a food.” (*Id.* at  
4 subd. (e).)

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

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

24 15. Proposition 65 establishes a procedure by which the State is to develop a list of  
25 chemicals “known to the State to cause cancer or reproductive toxicity.” (Health & Safety Code,  
26 § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months after  
27 the chemical is published on the State list. (Health & Safety Code, § 25249.10, subd. (b).)

28 16. Lead was listed as a chemical known to the State of California to cause developmental

1 toxicity in the fetus and male and female reproductive toxicity on February 27, 1987. Lead was  
2 listed as a chemical known to the State of California to cause cancer on October 1, 1992.  
3 (OEHHA Chemicals Considered or Listed Under Proposition 65 -  
4 <https://oehha.ca.gov/proposition-65/chemicals/lead-and-lead-compounds>.) The MADL for lead  
5 as a chemical known to cause reproductive toxicity is 0.5 micrograms per day. (Cal. Code  
6 Regs., tit. 27, §25805, subd. (b).) The No Significant Risk Level for lead as a carcinogen is 15  
7 micrograms per day. (Cal. Code Regs., tit. 27, §25705, subd. (b).)

8 17. Cadmium was officially listed as a chemical known to cause developmental toxicity and  
9 male reproductive toxicity on May 1, 1997, while cadmium and cadmium compounds were  
10 listed as chemicals known to the State of California to cause cancer on October 1, 1987.  
11 (OEHHA Chemicals Considered or Listed Under Proposition 65 -  
12 <https://oehha.ca.gov/proposition-65/chemicals/cadmium>.) The MADL for cadmium as a  
13 chemical known to cause reproductive toxicity is 4.1 micrograms per day. (Cal. Code Regs., tit.  
14 27, §25805, subd. (b).)

15 18. Mercury and mercury compounds were listed as chemicals known to the State of  
16 California to cause developmental toxicity in the fetus and male and female reproductive  
17 toxicity on July 1, 1990 ([https://oehha.ca.gov/proposition-65/chemicals/mercury-and-mercury-](https://oehha.ca.gov/proposition-65/chemicals/mercury-and-mercury-compounds)  
18 [compounds](https://oehha.ca.gov/proposition-65/chemicals/mercury-and-mercury-compounds)).

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

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

V

**STATEMENT OF FACTS**

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3 21. The Feed has developed, manufactured, marketed, distributed, and/or sold the SUBJECT  
4 PRODUCTS containing lead and/or cadmium and/or mercury into the State of California.  
5 Consumption of the SUBJECT PRODUCTS according to the directions and/or  
6 recommendations provided for said products causes consumers to be exposed to lead at levels  
7 exceeding the 0.5 micrograms per day MADL and/or cadmium at levels exceeding the 4.1  
8 micrograms per day MADL and/or be exposed to mercury and requiring a warning. Consumers  
9 have been ingesting these products for many years, without any knowledge of their exposure to  
10 these very dangerous chemicals.

11 22. For many years, The Feed has knowingly and intentionally exposed numerous persons  
12 to lead and/or cadmium and/or mercury without providing any type of Proposition 65 warning.  
13 Prior to ERC's Notices of Violation and this Complaint, The Feed failed to provide a warning  
14 on the labels of the SUBJECT PRODUCTS or provide any other legally acceptable warning.  
15 The Feed has, at all times relevant hereto, been aware that the SUBJECT PRODUCTS  
16 contained lead and/or cadmium and/or mercury and that persons using these products have been  
17 exposed to these chemicals. The Feed has been aware of the presence of lead and/or cadmium  
18 and/or mercury in the SUBJECT PRODUCTS and has failed to disclose the presence of these  
19 chemicals to the public, who undoubtedly believe they have been ingesting totally healthy and  
20 pure products pursuant to the company's statements.

21 23. Both prior and subsequent to ERC's Notices of Violation, The Feed failed to provide  
22 consumers of the SUBJECT PRODUCTS with a clear and reasonable warning that they have  
23 been exposed to chemicals known to the State of California to cause cancer and/or birth defects  
24 and other reproductive harm. This failure to warn is ongoing.

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

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

6 25. By committing the acts alleged above, The Feed has, in the course of doing business,  
7 knowingly and intentionally exposed users of the SUBJECT PRODUCTS to lead and/or  
8 cadmium and/or mercury, chemicals known to the State of California to cause cancer and/or  
9 birth defects, and other reproductive harm, without first giving clear and reasonable warning to  
10 such individuals within the meaning of Health & Safety Code section 25249.6. In doing so, The  
11 Feed has violated Health & Safety Code section 25249.6 and continues to violate the statute  
12 with each successive sale of the SUBJECT PRODUCTS.

13 26. Said violations render The Feed liable for civil penalties, up to \$2,500 per day for each  
14 violation, and subject The Feed to injunction.

15 **SECOND CAUSE OF ACTION**  
16 **(Declaratory Relief)**

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

19 28. There exists an actual controversy relating to the legal rights and duties of the Parties,  
20 within the meaning of Code of Civil Procedure section 1060, between ERC and The Feed,  
21 concerning whether The Feed has exposed individuals to chemicals known to the State of  
22 California to cause cancer and/or birth defects and other reproductive harm without providing  
23 clear and reasonable warning.

24 **VI**

25 **PRAYER**

26 WHEREFORE ERC prays for relief as follows:

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



1        2. On the First Cause of Action, and pursuant to Health & Safety Code section 25249.7,  
2 subdivision (a), for such temporary restraining orders, preliminary and permanent injunctive  
3 orders, or other orders as are necessary to prevent The Feed from exposing persons to lead  
4 and/or cadmium and/or mercury without providing clear and reasonable warning;

5        3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil  
6 Procedure section 1060 declaring that The Feed has exposed individuals to lead and/or  
7 cadmium and/or mercury without providing clear and reasonable warning; and

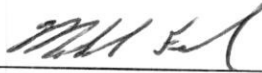
8        4. On all Causes of Action, for reasonable attorneys' fees pursuant to Code of Civil  
9 Procedure section 1021.5 or the substantial benefit theory;

10       5. For costs of suit herein; and

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

12  
13 DATED: February 11, 2023

MICHAEL FREUND & ASSOCIATES

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17 Michael Freund  
18 Attorney for Environmental Research Center, Inc.  
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# EXHIBIT A

**Michael Freund & Associates**

1919 Addison Street, Suite 105  
Berkeley, CA 94704  
Voice: 510.540.1992 • Fax: 510.371.0885

Michael Freund, Esq.

September 29, 2022

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

Dear Alleged Violators 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 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 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 Violators identified below.

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

**The Feed.com, Inc.**  
**Kyoku Superfoods LLC**

**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. Swiss RX Total Recovery Chocolate Mint – Lead, Mercury, Cadmium**
- 2. Kyoku Daily Superfood Shake – Lead, Mercury**

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.

On July 1, 1990, the State of California officially listed mercury and mercury compounds as chemicals known to cause developmental toxicity and male and female reproductive toxicity.

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.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least September 29, 2019, 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 Violators violated Proposition 65 because they 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 Violators to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time-consuming litigation.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violation to my attention at the law office address and telephone number indicated on the letterhead or at [freund1@aol.com](mailto:freund1@aol.com).**

Sincerely,



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Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to The Feed.com, Inc.; Kyoku Superfoods LLC; 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 The Feed.com, Inc.;  
Kyoku Superfoods LLC**

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that 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 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 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: September 29, 2022

---

Michael Freund

**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 September 29, 2022 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  
The Feed.com, Inc. & Kyoku Superfoods LLC  
224 Commerce St, Ste A1  
Broomfield, CO 80020

Incorporating Services, Ltd.  
(Registered Agent for The Feed.com, Inc. &  
Kyoku Superfoods LLC)  
3500 S Dupont Hwy  
Dover, DE 19901

Matthew Johnson  
(Registered Agent for The Feed.com, Inc.)  
224 Commerce St, Ste A1  
Broomfield, CO 80020

On September 29, 2022 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 September 29, 2022 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:

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CEPDProp65@acgov.org

Barbara Yook, District Attorney  
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September 29, 2022

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

September 29, 2022

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cfepd@yolocounty.org

On September 29, 2022, 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 September 29, 2022, in Fort Oglethorpe, Georgia.

---

Phyllis Dunwoody

**Service List**

District Attorney, Alpine  
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P.O. Box 248  
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District Attorney, Colusa  
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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.<sup>1</sup> 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

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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>.

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 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.

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<sup>2</sup> 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](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.

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# EXHIBIT B



**Michael Freund & Associates**

1919 Addison Street, Suite 105  
Berkeley, CA 94704  
Voice: 510.540.1992 • Fax: 510.371.0885

Michael Freund, Esq.

October 25, 2022

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

Dear Alleged Violators 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 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 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 Violators identified below.

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

**The Feed.com, Inc.**  
**Kyoku Superfoods LLC**

**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. Swiss RX Total Recovery Vanilla Chai- Lead, Cadmium**
- 2. Swiss RX Total Recovery Strawberry – Lead, Cadmium, Mercury**
- 3. Swiss RX Nitric Oxide - 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.

On July 1, 1990, the State of California officially listed mercury and mercury compounds as chemicals known to cause developmental toxicity and male and female reproductive toxicity.

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.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least October 25, 2019, 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 Violators violated Proposition 65 because they 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 Violators 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.

October 25, 2022

Page 3

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 or at freund1@aol.com.**

Sincerely,



---

Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to The Feed.com, Inc.; Kyoku Superfoods LLC; 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 The Feed.com, Inc.;  
Kyoku Superfoods LLC**

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that 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 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 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: October 25, 2022

---

Michael Freund

**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 25, 2022 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  
The Feed.com, Inc. & Kyoku Superfoods LLC  
224 Commerce St, Ste A1  
Broomfield, CO 80020

Incorporating Services, Ltd.  
(Registered Agent for The Feed.com, Inc. &  
Kyoku Superfoods LLC)  
3500 S Dupont Hwy  
Dover, DE 19901

Matthew Johnson  
(Registered Agent for The Feed.com, Inc.)  
224 Commerce St, Ste A1  
Broomfield, CO 80020

On October 25, 2022 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 25, 2022 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:

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October 25, 2022

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October 25, 2022

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Sonoma, CA 95403  
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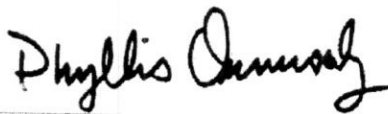
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Jeff W. Reisig, District Attorney  
Yolo County  
301 Second Street  
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cfepd@yolocounty.org

On October 25, 2022, 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 25, 2022, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

Service List

District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, Sutter County 463 2 <sup>nd</sup> Street Yuba City, CA 95991
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080
District Attorney, Colusa County 310 6 <sup>th</sup> St Colusa, CA 95932	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, El Dorado County 778 Pacific St Placerville, CA 95667	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, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, San Bernardino County 303 West Third Street San Bernardino, CA 92415	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, San Mateo County 400 County Ctr., 3rd Floor Redwood City, CA 94063	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Sierra County Post Office Box 457 100 Courthouse Square, 2 <sup>nd</sup> Floor Downieville, CA 95936	
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453		
District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	



## 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?*

**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

<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>.

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 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.

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<sup>2</sup> 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](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.