

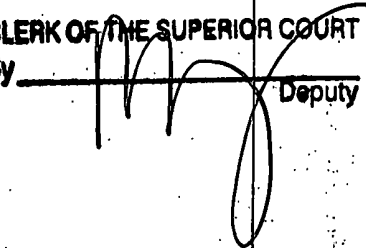


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**FILED**  
**ALAMEDA COUNTY**

APR 12 2017

CLERK OF THE SUPERIOR COURT

By  Deputy

Rec'd 1-19-17

1 Michael Freund SBN 99687  
2 Ryan Hoffman SBN 283297  
3 Michael Freund & Associates  
4 1919 Addison Street, Suite 105  
5 Berkeley, CA 94704  
6 Telephone: (510) 540-1992  
7 Facsimile: (510) 540-5543

8 Attorneys for Plaintiff  
9 ENVIRONMENTAL RESEARCH CENTER, INC.

10 Brian S. Haughton SBN 111709  
11 David M. Metres SBN 273081  
12 Barg Coffin Lewis & Trapp, LLP  
13 350 California Street, 22<sup>nd</sup> Floor  
14 San Francisco, CA 94104-1435  
15 Telephone: (415) 228-5400  
16 Facsimile: (415) 228-5450  
17 Email: bhaughton@bargcoffin.com  
18 dmetres@bargcoffin.com

19 Attorneys for Defendant  
20 NUTRITION 53, INC.

21 SUPERIOR COURT OF THE STATE OF CALIFORNIA

22 COUNTY OF ALAMEDA

23 ENVIRONMENTAL RESEARCH  
24 CENTER, INC. a California non-profit  
25 corporation

26 Plaintiff,

27 v.

28 NUTRITION 53, INC. and DOES 1-100

Defendants.

CASE NO. RG16809437

STIPULATED CONSENT  
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: March 28, 2016

Trial Date: None set

1. INTRODUCTION

On March 28, 2016, Plaintiff Environmental Research Center, Inc. ("ERC"), a non-profit corporation, as a private enforcer, and in the public interest, initiated this action by filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the "Complaint") pursuant

1 to the provisions of California Health and Safety Code Section 25249.5 *et seq.* ("Proposition  
2 65"), against Nutrition 53, Inc. ("Nutrition 53") and Does 1-100. In this action, ERC alleges  
3 that a number of products manufactured, distributed or sold by Nutrition 53 contain lead, a  
4 chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and expose  
5 consumers to this chemical at a level requiring a Proposition 65 warning. These products  
6 (referred to hereinafter individually as a "Covered Product" or collectively as "Covered  
7 Products") are: (1) Nutrition53 Inc. Gainer1 Cookies & Cream, (2) Nutrition53 Inc. Gainer1  
8 Chocolate, (3) Nutrition53 Inc. Lean1 Banana, (4) Nutrition53 Inc. Lean1 Chocolate, (5)  
9 Nutrition53 Inc. Lean1 Chai, (6) Nutrition53 Inc. Lean1 Vanilla Raspberry, (7) Nutrition53 Inc.  
10 Neuro1 Chocolate, (8) Nutrition53 Inc. Vegan1 Chai, (9) Nutrition53 Inc. Lean1 Strawberry,  
11 (10) Nutrition 53 Inc. Protein1 Dutch Chocolate, (11) Nutrition 53 Inc. Protein1 Vanilla Bean,  
12 (12) Nutrition53 Inc. Vegan1 Chocolate, (13) Nutrition53 Inc. Vegan1 Vanilla, (14) Nutrition53  
13 Inc. Vegan1 Banana, (15) Nutrition53 Inc. Lean1 Vanilla, (16) Nutrition53 Inc. Lean1 Cookies  
14 & Cream, and (17) Nutrition53 Inc. Neuro1 Mixed Berry.

15 1.2 ERC and Nutrition 53 are hereinafter referred to individually as a "Party" or  
16 collectively as the "Parties."

17 1.3 ERC is a California non-profit corporation dedicated to, among other causes,  
18 helping safeguard the public from health hazards by reducing the use and misuse of hazardous  
19 and toxic chemicals, facilitating a safe environment for consumers and employees, and  
20 encouraging corporate responsibility.

21 1.4 For purposes of this Consent Judgment, the Parties agree that Nutrition 53 is a  
22 business entity that has employed ten or more persons at all times relevant to this action, and  
23 qualifies as a "person in the course of business" within the meaning of Proposition 65. Nutrition  
24 53 manufactures, distributes, and sells the Covered Products.

25 1.5 The Complaint is based on allegations contained in ERC's Notice of Violation  
26 dated November 5, 2015, that was served on the California Attorney General, other public  
27 enforcers, and Nutrition 53 ("Notice"). A true and correct copy of the Notice is attached as  
28 Exhibit A and is hereby incorporated by reference. More than 60 days have passed since the

1 Notice was served on the Attorney General, public enforcers, and Nutrition 53 and no  
2 designated governmental entity has filed a complaint against Nutrition 53 with regard to the  
3 Covered Products or the alleged violations.

4 1.6 ERC's Notice and Complaint allege that use of the Covered Products exposes  
5 persons in California to lead without first providing clear and reasonable warnings in violation  
6 of California Health and Safety Code Section 25249.6. Nutrition 53 denies all material  
7 allegations contained in the Notice and Complaint.

8 1.7 The Parties have entered into this Consent Judgment in order to settle,  
9 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.  
10 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of  
11 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,  
12 parent companies, subsidiaries, divisions, franchisees, licensees, customers, suppliers,  
13 distributors, wholesalers, or retailers. Except for the representations made above, nothing in  
14 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of  
15 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an  
16 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any  
17 purpose.

18 1.8 Except as expressly set forth herein, nothing in this Consent Judgment shall  
19 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
20 current or future legal proceeding unrelated to these proceedings.

21 1.9 The Effective Date of this Consent Judgment is the date on which it is entered as  
22 a Judgment by this Court.

## 23 2. JURISDICTION AND VENUE

24 For purposes of this Consent Judgment and any further court action that may become  
25 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter  
26 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction  
27 over Nutrition 53 as to the acts alleged in the Complaint, that venue is proper in Alameda County,  
28 and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of

1 all claims up through and including the Effective Date which were or could have been asserted in  
2 this action based on the facts alleged in the Notice and Complaint.

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

4 **3.1** Beginning on the Effective Date, Nutrition 53 shall be permanently enjoined  
5 from "Distributing into the State of California", or directly selling in the State of California,  
6 any Covered Product which exposes a person to a "Daily Lead Exposure Level" of more than  
7 0.5 micrograms per day unless it meets the warning requirements under Section 3.2.

8 **3.1.1** As used in this Consent Judgment, the term "Distributing into the State  
9 of California" shall mean to directly ship a Covered Product into California for sale in  
10 California or to sell a Covered Product to a distributor that Nutrition 53 knows will sell the  
11 Covered Product in California.

12 **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure  
13 Level" shall be measured in micrograms, and shall be calculated using the following formula:  
14 micrograms of lead per gram of product minus the amount of lead listed in Table 3.1.2,  
15 multiplied by grams of product per serving of the product (using the largest serving size  
16 appearing on the product label), multiplied by servings of the product per day (using the largest  
17 number of servings in a recommended dosage appearing on the product label), which equals  
18 micrograms of lead exposure per day.

19 If Nutrition 53 seeks to subtract out any amounts of naturally occurring lead listed in  
20 Table 3.1.2, Nutrition 53 shall provide ERC with the name of the Covered Product that  
21 Nutrition 53 contends contains naturally occurring lead, and a complete list showing all the  
22 ingredients in that Covered Product including the ingredients from Table 3.1.2 that are  
23 contained in the Covered Product, as well as the amount in grams per serving of each  
24 ingredient in the Covered Product. Nutrition 53 may update this information from time to time  
25 and will be entitled to submit this information to ERC confidentially.

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**TABLE 3.1.2**

INGREDIENT	NATURALLY OCCURRING AMOUNT OF LEAD
Elemental Calcium	0.8 micrograms/gram
Ferrous Fumarate	0.4 micrograms/gram
Zinc Oxide	8.0 micrograms/gram
Magnesium Oxide	0.4 micrograms/gram
Magnesium Carbonate	0.332 micrograms/gram
Magnesium Hydroxide	0.4 micrograms/gram
Zinc Gluconate	0.8 micrograms/gram
Potassium Chloride	1.1 micrograms/gram
Cocoa-powder	1.0 micrograms/gram

14 **3.2 Clear and Reasonable Warnings**

15 If Nutrition 53 is required to provide a warning pursuant to Section 3.1, the following  
16 warning must be utilized ("Warning"):

17 **WARNING:** This product can expose you to chemicals including lead which is known to the  
18 State of California to cause [cancer and] birth defects or other reproductive harm. For  
19 more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov). Nutrition 53 shall use the phrase "cancer  
20 and" in the Warning only if the "Daily Lead Exposure Level" is greater than 15 micrograms of  
21 lead as determined pursuant to the quality control methodology set forth in Section 3.4.

22 The Warning shall be securely affixed to or printed upon the container or label of each  
23 Covered Product. In addition, for Covered Products sold over Nutrition 53's website, the  
24 Warning shall appear on Nutrition 53's checkout page on its website for California consumers  
25 identifying any Covered Product, and also appear prior to completing checkout on Nutrition 53's  
26 website when a California delivery address is indicated for any purchase of any Covered  
27 Product.

28 The Warning shall be at least the same size as the largest of any other health or safety

1 warnings also appearing on its website or on the label or container of Nutrition 53's product  
2 packaging and the word "WARNING" shall be in all capital letters and in bold print. No  
3 statements contradicting or conflicting with the Warning shall accompany the Warning.

4 Nutrition 53 must display the above Warning with such conspicuousness, as compared  
5 with other words, statements, design of the label, container, or on its website, as applicable, to  
6 render the Warning likely to be read and understood by an ordinary individual under customary  
7 conditions of purchase or use of the product.

### 8 3.3 Reformulated Covered Products

9 A Reformulated Covered Product is one for which the "Daily Lead Exposure Level" is no  
10 greater than 0.5 micrograms of lead per day as determined by the quality control methodology  
11 described in Section 3.4.

### 12 3.4 Testing and Quality Control Methodology

13 3.4.1 Beginning within one year of the Effective Date, Nutrition 53 shall  
14 arrange for lead testing of the Covered Products at least once a year for a minimum of five  
15 consecutive years by arranging for testing of five randomly selected samples of each of the  
16 Covered Products, in the form intended for sale to the end-user, which Nutrition 53 intends to  
17 sell or is manufacturing for sale in California, directly selling to a consumer in California or  
18 "Distributing into the State of California." If tests conducted pursuant to this Section  
19 demonstrate that no Warning is required for a Covered Product during each of five consecutive  
20 years, then the testing requirements of this Section will no longer be required as to that Covered  
21 Product. However, if during or after the five-year testing period, Nutrition 53 changes  
22 ingredient suppliers for any of the Covered Products and/or reformulates any of the Covered  
23 Products, Nutrition 53 shall test that Covered Product annually for at least four (4) consecutive  
24 years after such change is made. The testing requirement does not apply to any of the Covered  
25 Products for which Nutrition 53 has provided the Warning specified in Section 3.2.

26 3.4.2 For purposes of measuring the "Daily Lead Exposure Level", the highest  
27 lead detection result of the five (5) randomly selected samples of the Covered Products will be  
28 controlling.

1           **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a  
2 laboratory method that complies with the performance and quality control factors appropriate  
3 for the method used, including limit of detection, qualification, accuracy, and precision that  
4 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")  
5 achieving a limit of quantification of less than or equal to 0.010 mg/kg or any other testing  
6 method subsequently agreed to in writing by the Parties and approved by the Court through  
7 entry of a modified consent judgment.

8           **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an  
9 independent third party laboratory certified by the California Environmental Laboratory  
10 Accreditation Program or an independent third-party laboratory that is registered with the  
11 United States Food & Drug Administration.

12           **3.4.5** Nothing in this Consent Judgment shall limit Nutrition 53's ability to  
13 conduct, or require that others conduct, additional testing of the Covered Products, including  
14 the raw materials used in their manufacture.

15           **3.4.6** Within thirty (30) days of ERC's written request, Nutrition 53 shall  
16 deliver lab reports obtained pursuant to Section 3.4 to ERC. Nutrition 53 shall retain all test  
17 results and documentation for a period of five years from the date of each test.

18 **4. SETTLEMENT PAYMENT**

19           **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil  
20 penalties, attorney's fees, and costs, Nutrition 53 shall make a total payment of \$82,500.00  
21 ("Total Settlement Amount") to ERC in ten consecutive monthly payments in the amount of  
22 \$5,000.00 for payments one through nine and the tenth payment of \$37,500.00 with the first  
23 payment due and owing within 5 days of the Effective Date and nine consecutive monthly  
24 payment due in 30 day increments thereafter. Nutrition 53 shall make these payments by wire  
25 transfer to ERC's escrow account, for which ERC will give Nutrition 53 the necessary account  
26 information. The Total Settlement Amount shall be apportioned as follows:

27           **4.2** \$25,699.31 shall be considered a civil penalty pursuant to California Health and  
28 Safety Code Section 25249.7(b)(1). ERC shall remit 75% (\$19,274.48) of the civil penalty to

1 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe  
2 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety  
3 Code Section 25249.12(c). ERC will retain the remaining 25% (\$6,424.83) of the civil penalty.

4 4.3 \$4,096.35 shall be distributed to ERC as reimbursement to ERC for reasonable  
5 costs incurred in bringing this action.

6 4.4 \$19,274.44 shall be distributed to ERC as an Additional Settlement Payment  
7 ("ASP"), pursuant to California Code of Regulations, title 27, sections 3203, subdivision (d) and  
8 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly  
9 caused by Defendant in this matter. These activities are detailed below and support ERC's  
10 overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary  
11 supplement products in California. ERC's activities have had, and will continue to have, a direct  
12 and primary effect within the State of California because California consumers will be benefitted  
13 by the reduction and/or elimination of exposure to lead in dietary supplements and/or by  
14 providing clear and reasonable warnings to California consumers prior to ingestion of the  
15 products.

16 Based on a review of past years' actual budgets, ERC is providing the following list of  
17 activities ERC engages in to protect California consumers through Proposition 65 citizen  
18 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those  
19 activities: (1) ENFORCEMENT (55-70%): obtaining, shipping, analyzing, and testing dietary  
20 supplement products that may contain lead and are sold to California consumers; continued  
21 monitoring and enforcement of past consent judgments and settlements to ensure companies are  
22 in compliance with their obligations thereunder, with a specific focus on those judgments and  
23 settlements concerning lead (which necessarily includes additional work purchasing, processing,  
24 analyzing and testing consumer products; litigating matters that result in defaults, bankruptcies,  
25 or dismissals; (2) VOLUNTARY COMPLIANCE PROGRAM (10-20%): maintaining ERC's  
26 Voluntary Compliance Program by acquiring products from companies, developing and  
27 maintaining a case file, testing products from these companies, providing the test results and  
28 supporting documentation to the companies, and offering guidance in implementing a self-testing



1 program for lead in dietary supplement products; (3) "GOT LEAD" PROGRAM (up to 5%);  
2 maintaining ERC's "Got Lead?" Program which reduces the numbers of contaminated products  
3 that reach California consumers by providing access to free testing for lead in dietary supplement  
4 products (Products submitted to the program are screened for ingredients which are suspected to  
5 be contaminated, and then may be purchased by ERC, catalogued, sent to a qualified laboratory  
6 for testing, and the results shared with the consumer that submitted the product); (4)  
7 DONATION: from this settlement, a donation of \$900.00 to Center For Environmental Health  
8 will be provided to address reducing toxic chemical exposures in California and following up  
9 with the recipient to ensure the funds are utilized in a manner that is consistent with ERC's  
10 mission and stated purpose of the Donation; (5) PUBLIC OUTREACH (up to 5%): public  
11 outreach programs including maintaining ERC's blog, website, and social media accounts; (6)  
12 SPECIAL PROJECTS (10-20%): projects including obtaining expert and legal opinions not  
13 specific to any one case that are necessary to the continued private enforcement of Proposition  
14 65 (7) SCHOLARSHIPS (up to 5%): scholarships for college students in California who have  
15 been or are currently diagnosed with cancer or who are pursuing an environmental health science  
16 major; and (8) PRODUCT DATABASE (up to 5%): maintaining a database with all products  
17 sold to California consumers that ERC has tested for lead, cadmium, or arsenic.

18 ERC will maintain adequate records to document that the funds paid as an ASP are spent  
19 on the activities described herein. ERC shall provide the Attorney General, within thirty days of  
20 any request, copies of documentation demonstrating how such funds have been spent.

21 4.5 \$4,590.00 shall be distributed to Michael Freund as reimbursement of ERC's  
22 attorney's fees, \$10,100.00 shall be distributed to Ryan Hoffman as reimbursement of ERC's  
23 attorney's fees, while \$18,739.90 shall be distributed to ERC for its in-house legal fees. Except  
24 as explicitly provided herein, each Party shall bear its own fees and costs.

25 4.6 In the event that Nutrition 53 fails to remit any of the settlement payments owed  
26 under Section 4 of this Consent Judgment on or before the due dates, Nutrition 53 shall be  
27 deemed to be in material breach of its obligations under this Consent Judgment. ERC shall  
28 provide written notice of the delinquency to Nutrition 53 via electronic mail. If Nutrition 53

1 fails to deliver the payment within five (5) days from the written notice, the Total Settlement  
2 Payment shall become immediately due and payable and shall accrue interest at the statutory  
3 judgment interest rate provided in the Code of Civil Procedure Section 685.010. Additionally,  
4 Nutrition 53 agrees to pay ERC's reasonable attorney's fees and costs for any efforts to collect  
5 the payment due under this Consent Judgment.

6 **5. MODIFICATION OF CONSENT JUDGMENT**

7 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by  
8 written stipulation of the Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a  
9 modified consent judgment.

10 **5.2** If Nutrition 53 seeks to modify this Consent Judgment under Section 5.1, then  
11 Nutrition 53 must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks  
12 to meet and confer regarding the proposed modification in the Notice of Intent, then ERC must  
13 provide written notice to Nutrition 53 within thirty (30) days of receiving the Notice of Intent.  
14 If ERC notifies Nutrition 53 in a timely manner of ERC's intent to meet and confer, then the  
15 Parties shall meet and confer in good faith as required in this Section. The Parties shall meet in  
16 person or via telephone within thirty (30) days of ERC's notification of its intent to meet and  
17 confer. Within thirty (30) days of such meeting, if ERC disputes the proposed modification,  
18 ERC shall provide to Nutrition 53 a written basis for its position. The Parties shall continue to  
19 meet and confer for an additional thirty (30) days in an effort to resolve any remaining disputes.  
20 Should it become necessary, the Parties may agree in writing to different deadlines for the  
21 meet-and-confer period.

22 **5.3** In the event that Nutrition 53 initiates or otherwise requests a modification under  
23 Section 5.1, and the meet and confer process leads to a joint motion or application of the  
24 Consent Judgment, Nutrition 53 shall reimburse ERC its costs and reasonable attorney's fees  
25 for the time spent in the meet-and-confer process and filing and arguing the motion or  
26 application.

1       **5.4**   Where the meet-and-confer process does not lead to a joint motion or  
2 application in support of a modification of the Consent Judgment, then either Party may seek  
3 judicial relief on its own.

4       **6.   RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
5       **JUDGMENT**

6       **6.1**   This Court shall retain jurisdiction of this matter to enforce, modify or terminate  
7 this Consent Judgment.

8       **6.2**   If ERC alleges that any Covered Product fails to qualify as a Reformulated  
9 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall  
10 inform Nutrition 53 in a reasonably prompt manner of its test results, including information  
11 sufficient to permit Nutrition 53 to identify the Covered Products at issue. Nutrition 53 shall,  
12 within thirty (30) days following such notice, provide ERC with testing information, from an  
13 independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,  
14 demonstrating Nutrition 53's compliance with the Consent Judgment, if warranted. The Parties  
15 shall first attempt to resolve the matter prior to ERC taking any further legal action.

16       **7.   APPLICATION OF CONSENT JUDGMENT**

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

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

24       **8.1**   This Consent Judgment is a full, final, and binding resolution between ERC, on  
25 behalf of itself and in the public interest, and Nutrition 53 and its respective officers, directors,  
26 shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,  
27 franchisees, licensees, customers (not including private label customers of Nutrition 53),  
28 distributors, wholesalers, retailers, and all other upstream and downstream entities in the

1 distribution chain of any Covered Product, and the predecessors, successors and assigns of any  
2 of them (collectively, "Released Parties"). ERC hereby fully releases and discharges the  
3 Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities,  
4 damages, penalties, fees, costs, and expenses asserted, or that could have been asserted from  
5 the handling, use, or consumption of the Covered Products, as to any alleged violation of  
6 Proposition 65 or its implementing regulations arising from the failure to provide Proposition  
7 65 warnings on the Covered Products regarding lead up to and including the Effective Date.

8       **8.2** ERC on its own behalf only, and Nutrition 53 on its own behalf only, further  
9 waive and release any and all claims they may have against each other for all actions or  
10 statements made or undertaken in the course of seeking or opposing enforcement of Proposition  
11 65 in connection with the Notice or Complaint up through and including the Effective Date,  
12 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to  
13 enforce the terms of this Consent Judgment.

14       **8.3** It is possible that other claims not known to the Parties arising out of the facts  
15 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be  
16 discovered. ERC on behalf of itself only, and Nutrition 53, on behalf of itself only,  
17 acknowledge that this Consent Judgment is expressly intended to cover and include all such  
18 claims up through and including the Effective Date, including all rights of action therefore.  
19 ERC and Nutrition 53 acknowledge that the claims released in Sections 8.1 and 8.2 above may  
20 include unknown claims, and nevertheless waive California Civil Code Section 1542 as to any  
21 such unknown claims. California Civil Code Section 1542 reads as follows:

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

25 ERC on behalf of itself only, and Nutrition 53, acknowledge and understand the significance  
26 and consequences of this specific waiver of California Civil Code Section 1542.

1       8.4    Compliance with the terms of this Consent Judgment shall be deemed to  
2 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead  
3 in the Covered Products as set forth in the Notice and the Complaint.

4       8.5    Nothing in this Consent Judgment is intended to apply to any occupational or  
5 environmental exposures arising under Proposition 65, nor shall it apply to any of Nutrition  
6 53's products other than the Covered Products.

7       **9.    SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

10      **10.   GOVERNING LAW**

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

13      **11.   PROVISION OF NOTICE**

14      All notices required to be given to either Party to this Consent Judgment by the other shall  
15 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via  
16 email may also be sent.

17      **FOR ENVIRONMENTAL RESEARCH CENTER, INC.:**

18      Chris Heptinstall, Executive Director, Environmental Research Center  
19      3111 Camino Del Rio North, Suite 400  
20      San Diego, CA 92108  
21      Tel: (619) 500-3090  
22      Email: chris\_erc501c3@yahoo.com

23      With a copy to:  
24      Michael Freund  
25      Ryan Hoffman  
26      Michael Freund & Associates  
27      1919 Addison Street, Suite 105  
28      Berkeley, CA 94704  
29      Telephone: (510) 540-1992  
30      Facsimile: (510) 540-5543

1 **NUTRITION 53, INC.**

2 Pete Olander  
3 Nutriton53  
4 3706 Mt. Diablo Blvd.  
5 Lafayette CA, 94549  
6 Telephone: (925) 283-5325  
7 Email: [peteo@nutrition53.com](mailto:peteo@nutrition53.com)

8 With a copy to:  
9 Brian S. Haughton  
10 David M. Metres  
11 Barg Coffin Lewis & Trapp, LLP  
12 350 California Street, 22<sup>nd</sup> Floor  
13 San Francisco, CA 94104-1435  
14 Telephone: (415) 228-5400  
15 Facsimile: (415) 228-5450  
16 Email: [bhaughton@bargcoffin.com](mailto:bhaughton@bargcoffin.com) [dmetres@bargcoffin.com](mailto:dmetres@bargcoffin.com)

12 **12. COURT APPROVAL**

13 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
14 Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
15 Consent Judgment.

16 **12.2** If the California Attorney General objects to any term in this Consent Judgment,  
17 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible  
18 prior to the hearing on the motion.

19 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be  
20 void and have no force or effect.

21 **13. EXECUTION AND COUNTERPARTS**

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

25 **14. DRAFTING**

26 The terms of this Consent Judgment have been reviewed by the respective counsel for each  
27 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and  
28 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and

1 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,  
2 and no provision of this Consent Judgment shall be construed against any Party, based on the fact  
3 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any  
4 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated  
5 equally in the preparation and drafting of this Consent Judgment.

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

7 If a dispute arises with respect to either Party's compliance with the terms of this Consent  
8 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in  
9 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be  
10 filed in the absence of such a good faith attempt to resolve the dispute beforehand.

11 **16. ENFORCEMENT**

12 ERC may, by motion or order to show cause before the Superior Court of Alameda  
13 County, enforce the terms and conditions contained in this Consent Judgment. In any action  
14 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,  
15 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.  
16 To the extent the failure to comply with the Consent Judgment constitutes a violation of  
17 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent Judgment,  
18 but may seek in another action whatever fines, costs, penalties, or remedies as are provided by  
19 law for failure to comply with Proposition 65 or other laws.

20 **17. ENTIRE AGREEMENT, AUTHORIZATION**

21 **17.1** This Consent Judgment contains the sole and entire agreement and  
22 understanding of the Parties with respect to the entire subject matter herein, and any and all  
23 prior discussions, negotiations, commitments, and understandings related hereto. No  
24 representations, oral or otherwise, express or implied, other than those contained herein have  
25 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to  
26 herein, shall be deemed to exist or to bind any Party.

27 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully  
28 authorized by the Party he or she represents to stipulate to this Consent Judgment.

1 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
2 **CONSENT JUDGMENT**

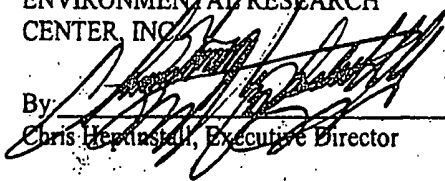
3 This Consent Judgment has come before the Court upon the request of the Parties. The  
4 Parties request the Court to fully review this Consent Judgment and, being fully informed  
5 regarding the matters which are the subject of this action, to:

- 6 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
7 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has  
8 been diligently prosecuted, and that the public interest is served by such settlement; and  
9 (2) Make the findings pursuant to California Health and Safety Code section  
10 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

11 **IT IS SO STIPULATED:**


12 Dated: 11/30/, 2016

ENVIRONMENTAL RESEARCH  
CENTER, INC.

By:   
Chris Hestings, Executive Director

15 Dated: 11/30/16, 2016

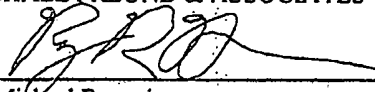
NUTRITION 53, INC.

  
By: Peter Olander  
Its: Operations

19 **APPROVED AS TO FORM:**

20 Dated: 11/30, 2016

MICHAEL FREUND & ASSOCIATES

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



1 Dated: 11/30, 2016

BARG COFFIN LEWIS & TRAPP, LLP

2 By: David M. Metres  
3 Brian S. Houghton  
4 David M. Metres  
5 Attorneys for Defendant Nutrition 53, Inc.

6  
7  
8 **ORDER AND JUDGMENT**

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

11 IT IS SO ORDERED, ADJUDGED AND DECREED.

12 Dated: 4/12/17

13 V. K. Kohler  
14 Judge of the Superior Court

**Michael Freund & Associates**

1919 Addison Street, Suite 105  
Berkeley, CA 94704  
Voice: 510.540.1992 • Fax: 510.540.5543

Michael Freund, Esq.  
Ryan Hoffman, Esq.

OF COUNSEL:  
Denise Ferkich Hoffman, Esq.

November 5, 2015

**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:

**Nutrition 53, Inc.**

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

- Nutrition53 Inc. Gainer1 Cookies & Cream - Lead
- Nutrition53 Inc. Gainer1 Chocolate - Lead
- Nutrition53 Inc. Lean1 Banana - Lead
- Nutrition53 Inc. Lean1 Chocolate - Lead
- Nutrition53 Inc. Lean1 Chai - Lead
- Nutrition53 Inc. Lean1 Vanilla Raspberry - Lead
- Nutrition53 Inc. Neuro1 Chocolate - Lead
- Nutrition53 Inc. Vegan1 Chai - Lead

**Exhibit A**

November 5, 2015

Page 2

- Nutrition53 Inc. Lean1 Strawberry - Lead
- Nutrition 53 Inc. Protein1 Dutch Chocolate - Lead
- Nutrition 53 Inc. Protein1 Vanilla Bean - Lead
- Nutrition53 Inc. Vegan1 Chocolate - Lead
- Nutrition53 Inc. Vegan1 Vanilla - Lead
- Nutrition53 Inc. Vegan1 Banana - Lead
- Nutrition53 Inc. Lean1 Vanilla - Lead
- Nutrition53 Inc. Lean1 Cookies & Cream - Lead
- Nutrition53 Inc. Neuro1 Mixed Berry - 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 this chemical has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

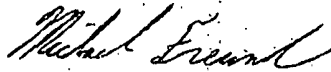
**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least November 5, 2012, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers 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 handling and/or using 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.

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
November 5, 2015  
Page 3

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violation to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



---

Michael Freund

Attachments

- Certificate of Merit
- Certificate of Service
- EHHA Summary (to Nutrition 53, Inc. and its Registered Agent 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 Nutrition 53, Inc.**

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.

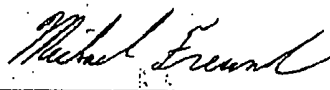
2. I am an attorney for the noticing party.

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.

Dated: November 5, 2015



Michael Freund

**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 November 5, 2015, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to 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  
Nutrition 53, Inc.  
3706 Mount Diablo Boulevard  
Lafayette, CA 94549

Gerry Niesar  
(Nutrition 53, Inc.'s Registered  
Agent for Service of Process)  
90 New Montgomery Street, Suite 900  
San Francisco, CA 94105

On November 5, 2015, 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>:

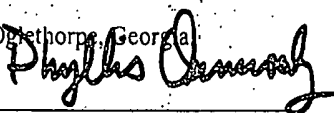
Office of the California Attorney General  
Prop 65 Enforcement Reporting  
1515 Clay Street, Suite 2000  
Oakland, CA 94612-0550

On November 5, 2015, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following party when a true and correct copy thereof was sent via electronic mail to the party listed below:

Yolo County District Attorney  
301 2<sup>nd</sup> Street  
Woodland, CA 95695  
[cfepd@yolocounty.org](mailto:cfepd@yolocounty.org)

On November 5, 2015, 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 November 5, 2015, in Fort Oglethorpe, Georgia

  
\_\_\_\_\_  
Phyllis Dunwoody

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

November 5, 2015

Page 6

Service List

District Attorney, Alameda County  
1225 Fallon Street, Suite 900  
Oakland, CA 94612

District Attorney, Alpine County  
P.O. Box 248  
Markleeville, CA 96120

District Attorney, Amador County  
708 Court Street  
Jackson, CA 95642

District Attorney, Butte County  
25 County Center Drive, Suite 245  
Oroville, CA 95965

District Attorney, Calaveras County  
891 Mountain Ranch Road  
San Andreas, CA 95249

District Attorney, Colusa County  
346 Fifth Street Suite 101  
Colusa, CA 95932

District Attorney, Contra Costa County  
900 Ward Street  
Martinez, CA 94553

District Attorney, Del Norte County  
450 H Street, Room 171  
Crescent City, CA 95531

District Attorney, El Dorado County  
515 Main Street  
Placerville, CA 95667

District Attorney, Fresno County  
2220 Tulare Street, Suite 1000  
Fresno, CA 93721

District Attorney, Glenn County  
Post Office Box 430  
Willows, CA 95988

District Attorney, Humboldt County  
825 5th Street 4<sup>th</sup> Floor  
Eureka, CA 95501

District Attorney, Imperial County  
940 West Main Street, Ste 102  
El Centro, CA 92243

District Attorney, Inyo County  
230 W. Line Street  
Rishop, CA 93514

District Attorney, Kern County  
1215 Truxtun Avenue  
Bakersfield, CA 93301

District Attorney, Kings County  
1400 West Lacey Boulevard  
Hanford, CA 93230

District Attorney, Lake County  
255 N. Forbes Street  
Lakewood, CA 95453

District Attorney, Lassen County  
220 South Lassen Street, Ste. 8  
Susanville, CA 96130

District Attorney, Los Angeles County  
210 West Temple Street, Suite 18000  
Los Angeles, CA 90012

District Attorney, Madera County  
209 West Yosemite Avenue  
Madera, CA 93637

District Attorney, Marin County  
3501 Civic Center Drive, Room 130  
San Rafael, CA 94903

District Attorney, Mariposa County  
Post Office Box 730  
Mariposa, CA 95338

District Attorney, Mendocino County  
Post Office Box 1000  
Ukiah, CA 95482

District Attorney, Merced County  
550 W. Main Street  
Merced, CA 95340

District Attorney, Modoc County  
204 S Court Street, Room 202  
Alturas, CA 96101-4020

District Attorney, Mono County  
Post Office Box 617  
Bridgeport, CA 93517

District Attorney, Monterey County  
Post Office Box 1131  
Salinas, CA 93902

District Attorney, Napa County  
931 Parkway Mall  
Napa, CA 94559

District Attorney, Nevada County  
201 Commercial Street  
Nevada City, CA 95959

District Attorney, Orange County  
401 West Civic Center Drive  
Santa Ana, CA 92701

District Attorney, Placer County  
10810 Justice Center Drive, Ste 240  
Roseville, CA 95678

District Attorney, Plumas County  
520 Main Street, Room 404  
Quincy, CA 95971

District Attorney, Riverside County  
3960 Orange Street  
Riverside, CA 92501

District Attorney, Sacramento County  
901 "G" Street  
Sacramento, CA 95814

District Attorney, San Benito County  
419 Fourth Street, 2nd Floor  
Hollister, CA 95023

District Attorney, San Bernardino County  
316 N. Mountain View Avenue  
San Bernardino, CA 92415-0004

District Attorney, San Diego County  
330 West Broadway, Suite 1300  
San Diego, CA 92101

District Attorney, San Francisco County  
850 Bryant Street, Suite 322  
San Francisco, CA 94103

District Attorney, San Joaquin County  
222 E. Weber Ave. Rm. 202  
Stockton, CA 95202

District Attorney, San Luis Obispo County  
1035 Palm St, Room 450  
San Luis Obispo, CA 93408

District Attorney, San Mateo County  
400 County Cir., 3rd Floor  
Redwood City, CA 94063

District Attorney, Santa Barbara County  
1112 Santa Barbara Street  
Santa Barbara, CA 93101

District Attorney, Santa Clara County  
70 West Hedding Street  
San Jose, CA 95110

District Attorney, Santa Cruz County  
701 Ocean Street, Room 200  
Santa Cruz, CA 95060

District Attorney, Shasta County  
1355 West Street  
Redding, CA 96001

District Attorney, Sierra County  
PO Box 457  
Downsville, CA 95936

District Attorney, Siskiyou County  
Post Office Box 986  
Yreka, CA 96097

District Attorney, Solano County  
675 Texas Street, Ste 4500  
Fairfield, CA 94533

District Attorney, Sonoma County  
600 Administration Drive,  
Room 212J  
Santa Rosa, CA 95403

District Attorney, Stanislaus County  
832 12th Street, Ste 300  
Modesto, CA 95354

District Attorney, Sutter County  
446 Second Street  
Yuba City, CA 95991

District Attorney, Tehama County  
Post Office Box 519  
Red Bluff, CA 96080

District Attorney, Trinity County  
Post Office Box 310  
Weaverville, CA 96093

District Attorney, Tulare County  
221 S. Mooney Blvd., Room 224  
Visalia, CA 93291

District Attorney, Tuolumne County  
423 N. Washington Street  
Sonora, CA 95370

District Attorney, Ventura County  
800 South Victoria Ave, Suite 314  
Ventura, CA 93009

District Attorney, Yuba County  
215 Fifth Street, Suite 152  
Marysville, CA 95901

Los Angeles City Attorney's Office  
City Hall East  
200 N. Main Street, Suite 800  
Los Angeles, CA 90012

San Diego City Attorney's Office  
1200 3rd Avenue, Ste 1620  
San Diego, CA 92101

San Francisco, City Attorney  
City Hall, Room 234  
1 Dr Carlton B Goodlett PL  
San Francisco, CA 94102

San Jose City Attorney's Office  
200 East Santa Clara Street,  
16th Floor  
San Jose, CA 95113

27 CCR Appendix A

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. Please refer 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.

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 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 say 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 Periods.** 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.

#### **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 private party may not file an action against the alleged violator for these exposures, or recover in a settlement any payment in lieu of penalties any reimbursement for costs and attorney's fees, if the notice was served on or after October 5, 2013, and the alleged violator has done *all* of the following within 14 days of being served notice:

- Corrected the alleged violation;
- Agreed to pay a civil penalty of \$5B500 (subject to change as noted below) to the private party within 30 days; and
- Notified the private party serving the notice in writing that the violation has been corrected.

The written notification to the private-party must include a notice of special compliance procedure and proof of compliance form completed by the alleged violator as directed in the notice. On April 1, 2019, and every five years thereafter, the dollar amount of the civil penalty will be adjusted by the Judicial Council based on the change in the annual California Consumer Price Index. The Judicial Council will publish the dollar amount of the adjusted civil penalty at each five-year interval, together with the date of the next scheduled adjustment.

An alleged violator may satisfy these conditions only one time for a violation arising from the same exposure in the same facility or on the same premises. The satisfaction of these conditions does not prevent the Attorney General, a district attorney, a city attorney of a city of greater than 750,000 population, or any full-time city prosecutor with the consent of the district attorney, from filing an enforcement action against an alleged violator. The amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator for the same alleged violation to a private-party.

A copy of the notice of special compliance procedure and proof of compliance form is included with this notice and can be downloaded from OEHHA's website at: <http://oehha.ca.gov/prop65/law/p65law72003.html>.

The notice is reproduced here:

Page 1

Date: November 5, 2015

Name of Noticing Party or attorney for Noticing Party: Environmental Research Center, Inc.

Address: 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108

Phone number: 619-500-3090

## **SPECIAL COMPLIANCE PROCEDURE**

### **PROOF OF COMPLIANCE**

You are receiving this form because the Noticing Party listed above has alleged that you are violating California Health and Safety Code §25249.6 (Prop. 65).

**The Noticing Party may not bring any legal proceedings against you for the alleged violation checked below if:**

1. You have actually taken the corrective steps that you have certified in this form
2. The Noticing Party has received this form at the address shown above, accurately completed by you, postmarked within 14 days of your receiving this notice
3. The Noticing Party receives the required \$500 penalty payment from you at the address shown above postmarked within 30 days of your receiving this notice.
4. This is the first time you have submitted a Proof of Compliance for a violation arising from the same exposure in the same facility on the same premises.

### **PART I: TO BE COMPLETED BY THE NOTICING PARTY OR ATTORNEY FOR THE NOTICING PARTY**

The alleged violation is for an exposure to: (check one)

Alcoholic beverages that are consumed on the alleged violator's premises to the extent on-site consumption is permitted by law.

A chemical known to the state to cause cancer or reproductive toxicity in a food or beverage prepared and sold on the alleged violator's premises for immediate consumption on or off premises to the extent: (1) the chemical was not intentionally added; and (2) the chemical 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.

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.

Chemicals known to the State to cause cancer or reproductive toxicity in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking noncommercial vehicles.

### **IMPORTANT NOTES:**

1. You have no potential liability under California Health and Safety Code §25249.6 if your business has nine (9) or fewer employees.
2. Using this form will NOT prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action over the same alleged violations, and that in any such action, the amount of civil penalty shall be reduced to reflect any payment made at this time.

Page 2

Date: November 5, 2015

Name of Noticing Party or attorney for Noticing Party: Environmental Research Center, Inc.  
Address: 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108  
Phone number: 619-500-3090

**PART 2: TO BE COMPLETED BY THE ALLEGED VIOLATOR OR AUTHORIZED REPRESENTATIVE**

**Certification of Compliance**

Accurate completion of this form will demonstrate that you are now in compliance with California Health and Safety Code §25249.6 for the alleged violation listed above. You must complete and submit the form below to the Noticing Party at the address shown above, postmarked within 14 days of you-receiving this notice.

I hereby agree to pay, within 30 days of completion of this notice, a civil penalty of \$500 to the Noticing Party only and certify that I have complied with Health and Safety Code §25249.6 by (check only one of the following):

- Posting a warning or warnings about the alleged exposure that complies with the law, and attaching a copy of that warning and a photograph accurately showing its placement on my premises;
- Posting the warning or warnings demanded in writing by the Noticing Party, and attaching a copy of that warning and a photograph accurately its placement on my premises; OR
- Eliminating the alleged exposure, and attaching a statement accurately describing how the alleged exposure has been eliminated.

**Certification**

My statements on this form, and on any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I have carefully read the instructions to complete this form. I understand that if I make a false statement on this form, I may be subject to additional penalties under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65).

\_\_\_\_\_  
Signature of alleged violator or authorized representative Date

\_\_\_\_\_  
Name and title of signatory

**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 2014

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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>.

<sup>2</sup> See Section 25501(a)(4).

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.

#### **HISTORY**

1. New Appendix A filed 4-22-97; operative 4-22-97 pursuant to Government Code section 11343.4(d) (Register 97, No. 17).

2. Amendment filed 1-7-2003; operative 2-6-2003 (Register 2003, No. 2).

3. Change without regulatory effect renumbering title 22, section 12903 and Appendix A to title 27, section 25903 and Appendix A, including amendment of appendix, filed 6-18-2008 pursuant to section 100, title 1, California Code of Regulations (Register 2008, No. 25).

4. Amendment filed 11-19-2012; operative 12-19-2012 (Register 2012, No. 47).

5. Amendment of appendix and Note filed 11-19-2014; operative 1-1-2015 (Register 2014, No. 47).

This database is current through 9/18/15 Register 2015, No. 38

27 CCR-Appendix A, 27 CA ADC Appendix A