

**ELECTRONICALLY FILED**

Superior Court of California,  
County of Alameda

10/16/2023 at 12:22:38 PM

By: Darrell Drew,  
Deputy Clerk

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7 Attorney for Plaintiff Environmental Research Center, Inc.

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

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

13 **Plaintiff,**

14 **vs.**

15 **VIVRI USA, LLC and DOES 1-100**

16 **Defendants.**

CASE NO. 23CV047722

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

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

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

8  
9 **II**  
**PARTIES**

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

14 3. Defendant Vivri is a business that develops, manufactures, markets, distributes, and/or  
15 sells nutritional health products that have exposed users to lead and/or cadmium and/or mercury  
16 in the State of California within the relevant statute of limitations period. These “SUBJECT  
17 PRODUCTS” (as identified in the Notices of Violation dated May 4, 2023 and May 12, 2023  
18 attached hereto as **Exhibits A and B**) are: (1) Vivri Spinach & Cheese Cream Meal Soup (lead),  
19 (2) Vivri Corn Cream Meal Soup (lead), (3) Vivri Keto Meal Shake Gerry's Coconut Horchata  
20 (lead), (4) Vivri Shake Me! Strawberry Sensation Complete Meal Replacement (lead), (5) Vivri  
21 Shake Me! Chocolate Delight Complete Meal Replacement (lead), (6) Vivri Shake Me! Vanilla  
22 Extravaganza Complete Meal Replacement (lead), (7) Vivri Creamy Portobello Soup Complete  
23 Meal Replacement (lead), (8) Vivri Vegan Shake Me! Chocolate Fusion Complete Meal  
24 Replacement (lead, cadmium, mercury), and (9) Vivri Shake Me! Cookies & Cream Complete  
25 Meal Replacement (lead). Vivri USA, LLC is a company subject to Proposition 65 as it  
26 employs ten or more persons and has employed ten or more persons at all times relevant to this  
27 action.

28 4. Defendants Does 1-100, are named herein under fictitious names, as their true names

1 and capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that  
2 each of said Does is responsible, in some actionable manner, for the events and happenings  
3 hereinafter referred to, either through said Does' conduct, or through the conduct of its agents,  
4 servants or employees, or in some other manner, causing the harms alleged by ERC in this  
5 Complaint. When said true names and capacities of Does are ascertained, ERC will seek leave  
6 to amend this Complaint to set forth the same.

### 7 III

#### 8 JURISDICTION AND VENUE

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

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

18 7. The Complaint is based on allegations contained in the Notices of Violation dated  
19 May 4, 2023 and May 12, 2023, served on the California Attorney General, other public  
20 enforcers, and Vivri. The Notices of Violation constitute adequate notice to Vivri because they  
21 provided adequate information to allow Vivri to assess the nature of the alleged violations,  
22 consistent with Proposition 65 and its implementing regulations. A certificate of merit and a  
23 certificate of service accompanied each copy of the Notices of Violation, and both certificates  
24 comply with Proposition 65 and its implementing regulations. The Notices of Violation served  
25 on Vivri also included a copy of "The Safe Drinking Water and Toxic Enforcement Act of 1986  
26 (Proposition 65): A Summary." Service of the Notices of Violation and accompanying  
27 documents complied with Proposition 65 and its implementing regulations. Attached hereto as  
28 **Exhibits A and B** are true and correct copies of the Notices of Violation and associated

1 documents. More than 60 days have passed since ERC mailed the Notices of Violation and no  
2 public enforcement entity has filed a Complaint in this case.

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

#### 7 IV

#### 8 STATUTORY BACKGROUND

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

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

14 No person in the course of doing business shall knowingly and  
15 intentionally expose any individual to a chemical known to the state to  
16 cause cancer or reproductive toxicity without first giving clear and  
17 reasonable warning to such individual, except as provided in Section  
18 25249.10.

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

27 12. In this case, the exposures are caused by consumer products. A consumer product is  
28 defined as "any article, or component part thereof, including food, that is produced, distributed,

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

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

16 14. 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 15. 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 16. 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.

5 (OEHHA Chemicals Considered or Listed Under Proposition 65 -

6 <https://oehha.ca.gov/proposition-65/chemicals/lead-and-lead-compounds>.) The MADL for lead  
7 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 17. Cadmium was officially listed as a chemical known to cause developmental toxicity and  
11 male reproductive toxicity on May 1, 1997, while cadmium and cadmium compounds were  
12 listed as chemicals known to the State of California to cause cancer on October 1, 1987.

13 (OEHHA Chemicals Considered or Listed Under Proposition 65 -

14 <https://oehha.ca.gov/proposition-65/chemicals/cadmium>.) The MADL for cadmium as a  
15 chemical known to cause reproductive toxicity is 4.1 micrograms per day. (Cal. Code Regs., tit.  
16 27, §25805, subd. (b).)

17 18. Mercury and mercury compounds were listed as chemicals known to the State of  
18 California to cause developmental toxicity in the fetus and male and female reproductive  
19 toxicity on July 1, 1990 (OEHHA Chemicals Considered or Listed Under Proposition 65 -  
20 <https://oehha.ca.gov/proposition-65/chemicals/mercury-and-mercury-compounds>).

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

27 20. Proposition 65 may be enforced by any person in the public interest who provides notice  
28 sixty days before filing suit to both the violator and designated law enforcement officials. The

1 failure of law enforcement officials to file a timely Complaint enables a citizen suit to be filed  
2 pursuant to Health & Safety Code section 25249.7, subdivisions (c) and (d).

3 V

4 **STATEMENT OF FACTS**

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

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

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

27 ///

28 ///

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, Vivri 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/or other reproductive harm, without first giving clear and reasonable warning  
10 to such individuals within the meaning of Health & Safety Code section 25249.6. In doing so,  
11 Vivri 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 Vivri liable for civil penalties, up to \$2,500 per day for each  
14 violation, and subject Vivri 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 Vivri,  
21 concerning whether Vivri has exposed individuals to a chemical known to the State of  
22 California to cause cancer and/or birth defects and/or 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 Vivri from exposing persons to lead and/or  
4 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 Vivri has exposed individuals to lead and/or cadmium  
7 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: October 15, 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.

May 4, 2023

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

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

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

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

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

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

**Vivri USA, LLC**

**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. Vivri Spinach & Cheese Cream Meal Soup - Lead**
- 2. Vivri Corn Cream Meal Soup - Lead**
- 3. Vivri Keto Meal Shake Gerry's Coconut Horchata - Lead**
- 4. Vivri Shake Me! Strawberry Sensation Complete Meal Replacement - Lead**
- 5. Vivri Shake Me! Chocolate Delight Complete Meal Replacement - 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 May 4, 2020, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until this known toxic chemical is either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemical. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons 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.

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 Vivri USA, LLC and its 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 Vivri USA, LLC**

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

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

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

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



---

Michael Freund

Dated: May 4, 2023

**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 May 4, 2023, 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  
Vivri USA, LLC  
2629 N Stemmons Fwy, Ste 105  
Dallas, TX 75207

Current President or CEO  
Vivri USA, LLC  
4040 N 24<sup>th</sup> St  
Phoenix, AZ 85016

Current President or CEO  
Vivri USA, LLC  
5001 Spring Valley Rd, Ste 170E  
Dallas, TX 75244

Sierra Corporate Services – Reno  
(Registered Agent for Vivri USA, LLC)  
100 West Liberty St, 10<sup>th</sup> Fl  
Reno, NV 89501

Incorp Services, Inc.  
(Registered Agent for Vivri USA, LLC)  
815 Brazos St, Ste 500  
Austin, TX 78701

On May 4, 2023, 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 May 4, 2023, 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:

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

Barbara Yook, District Attorney  
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Prop65Env@co.calaveras.ca.us

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

May 4, 2023

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

May 4, 2023

Page 6

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cfepd@yolocounty.org

On May 4, 2023, 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 May 4, 2023, in Fort Oglethorpe, Georgia.

---

Phyllis Dunwoody



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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
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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		
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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.

May 12, 2023

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

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

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

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

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

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

**Vivri USA, 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. Vivri Shake Me! Vanilla Extravaganza Complete Meal Replacement - Lead**
- 2. Vivri Creamy Portobello Soup Complete Meal Replacement - Lead**
- 3. Vivri Vegan Shake Me! Chocolate Fusion Complete Meal Replacement – Lead, Cadmium, Mercury**
- 4. Vivri Shake Me! Cookies & Cream Complete Meal Replacement - 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 May 12, 2020, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons ingesting these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time-consuming litigation.

ERC has retained 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,



---

Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Vivri USA, LLC and its 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 Vivri USA, LLC**

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

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

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

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



Dated: May 12, 2023

---

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 May 12, 2023, 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  
Vivri USA, LLC  
2629 N Stemmons Fwy, Ste 105  
Dallas, TX 75207

Current President or CEO  
Vivri USA, LLC  
4040 N 24<sup>th</sup> St  
Phoenix, AZ 85016

Current President or CEO  
Vivri USA, LLC  
5001 Spring Valley Rd, Ste 170E  
Dallas, TX 75244

Sierra Corporate Services – Reno  
(Registered Agent for Vivri USA, LLC)  
100 West Liberty St, 10<sup>th</sup> Fl  
Reno, NV 89501

Incorp Services, Inc.  
(Registered Agent for Vivri USA, LLC)  
815 Brazos St, Ste 500  
Austin, TX 78701

On May 12, 2023, 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 May 12, 2023, 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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Notice of Violation of California Health & Safety Code §25249.5 *et seq.*

May 12, 2023

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Executed on May 12, 2023, in Fort Oglethorpe, Georgia.

---

Phyllis Dunwoody

**Service List**

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Jackson, CA 95642

District Attorney, Butte  
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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.