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 ENVIRONMENTAL RESEARCH CENTER

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12 Attorneys for Defendant  
 SECOND WIND VITAMINS, INC. dba  
 13 CELEBRATE VITAMINS

14  
 15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 16 COUNTY OF ALAMEDA

17 ENVIRONMENTAL RESEARCH  
 18 CENTER, a California non-profit  
 corporation,

19 Plaintiff.

20 v.

21 SECOND WIND VITAMINS, INC. dba  
 22 CELEBRATE VITAMINS and DOES 1-100

23 Defendants.  
 24  
 25  
 26  
 27

**FILED**  
 ALAMEDA COUNTY

MAR 23 2015

CLERK OF THE SUPERIOR COURT

By Kate Clarke  
 Deputy

FILE BY FAX

CASE NO. RG14724362

STIPULATED CONSENT JUDGMENT:  
 [PROPOSED] ORDER

Health & Safety Code § 25249.5 et seq.

Action Filed: May 7, 2014

Trial Date: None set

28 STIPULATED CONSENT JUDGMENT: [PROPOSED] ORDER

CASE NO. RG14724362

1 **1. INTRODUCTION**

2 **1.1** On May 7, 2014, Plaintiff Environmental Research Center ("ERC"), a non-  
3 profit corporation, as a private enforcer, and in the public interest, initiated this action by filing  
4 a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the "Complaint")  
5 pursuant to the provisions of California Health and Safety Code section 25249.5 et seq.  
6 ("Proposition 65"), against Second Wind Vitamins, Inc. dba Celebrate Vitamins and Does 1-  
7 100 (collectively "Second Wind"). In this action, ERC alleges that a number of products  
8 manufactured, distributed or sold by Second Wind contain lead, a chemical listed under  
9 Proposition 65 as a carcinogen and reproductive toxin, and expose consumers to this chemical  
10 at a level requiring a Proposition 65 warning. These products (referred to hereinafter  
11 individually as a "Covered Product" or collectively as "Covered Products") are: (1) "Wellness  
12 Foods Inc. The Simply Bar Cinnamon Pecan Protein Bar", (2) "Wellness Foods Inc. The  
13 Simply Bar Caramel Peanut Protein Bar", (3) "Wellness Foods Inc. The Simply Bar Lemon  
14 Coconut Protein Bar", (4) "Chike Nutrition LLC Chike Meal Replacement Chocolate Bliss",  
15 (5) "Chike Nutrition LLC Chike Meal Replacement Very Vanilla", (6) "Celebrate Vitamins  
16 Celebrate Bariatric Supplements Celebrate ENS Multivitamin, Calcium & Protein Shake  
17 Chocolate Milk", (7) "Celebrate Vitamins Celebrate Bariatric Supplements Celebrate ENS  
18 Multivitamin, Calcium & Protein Shake Vanilla Cake Batter", (8) "Celebrate Vitamins  
19 Celebrate Bariatric Supplements Celebrate ENS Multivitamin, Calcium & Protein Shake  
20 Strawberry", and (9) "Chike Nutrition LLC High Protein Iced Coffee Energy + Protein".

21 **1.2** ERC is a California non-profit corporation dedicated to, among other causes,  
22 helping safeguard the public from health hazards by reducing the use and misuse of hazardous  
23 and toxic chemicals; facilitating a safe environment for consumers and employees, and  
24 encouraging corporate responsibility.

25 **1.3** For purposes of this Consent Judgment, the parties agree that Second Wind is a  
26 business entity that has employed ten or more persons at all times relevant to this action, and  
27

ASL

1 qualifies as a "person in the course of business" within the meaning of Proposition 65. Second  
2 Wind manufactures, distributes and sells the Covered Products.

3 1.4 ERC and Second Wind are referred to individually as a "Party" or collectively  
4 as the "Parties."

5 1.5 The Complaint is based on allegations contained in ERC's Notice of Violation  
6 dated May 17, 2013, that was served on the California Attorney General, other public  
7 enforcers, and Second Wind ("Notice"). A true and correct copy of the Notice is attached as  
8 Exhibit A and is hereby incorporated by reference. More than 60 days have passed since the  
9 Notice was mailed and uploaded to the Attorney General's website, and no designated  
10 governmental entity has filed a complaint against Second Wind with regard to the Covered  
11 Products or the alleged violations.

12 1.6 ERC's Notice and Complaint allege that use of the Covered Products exposes  
13 persons in California to lead without first providing clear and reasonable warnings in violation  
14 of California Health and Safety Code section 25249.6. Second Wind denies all material  
15 allegations contained in the Notice and Complaint.

16 1.7 The Parties have entered into this Consent Judgment in order to settle.  
17 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.  
18 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of  
19 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,  
20 parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, suppliers,  
21 distributors, wholesalers, or retailers. Except for the representations made above, nothing in  
22 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of  
23 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an  
24 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any  
25 purpose.

1           1.8    Except as expressly set forth herein, nothing in this Consent Judgment shall  
2 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
3 other or future legal proceeding unrelated to these proceedings.

4           1.9    The Effective Date of this Consent Judgment is the date on which it is entered as  
5 a Judgment by this Court.

6           **2.    JURISDICTION AND VENUE**

7           For purposes of this Consent Judgment and any further court action that may become  
8 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter  
9 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction  
10 over Second Wind as to the acts alleged in the Complaint, that venue is proper in Alameda  
11 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final  
12 resolution of all claims up through and including the Effective Date which were or could have  
13 been asserted in this action based on the facts alleged in the Notice and Complaint.

14           **3.    INJUNCTIVE RELIEF, REFORMULATION, TESTING AND WARNINGS**

15           3.1    Beginning six months from the Effective Date ("Compliance Date"), Second  
16 Wind shall be permanently enjoined from manufacturing for sale in the State of California,  
17 "Distributing into the State of California", or directly selling in the State of California, any  
18 Covered Product which exposes a person to a "Daily Exposure Level" of more than 0.5  
19 micrograms per day when the maximum suggested dose is taken as directed on the Covered  
20 Product's label, unless it meets the warning requirements under Section 3.2.

21           3.1.1   As used in this Consent Judgment, the term "Distributing into the State  
22 of California" shall mean to directly ship a Covered Product into California for sale in  
23 California or to sell a Covered Product to a distributor that Second Wind knows will sell the  
24 Covered Product in California.

25           3.1.2   For purposes of this Consent Judgment, the "Daily Lead Exposure  
26 Level" shall be measured in micrograms, and shall be calculated using the following formula:  
27 micrograms of lead per gram of product, multiplied by grams of product per serving of the  
28

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1 product (using the largest serving size appearing on the product label), multiplied by servings  
2 of the product per day (using the largest number of servings in a recommended dosage  
3 appearing on the product label), which equals micrograms of lead exposure per day.

### 4 3.2 Clear and Reasonable Warnings

5 If Second Wind is required to provide a warning pursuant to Section 3.1, the following  
6 warning must be utilized:

7 **WARNING: This product contains [lead,] a chemical known to the State of California**  
8 **to cause [cancer and] birth defects or other reproductive harm.**

9 The term "lead" is optional. Second Wind shall use the phrase "cancer and" in the  
10 warning only if the maximum daily dose recommended on the label contains more than 15  
11 micrograms of lead as determined pursuant to the quality control methodology set forth in Section  
12 3.4.

13 Second Wind shall provide the warning on one of the following: 1) for website purchases  
14 only, on its website, where the warning conspicuously appears prior to a customer's purchase of a  
15 product or 2) for non-website purchases, on the label of Second Wind's products in California.  
16 The warning shall be at least the same size as the largest of any other health or safety warnings  
17 also appearing on the label, container, receipt, invoice, website, or insert, and the word  
18 "WARNING" shall be in all capital letters. No contradictory or conflicting statements about  
19 Proposition 65 or lead may accompany the warning.

20 Second Wind must display the above warnings with such conspicuousness, as compared  
21 with other words, statements, or design of the label or container, as applicable, to render the  
22 warning likely to be read and understood by an ordinary individual under customary conditions of  
23 purchase or use of the product.

24 Notwithstanding any of the foregoing, Second Wind may use the following safe-harbor  
25 warning language in a warning required by Section 3.1 if such warning was displayed on a Second  
26 Wind products already in the stream of commerce on the Effective Date: "Proposition 65  
27 WARNING: This product contains chemicals or substances known to the State of California to

1 cause cancer and birth defects or other reproductive harm.”

2 **3.3 Reformulated Covered Products**

3 A Reformulated Covered Product is one for which the Daily Exposure Level when the  
4 maximum suggested dose is taken as directed on the Reformulated Covered Product's label.  
5 contains no more than 0.5 micrograms of lead per day as determined by the quality control  
6 methodology described in Section 3.4.

7 **3.4 Testing and Quality Control Methodology**

8 **3.4.1** All testing pursuant to this Consent Judgment shall be performed using a  
9 laboratory method that complies with the performance and quality control factors appropriate  
10 for the method used, including limit of detection, qualification, accuracy, and precision that  
11 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry (ICP-MS)  
12 achieving a limit of quantification of less than or equal to 0.010 mg/kg or any other testing  
13 method subsequently agreed upon in writing by the Parties.

14 **3.4.2** All testing pursuant to this Consent Judgment shall be performed by an  
15 independent third-party laboratory certified by the California Environmental Laboratory  
16 Accreditation Program or an independent third-party laboratory that is registered with the  
17 United States Food & Drug Administration. Nothing in this Consent Judgment shall limit  
18 Second Wind's ability to conduct, or require that others conduct, additional testing of the  
19 Covered Products, including the raw materials used in their manufacture.

20 **4. SETTLEMENT PAYMENT**

21 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil  
22 penalties, attorney's fees, and costs, Second Wind shall make a total payment of \$45,000.00  
23 ("Total Settlement Amount") to ERC within 10 business of the Effective Date. Second Wind  
24 shall make this payment by wire transfer to ERC's escrow account, for which ERC will give  
25 Second Wind the necessary account information. The Total Settlement Amount shall be  
26 apportioned as follows:

1           4.2           \$10,000.00 shall be considered a civil penalty pursuant to California Health  
2 and Safety Code §25249.7(b)(1). ERC shall remit 75% (\$7,500.00) of the civil penalty to the  
3 Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe  
4 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety  
5 Code §25249.12(c). ERC will retain the remaining 25% (\$2,500.00) of the civil penalty.

6           4.3           \$2,345.43 shall be distributed to Environmental Research Center as  
7 reimbursement to ERC for reasonable costs incurred in bringing this action; and \$5,364.76  
8 shall be distributed to Environmental Research Center in lieu of further civil penalties, for the  
9 day-to-day business activities such as (1) continued enforcement of Proposition 65, which  
10 includes work, analyzing, researching and testing consumer products that may contain  
11 Proposition 65 chemicals, focusing on the same or similar type of ingestible products that are  
12 the subject matter of the current action; (2) the continued monitoring of past consent judgments  
13 and settlements to ensure companies are in compliance with Proposition 65; and (3) giving a  
14 donation of \$268.00 to the Natural Resources Defense Council to address reducing toxic  
15 chemical exposures in California.

16           4.4           \$1,440.00 shall be distributed to Michael Freund as reimbursement of ERC's  
17 attorney's fees, \$6,895.00 shall be distributed to Ryan Hoffman as reimbursement of ERC's  
18 attorney's fees, \$3,000.00 shall be distributed to Karen Evans as reimbursement of ERC's  
19 attorney's fees, while \$15,954.81 shall be distributed to ERC for its in-house legal fees.

20       **5.    MODIFICATION OF CONSENT JUDGMENT**

21           5.1           This Consent Judgment may be modified only (i) by written stipulation of  
22 the Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent  
23 judgment.

24           5.2           If Second Wind seeks to modify this Consent Judgment under Section 5.1,  
25 then Second Wind must provide written notice to ERC of its intent ("Notice of Intent"). If ERC  
26 seeks to meet and confer regarding the proposed modification in the Notice of Intent, then ERC  
27 must provide written notice to Second Wind within thirty days of receiving the Notice of Intent.

1 If ERC notifies Second Wind in a timely manner of ERC's intent to meet and confer, then the  
2 Parties shall meet and confer in good faith as required in this Section. The Parties shall meet in  
3 person or via telephone within thirty (30) days of ERC's notification of its intent to meet and  
4 confer. Within thirty days of such meeting, if ERC disputes the proposed modification, ERC  
5 shall provide to Second Wind a written basis for its position. The Parties shall continue to meet  
6 and confer for an additional thirty (30) days in an effort to resolve any remaining disputes.  
7 Should it become necessary, the Parties may agree in writing to different deadlines for the  
8 meet-and-confer period.

9       **5.3**       In the event that Second Wind initiates or otherwise requests a modification  
10 under Section 5.1 for its primary benefit, and the meet and confer process leads to a joint  
11 motion or application of the Consent Judgment, Second Wind shall reimburse ERC its costs  
12 and reasonable attorney's fees for the time spent in the meet-and-confer process and filing and  
13 arguing the motion or application, if any. This provision may be waived by agreement of the  
14 Parties.

15       **5.4**       Where the meet-and-confer process does not lead to a joint motion or  
16 application in support of a modification of the Consent Judgment, then either Party may seek  
17 judicial relief on its own. In such a situation, the prevailing party may seek to recover costs and  
18 reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"  
19 means a party who is successful in obtaining relief more favorable to it than the relief that the  
20 other party was amenable to providing during the Parties' good faith attempt to resolve the  
21 dispute that is the subject of the modification.

22       **6.   RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
23       **JUDGMENT**

24       **6.1**       This Court shall retain jurisdiction of this matter to enforce, modify or  
25 terminate this Consent Judgment.

26       **6.2**       If ERC alleges that any Covered Product fails to qualify as a Reformulated  
27 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall

*Handwritten initials/signature*



1 inform Second Wind in a reasonably prompt manner of its test results, including information  
2 sufficient to permit Second Wind to identify the Covered Products at issue. Second Wind shall,  
3 within thirty days following such notice, provide ERC with testing information, from an  
4 independent third-party laboratory meeting the requirements of Sections 3.4.1 and 3.4.2,  
5 demonstrating Defendant's compliance with the Consent Judgment, if warranted. The Parties  
6 shall first attempt to resolve the matter prior to ERC taking any further legal action.

7 **7. APPLICATION OF CONSENT JUDGMENT**

8 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their  
9 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,  
10 divisions, affiliates, franchisees, licensees, customers (excluding private labelers), distributors,  
11 wholesalers, retailers, predecessors, successors, and assigns. This Consent Judgment shall have no  
12 application to Covered Products which are distributed or sold exclusively outside the State of  
13 California and which are not used by California consumers.

14 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

15 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,  
16 on behalf of itself and in the public interest, and Second Wind, of any alleged violation of  
17 Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of  
18 exposure to lead from the handling, use, or consumption of the Covered Products and fully  
19 resolves all claims that have been or could have been asserted in this action up to and including  
20 the Effective Date for failure to provide Proposition 65 warnings for the Covered Products.  
21 ERC, on behalf of itself and in the public interest, hereby discharges Second Wind and its  
22 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,  
23 divisions, affiliates, suppliers, franchisees, licensees, customers (not including private label  
24 customers of Second Wind), distributors, wholesalers, retailers, and all other upstream and  
25 downstream entities in the distribution chain of any Covered Product, and the predecessors,  
26 successors and assigns of any of them (collectively, "Released Parties"), from any and all  
27 claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and

1 expenses asserted, or that could have been asserted, as to any alleged violation of Proposition  
2 65 arising from the failure to provide Proposition 65 warnings on the Covered Products  
3 regarding lead.

4           8.2           ERC on its own behalf only, on one hand, and Second Wind on its own  
5 behalf only, on the other, further waive and release any and all claims they may have against  
6 each other for all actions or statements made or undertaken in the course of seeking or opposing  
7 enforcement of Proposition 65 in connection with the Notice or Complaint up through and  
8 including the Effective Date, provided, however, that nothing in Section 8 shall affect or limit  
9 any Party's right to seek to enforce the terms of this Consent Judgment.

10           8.3           It is possible that other claims not known to the Parties arising out of the  
11 facts alleged in the Notice or the Complaint and relating to the Covered Products will develop  
12 or be discovered. ERC on behalf of itself only, on one hand, and Second Wind, on the other  
13 hand, acknowledge that this Consent Judgment is expressly intended to cover and include all  
14 such claims up through the Effective Date, including all rights of action therefore. ERC and  
15 Second Wind acknowledge that the claims released in Sections 8.1 and 8.2 above may include  
16 unknown claims, and nevertheless waive California Civil Code section 1542 as to any such  
17 unknown claims. California Civil Code section 1542 reads as follows:

18           A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
19           CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
20           FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
21           KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
22           OR HER SETTLEMENT WITH THE DEBTOR.

21 ERC on behalf of itself only, on the one hand, and Second Wind, on the other hand,  
22 acknowledge and understand the significance and consequences of this specific waiver of  
23 California Civil Code section 1542.

24           8.4           Compliance with the terms of this Consent Judgment shall be deemed to  
25 constitute compliance with Proposition 65 by any releasee regarding alleged exposures as set  
26 forth in the Notice and the Complaint.

1           **8.5**        Nothing in this Consent Judgment is intended to apply to any occupational  
2 or environmental exposures arising under Proposition 65, nor shall it apply to any of Second  
3 Wind's products other than the Covered Products.

4           **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

5            In the event that any of the provisions of this Consent Judgment are held by a court to be  
6 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

7           **10. GOVERNING LAW**

8            The terms and conditions of this Consent Judgment shall be governed by and construed in  
9 accordance with the laws of the State of California.

10          **11. PROVISION OF NOTICE**

11          All notices required to be given to either Party to this Consent Judgment by the other shall  
12 be in writing and sent to the following agents listed below by: (a) first-class, registered, or certified  
13 mail; (b) overnight courier; or (c) personal delivery. Courtesy copies via email may also be sent.

14          **FOR ENVIRONMENTAL RESEARCH CENTER:**

15 Chris Heptinstall, Executive Director, Environmental Research Center

16 3111 Camino Del Rio North, Suite 400

17 San Diego, CA 92108

18 Tel: (619) 500-3090; Email: chris\_erc501c3@yahoo.com

19          **With a copy to:**

20 Michael Freund

21 Ryan Hoffman

22 Michael Freund & Associates

23 1919 Addison Street, Suite 105

24 Berkeley, CA 94704

25 Telephone: (510) 540-1992; Facsimile: (510) 540-5543

26          **FOR SECOND WIND VITAMINS, INC. dba**  
27          **CELEBRATE VITAMINS**

28          STIPULATED CONSENT JUDGMENT; [PROPOSED] ORDER

CASE NO. RG14724362

1 Vic Giacomia  
2 Current President or CEO  
3 Second Wind Vitamins, Inc:  
4 8691 Wadsworth Road, Suite 130  
5 Wadsworth, OH 44281

6 **With a copy to:**

7 James M. Maltesich  
8 Anthony J. Cortez  
9 Greenberg Traurig, LLP  
10 1201 K Street, Suite 1100  
11 Sacramento, CA 95814-3938  
12 T: (916) 442-1111; F: (916) 448-1709

13 **12. COURT APPROVAL**

14 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
15 Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
16 Consent Judgment.

17 **12.2** If the California Attorney General objects to any term in this Consent  
18 Judgment, the Parties shall use their best efforts to resolve the concern in a timely manner, and  
19 if possible prior to the hearing on the motion.

20 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be  
21 void and have no force or effect.

22 **13. EXECUTION AND COUNTERPARTS**

23 This Consent Judgment may be executed in counterparts, which taken together shall be  
24 deemed to constitute one document. A facsimile or pdf signature shall be construed as valid as  
25 the original signature.

26 **14. DRAFTING**

27 The terms of this Consent Judgment have been reviewed by the respective counsel for each  
28

1 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms with  
2 counsel. The Parties agree that, in any subsequent interpretation and construction of this Consent  
3 Judgment entered thereon, the terms and provisions shall not be construed against any Party.

4 **15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

5 If a dispute arises with respect to either Party's compliance with the terms of this Consent  
6 Judgment entered by the Court, the Parties shall meet in person or by telephone and endeavor to  
7 resolve the dispute in an amicable manner. No action or motion may be filed in the absence of  
8 such a good faith attempt to resolve the dispute beforehand. In the event an action or motion is  
9 filed, however, the prevailing party may seek to recover costs and reasonable attorney's fees. As  
10 used in the preceding sentence, the term "prevailing party" means a party who is successful in  
11 obtaining relief more favorable to it than the relief that the other party was amenable to providing  
12 during the Parties' good faith attempt to resolve the dispute that is the subject of such enforcement  
13 action.

14 **16. ENTIRE AGREEMENT, AUTHORIZATION**

15 **16.1** This Consent Judgment contains the sole and entire agreement and  
16 understanding of the Parties with respect to the entire subject matter herein, and any and all  
17 prior discussions, negotiations, commitments and understandings related hereto. No  
18 representations, oral or otherwise, express or implied, other than those contained herein have  
19 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to  
20 herein, shall be deemed to exist or to bind any Party.

21 **16.2** Each signatory to this Consent Judgment certifies that he or she is fully  
22 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as  
23 explicitly provided herein, each Party shall bear its own fees and costs.

24 **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
25 **CONSENT JUDGMENT**

26 This Consent Judgment has come before the Court upon the request of the Parties. The  
27 Parties request the Court to fully review this Consent Judgment and, being fully informed

1 regarding the matters which are the subject of this action, to:

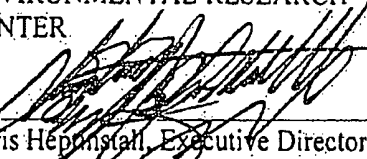
2 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
3 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has  
4 been diligently prosecuted, and that the public interest is served by such settlement; and

5 (2) Make the findings pursuant to California Health and Safety Code section  
6 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

7 **IT IS SO STIPULATED:**

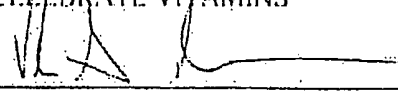
8 Dated: 1/28/ 2015

ENVIRONMENTAL RESEARCH  
CENTER

By:   
Chris Hepinstall, Executive Director

11 Dated: 1-26 2015

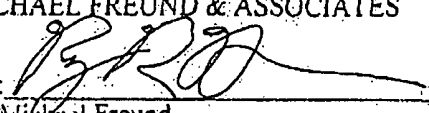
SECOND WIND VITAMINS, INC. dba  
CELEBRATE VITAMINS

By:   
Vic Giaconia  
Its: President/CEO

15 **APPROVED AS TO FORM:**

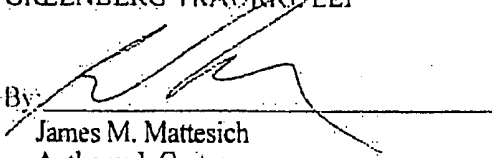
16 Dated: 2/2 2015

MICHAEL FREUND & ASSOCIATES

By:   
Michael Freund  
Ryan Hoffman  
Attorneys for Plaintiff Environmental  
Research Center

21 Dated: 1-26 2015

GREENBERG TRAUBIG LLP

By:   
James M. Mattesich  
Anthony J. Cortez  
Gregory G. Sperla  
Attorneys for Defendant Second Wind  
Vitamins, Inc. dba Celebrate Vitamins


*Handwritten initials*

ORDER AND JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is approved and Judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: 2/23, 2015

  
\_\_\_\_\_  
Judge of the Superior Court

**Stephen Pulido**

LAW OFFICE OF  
MICHAEL FREUND

RYAN HOFFMAN  
ATTORNEY AT LAW  
1919 ADDISON STREET, SUITE 105  
BERKELEY, CALIFORNIA 94704-1101

TEL (510) 540-1992  
FAX (510) 540-5543  
EMAIL RRHOFFMA@GMAIL.COM

May 17, 2013

**NOTICE OF VIOLATIONS 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 ("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:

**Second Wind Vitamins, Inc. dba Celebrate Vitamins**

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

- **Wellness Foods Inc. The Simply Bar Cinnamon Pecan Protein Bar – Lead**
- **Wellness Foods Inc. The Simply Bar Caramel Peanut Protein Bar – Lead**
- **Wellness Foods Inc. The Simply Bar Lemon Coconut Protein Bar – Lead**
- **Chike Nutrition LLC Chike Meal Replacement Chocolate Bliss – Lead**
- **Chike Nutrition LLC Chike Meal Replacement Very Vanilla – Lead**
- **Celebrate Vitamins Celebrate Bariatric Supplements Celebrate ENS Multivitamin, Calcium & Protein Shake Chocolate Milk – Lead**
- **Celebrate Vitamins Celebrate Bariatric Supplements Celebrate ENS Multivitamin, Calcium & Protein Shake Vanilla Cake Batter – Lead**

**Exhibit A**



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- **Celebrate Vitamins Celebrate Bariatric Supplements Celebrate ENS Multivitamin, Calcium & Protein Shake Strawberry – Lead**
- **Chike Nutrition LLC High Protein Iced Coffee Energy + Protein – 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 purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least May 17, 2010, 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 handling and/or using 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; and (2) pay an appropriate civil penalty. 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 Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,

  
Ryan Hoffman

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Second Wind Vitamins, Inc. dba Celebrate Vitamins and its Registered Agent for Service of Process only)

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

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**CERTIFICATE OF MERIT**

**Re: Environmental Research Center's Notice of Proposition 65 Violations by Second Wind Vitamins, Inc. dba Celebrate Vitamins**

I, Ryan Hoffman, 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 17, 2013



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Ryan Hoffman

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

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**CERTIFICATE OF SERVICE**

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, over the age of 18 years of age, and am not a party to the within entitled action. 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 17, 2013, 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 the party 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  
Second Wind Vitamins, Inc.  
8691 Wadsworth Road, Suite 130  
Wadsworth, OH 44281


Victor A. Giaconia  
(Second Wind Vitamins, Inc.'s Registered  
Agent for Service of Process)  
1152 Greenhaven Lane  
Wadsworth, OH 44281

On May 17, 2013, I electronically served the following documents: **NOTICE OF VIOLATION, 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)** on the following party by uploading a true and correct copy thereof 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 17, 2013, 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 Priority Mail.

Executed on May 17, 2013, in Fort Oglethorpe, Georgia.

  
\_\_\_\_\_  
Rebecca Turner-Smith

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

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Service List

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Los Angeles County 210 West Temple Street, Suite 18000 Los Angeles, CA 90012	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Francisco County 850 Bryant Street, Suite 322 San Francisco, CA 94103	District Attorney, Ventura County 800 South Victoria Ave, Suite 314 Ventura, CA 93009
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, San Joaquin County 222 E. Weber Ave. Rm. 202 Stockton, CA 95202	District Attorney, Yolo County 301 2 <sup>nd</sup> Street Woodland, CA 95695
District Attorney, Butte County 25 County Center Drive, Suite 245 Orville, CA 95965	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, San Luis Obispo County 1035 Palm St, Room 450 San Luis Obispo, CA 93408	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Santa Mateo County 400 County Ctr., 3 <sup>rd</sup> Floor Redwood City, CA 94063	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Contra Costa County 900 Ward Street Martinez, CA 94553	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Santa Clara County 70 West Hedding Street San Jose, CA 95110	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060	San Jose City Attorney's Office 200 East Santa Clara Street, 16 <sup>th</sup> Floor San Jose, CA 95113
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Monterey County Post Office Box 1131 Salinas, CA 93902	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Napa County 931 Parkway Mall Napa, CA 94559	District Attorney, Sierra County PO Box 457 Downieville, CA 95936	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Nevada County 110 Union Street Nevada City, CA 95959	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Sonoma County 600 Administration Drive, Room 212J Santa Rosa, CA 95403	
District Attorney, Inyo County 230 W. Line Street Bishop, CA 93514	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Stanislaus County 832 12 <sup>th</sup> Street, Ste 300 Modesto, CA 95354	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Riverside County 3960 Orange Street Riverside, CA 92501	District Attorney, Sutter County 446 Second Street Yuba City, CA 95991	
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Sacramento County 901 "G" Street Sacramento, CA 95814	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Benito County 419 Fourth Street, 2 <sup>nd</sup> Floor Hollister, CA 95023	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093	
District Attorney, Lassen County 220 South Lassen Street, Ste. 8 Susanville, CA 96130	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92415-0004	District Attorney, Tulare County 221 S. Mooney Blvd., Room 224 Visalia, CA 93291	

## 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's 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.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. The statute 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 "Governor's List."*** Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. This means that 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

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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>.

damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at:

[http://www.oehha.ca.gov/prop65/prop65\\_list/Newlist.html](http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html).

Only those chemicals that are on the list are regulated under this law. 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; for example, when exposures are sufficiently low (see below). 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. 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 as known to the State to cause cancer ("carcinogens"), a warning is not required if the business 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 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 a 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 a Food.** Certain exposures to chemicals that occur in foods naturally (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 into 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 the regulations and in Title 11, sections 3100-3103. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an 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.

## *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: July, 2012

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.9, 25249.10 and 25249.11, Health and Safety Code.