



OCU 25 2016

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BPI SPORTS, LLC dba CUTLER NUTRITION

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

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

Plaintiff,

v.

BPI SPORTS, LLC dba CUTLER  
NUTRITION, a Florida Limited Liability  
Company,

Defendants.

CASE NO. *R616830792*

STIPULATED CONSENT  
JUDGMENT; ~~PROPOSED~~  
~~ORDER~~

Health & Safety Code § 25249.5 et  
seq.

Action Filed: September 12, 2016  
Trial Date: None set

BY FAX

1. INTRODUCTION

1.1 On September 12, 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 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 Defendant BPI SPORTS, LLC dba CUTLER NUTRITION ("BPI SPORTS"), a  
3 Florida Limited Liability Company ("BPI SPORTS" or "Defendant"). In this action, ERC  
4 alleges that a number of products manufactured, distributed or sold by Defendant contain lead, a  
5 chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and expose  
6 consumers to this chemical at a level requiring a Proposition 65 warning. These products named  
7 in ERC's complaint (referred to hereinafter individually as a "Covered Product" or collectively  
8 as "Covered Products") are:

- 9 • Cutler Nutrition Total Protein Banana Cream Pie
- 10 • Cutler Nutrition Total Protein Strawberry Graham Cracker
- 11 • Cutler Nutrition Total Protein S'mores – Lead
- 12 • Cutler Nutrition Total Protein Chocolate Brownie
- 13 • Cutler Nutrition Total Protein Creamy Vanilla

14 1.2 ERC and Defendant are hereinafter referred to individually as a "Party" or  
15 collectively as the "Parties."

16 1.3 ERC is a California non-profit corporation dedicated to, among other causes,  
17 helping safeguard the public from health hazards by reducing the use and misuse of hazardous  
18 and toxic chemicals, facilitating a safe environment for consumers and employees, and  
19 encouraging corporate responsibility.

20 1.4 BPI SPORTS qualifies as a "person in the course of business" within the meaning  
21 of Proposition 65. BPI SPORTS manufactures, distributes and sells the Covered Products.

22 1.5 The Complaint is based on allegations contained in ERC's Notice of Violation  
23 dated January 13, 2016, that was served on the California Attorney General, other public  
24 enforcers, and BPI SPORTS ("Notice"). A true and correct copy of the Notice is attached as  
25 Exhibit A and is hereby incorporated by reference. More than 60 days have passed since the  
26 Notice was mailed and uploaded to the Attorney General's website, and no designated  
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1 governmental entity has filed a complaint against BPI SPORTS with regard to the Covered  
2 Products or the alleged violations.

3       1.6     ERC's Notice and Complaint allege that use of the Covered Products exposes  
4 persons in California to lead without first providing clear and reasonable warnings, in violation  
5 of California Health and Safety Code section 25249.6. BPI SPORTS denies all material  
6 allegations contained in the Notice and Complaint.

7       1.7     The Parties have entered into this Consent Judgment in order to settle,  
8 compromise and resolve disputed claims and thus avoid prolonged and costly litigation. Nothing  
9 in this Consent Judgment shall constitute, or be construed, as an admission by any of the Parties,  
10 or by any of their respective officers, directors, shareholders, employees, agents, parent  
11 companies, subsidiaries, divisions, franchisees, licensees, customers, suppliers, distributors,  
12 wholesalers, or retailers. Except for the representations made above, nothing in this Consent  
13 Judgment shall be construed as an admission by the Parties of any fact, issue of law, or violation  
14 of law, nor shall compliance with this Consent Judgment be construed as an admission by the  
15 Parties of any fact, issue of law, or violation of law, at any time, for any purpose.

16       1.8     Except as expressly set forth herein, nothing in this Consent Judgment shall  
17 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
18 other or future legal proceeding unrelated to these proceedings.

19       1.9     The Effective Date of this Consent Judgment is the date on which it is entered as  
20 a Judgment by this Court.

21     **2.    JURISDICTION AND VENUE**

22               For purposes of this Consent Judgment and any further court action that may  
23 become necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject  
24 matter jurisdiction over the allegations of violations contained in the Complaint, personal  
25 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in Alameda  
26 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final  
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1 resolution of all claims up through and including the Effective Date which were or could have been  
2 asserted in this action based on the facts alleged in the Notice and Complaint.

3 **3. INJUNCTIVE RELIEF**

4 Except as expressly set forth herein, commencing on the Effective Date, BPI SPORTS  
5 shall be permanently enjoined from manufacturing for sale in the State of California, marketing  
6 or "Distributing into the State of California," and directly selling any of the Covered Products in  
7 the State of California. "Distributing into the State of California" shall mean to directly ship a  
8 Covered Product into California for sale in California or to sell a Covered Product to a distributor  
9 that BPI SPORTS knows intends to or will sell the Covered Product in California. Covered  
10 Products manufactured before the Effective Date are not subject to the obligations imposed by  
11 section 3 irrespective of when they are sold. The final lot numbers of Covered Products  
12 manufactured before the Effective Date will be provided to ERC no more than (20) twenty days  
13 after the Effective Date and such Covered Products will not be covered by this permanent  
14 injunction.

15 **4. SETTLEMENT PAYMENT**

16 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil  
17 penalties, attorney's fees, and costs, Defendant shall make a total payment of \$72,000.00 ("Total  
18 Settlement Amount") in settlement payments to ERC on the following schedule: An initial  
19 payment of Eighteen Thousand Dollars (\$18,000) shall be made to ERC fourteen (14) days after  
20 the Effective Date (the Initial Payment), followed by three (3) payments in the amount of  
21 Eighteen Thousand Dollars (\$18,000) each payable no later than thirty (30), sixty (60) and ninety  
22 (90) days after the Initial Payment. Defendant shall make these payments by wire transfer to  
23 ERC's escrow account, for which ERC will give Defendant the necessary account information.  
24 The Total Settlement Amount shall be apportioned as follows:

25 **4.2** \$19,500.00 shall be considered a civil penalty pursuant to California Health and  
26 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$14,625.00) of the civil penalty to the  
27 Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe  
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1 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety  
2 Code §25249.12(c). ERC will retain the remaining 25% (\$4,875.00) of the civil penalty.

3 4.3 \$1,002.94 shall be distributed to ERC as reimbursement to ERC for reasonable  
4 costs incurred in bringing this action.

5 4.4 \$19,122.36 shall be distributed to ERC in lieu of further civil penalties, for the  
6 day-to-day business activities such as (1) continued enforcement of Proposition 65, which  
7 includes work, analyzing, researching and testing consumer products that may contain  
8 Proposition 65 chemicals, focusing on the same or similar type of ingestible products that are the  
9 subject matter of the current action; (2) the continued monitoring of past consent judgments and  
10 settlements to ensure companies are in compliance with Proposition 65; and (3) giving a  
11 donation of \$950.00 to the As You Sow to address reducing toxic chemical exposures in  
12 California.

13 4.5 \$17,610.50 shall be distributed to Adams Broadwell Joseph & Cardozo as  
14 reimbursement of ERC's attorney's fees, while \$14,764.20 shall be distributed to ERC for its  
15 in-house legal fees.

16 4.6 In the event that Defendant fails to remit the Total Settlement Payment owed  
17 under Section 4 of this Consent Judgment on or before the due dates, Defendant shall be deemed  
18 to be in material breach of its obligations under this Consent Judgment. ERC shall provide  
19 written notice of the delinquency to Defendant via electronic mail. If Defendant fails to deliver  
20 the Total Settlement Payment within ten (10) days from receipt of the written notice, the Total  
21 Settlement Payment shall become immediately due and payable and shall accrue interest at the  
22 statutory judgment interest rate provided in the Code of Civil Procedure section 685.010.  
23 Additionally, Defendant agrees to pay ERC's reasonable attorney's fees and costs for any efforts  
24 to collect the payment due under this Consent Judgment.

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1     **5.   MODIFICATION OF CONSENT JUDGMENT**

2           **5.1**   This Consent Judgment may be modified only as to injunctive terms (i) by written  
3 stipulation of the Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified  
4 consent judgment.

5           **5.2**   If one Defendant seeks to modify this Consent Judgment pursuant to Section 5.1,  
6 then Defendant must provide written notice to ERC of its intent ("Notice of Intent"). If ERC  
7 seeks to meet and confer regarding the proposed modification in the Notice of Intent, then ERC  
8 must provide written notice to Defendant within thirty days of receiving the Notice of Intent. If  
9 ERC notifies Defendant in a timely manner of ERC's intent to meet and confer, then the Parties  
10 shall meet and confer in good faith as required in this Section. The Parties shall meet in person  
11 or via telephone within thirty (30) days of ERC's notification of its intent to meet and confer.  
12 Within thirty days of such meeting, if ERC disputes the proposed modification, ERC shall  
13 provide to Defendant a written basis for its position. The Parties shall continue to meet and  
14 confer for an additional thirty (30) days in an effort to resolve any remaining disputes. Should it  
15 become necessary, the Parties may agree in writing to different deadlines for the  
16 meet-and-confer period.

17           **5.3**   In the event that Defendant initiates or otherwise request a modification pursuant  
18 Section 5.1, and the meet and confer process leads to a joint motion or application of the Consent  
19 Judgment, Defendant shall reimburse ERC its costs and reasonable attorney's fees for the time  
20 spent in the meet-and-confer process and filing and arguing the motion or application.

21           **5.4**   Where the meet-and-confer process does not lead to a joint motion or application  
22 in support of a modification of the Consent Judgment, then either Party may seek judicial relief  
23 on its own.

24     **6.   RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
25           **JUDGMENT**

26           This Court shall retain jurisdiction of this matter to enforce, modify or terminate this  
27 Consent Judgment.

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1       **7. APPLICATION OF CONSENT JUDGMENT**

2           This Consent Judgment applies to, shall be binding upon, and benefit the Parties and their  
3       respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,  
4       divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers,  
5       retailers, predecessors, successors, and assigns. This Consent Judgment shall have no  
6       application to Covered Products which are distributed or sold exclusively outside the State of  
7       California and which are not used by California consumers.

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

9           **8.1**       This Consent Judgment is a full, final, and binding resolution between ERC,  
10       on behalf of itself and in the public interest; BPI SPORTS and its respective officers, directors,  
11       shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,  
12       franchisees, licensees, customers (not including private label customers of BPI SPORTS),  
13       distributors, wholesalers, retailers, and all other upstream and downstream entities in the  
14       distribution chain of any Covered Product including, but not limited to, bodybuilding.com,  
15       Europa and Muscle Strength ("Released Parties"). ERC hereby fully releases and discharges the  
16       Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities,  
17       damages, penalties, fees, costs and expenses asserted, or that could have been asserted from the  
18       handling, use, or consumption of the Covered Products, as to any alleged violation of  
19       Proposition 65 or its implementing regulations arising from the failure to provide Proposition 65  
20       warnings on the Covered Products regarding lead up to and including the Effective Date.

21           **8.2**       ERC on its own behalf only, on one hand, and Defendant on its own behalf  
22       only, on the other, further waive and release any and all claims they may have against each other  
23       for all actions or statements made or undertaken in the course of seeking or opposing  
24       enforcement of Proposition 65 in connection with the Notice or Complaint up through and  
25       including the Effective Date; provided, however, that nothing in Section 8 shall affect or limit  
26       any Party's right to seek to enforce the terms of this Consent Judgment.

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1           8.3     It is possible that other claims not known to the Parties arising out of the facts  
2 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be  
3 discovered. ERC on behalf of itself only, on one hand, and Defendant, on the other hand,  
4 acknowledge that this Consent Judgment is expressly intended to cover and include all such  
5 claims up through the Effective Date, including all rights of action therefore. ERC and  
6 Defendant acknowledge that the claims released in Sections 8.1 and 8.2 above may include  
7 unknown claims, and nevertheless waive California Civil Code section 1542 as to any such  
8 unknown claims. California Civil Code section 1542 reads as follows:

9           A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
10           CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR  
11           AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR  
12           HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH  
13           THE DEBTOR.

14           ERC on behalf of itself only, on the one hand, and Defendant, on the other hand, acknowledge  
15 and understand the significance and consequences of this specific waiver of California Civil  
16 Code section 1542.

17           8.4     Compliance with the terms of this Consent Judgment shall be deemed to  
18 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead in  
19 the Covered Products as set forth in the Notice and the Complaint.

20           8.5     Nothing in this Consent Judgment is intended to apply to any occupational or  
21 environmental exposures arising under Proposition 65, nor shall it apply to any of Defendant's  
22 products other than the Covered Products.

## 23     9.     **SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

## 26     10.    **GOVERNING LAW**

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



.1 **11. PROVISION OF NOTICE**

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

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

6 Chris Heptinstall, Executive Director, Environmental Research Center  
7 3111 Camino Del Rio North, Suite 400  
8 San Diego, CA 92108  
9 Tel: (619) 500-3090  
Email: chris\_erc501c3@yahoo.com

10 With a copy to:  
11 TANYA A. GULESSERIAN  
12 CHRISTINA M. CARO  
13 ADAMS BROADWELL JOSEPH & CARDOZO  
14 601 Gateway Boulevard, Suite 1000  
15 South San Francisco, CA 94080-7037  
Telephone: (650) 589-1660  
Facsimile: (650) 589-5062  
Email: tgulesserian@adamsbroadwell.com  
ccaro@adamsbroadwell.com

16 **FOR BPI SPORTS, LLC dba CUTLER NUTRITION:**

17 Derek Ettinger, Chief Executive Officer, BPI Sports, LLC  
18 3149 S.W. 42nd Street, Suite 200  
19 Hollywood, FL 33312

20 With a copy to:  
21 DANIEL S. SILVERMAN  
22 VENABLE LLP  
23 2049 Century Park East, Suite 2300  
24 Los Angeles, CA 90067  
Tel: (310) 229-0373  
Fax: (310) 229-9901  
Email: dssilverman@venable.com

25 **12. COURT APPROVAL**

26 12.1 Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
27 Motion for Court Approval. Following Court Approval of the Consent Judgment, ERC shall  
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1 comply with California Health and Safety Code section 25249.7(f) and with Title II of the  
2 California Code of Regulations, section 3004. The Parties shall use their best efforts to support  
3 entry of this Consent Judgment.

4       **12.2** If the California Attorney General objects to any term in this Consent Judgment,  
5 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible  
6 prior to the hearing on the motion.

7       **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be void  
8 and have no force or effect.

9       **13. EXECUTION AND COUNTERPARTS**

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

13       **14. DRAFTING**

14       The terms of this Consent Judgment have been reviewed by the respective counsel for each  
15 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and  
16 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and  
17 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,  
18 and no provision of this Consent Judgment shall be construed against any Party, based on the fact  
19 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any  
20 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated  
21 equally in the preparation and drafting of this Consent Judgment.

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

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

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1     **16. ENFORCEMENT**

2             ERC may, by motion or order to show cause before the Superior Court of Alameda  
3 County, enforce the terms and conditions contained in this Consent Judgment. In any action  
4 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,  
5 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.  
6 To the extent the failure to comply with the Consent Judgment constitutes a violation of  
7 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent Judgment,  
8 but may seek in another action whatever fines, costs, penalties, or remedies as are provided by  
9 law for failure to comply with Proposition 65 or other laws.

10    **17. ENTIRE AGREEMENT, AUTHORIZATION**

11             17.1 This Consent Judgment contains the sole and entire agreement and understanding  
12 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
13 negotiations, commitments and understandings related hereto. No representations, oral or  
14 otherwise, express or implied, other than those contained herein have been made by any Party.  
15 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to  
16 exist or to bind any Party.

17             17.2 Each signatory to this Consent Judgment certifies that he or she is fully  
18 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as  
19 explicitly provided herein, each Party shall bear its own fees and costs.

20    **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
21    **CONSENT JUDGMENT**

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

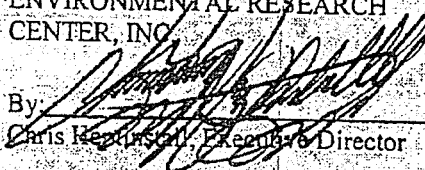
25             (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
26 equitable settlement of all matters raised by the allegations of the Complaint; that the matter has  
27 been diligently prosecuted, and that the public interest is served by such settlement; and  
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1 (2) Make the findings pursuant to California Health and Safety Code section  
2 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.  
3

4 **IT IS SO STIPULATED:**

5 Dated: 9/18/, 2016

ENVIRONMENTAL RESEARCH  
CENTER, INC

By:   
Chris Reardon, Executive Director

8 Dated: \_\_\_\_\_, 2016

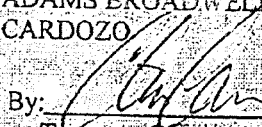
BPI SPORTS, LLC dba CUTLER  
NUTRITION

By:  
Its:

13 **APPROVED AS TO FORM:**

14 Dated: September 20, 2016

ADAMS BROADWELL JOSEPH &  
CARDOZO

By:   
Tanya A. Gulesserian  
Christina M. Caro  
Attorneys for Plaintiff Environmental  
Research Center, Inc.

19 Dated: \_\_\_\_\_, 2016

VENABLE LLP

By: \_\_\_\_\_  
Daniel S. Silverman  
Attorney for Defendant BPI Sports, LLC  
dba Cutler Nutrition

OR

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

**IT IS SO STIPULATED:**

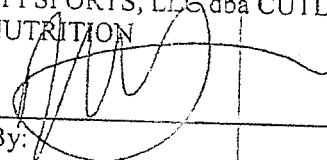
Dated: \_\_\_\_\_, 2016

Dated: 9/20, 2016

ENVIRONMENTAL RESEARCH CENTER, INC.

By: \_\_\_\_\_  
Chris Heptinstall, Executive Director

BPI SPORTS, LLC dba CUTLER NUTRITION

  
By: \_\_\_\_\_  
Its: \_\_\_\_\_

**APPROVED AS TO FORM:**

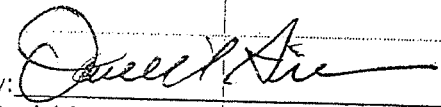
Dated: \_\_\_\_\_, 2016

ADAMS BROADWELL JOSEPH & CARDOZO

By: \_\_\_\_\_  
Tanya A. Gulesserian  
Christina M. Caro  
Attorneys for Plaintiff Environmental Research Center, Inc.

Dated: 9-20, 2016

VENABLE LLP

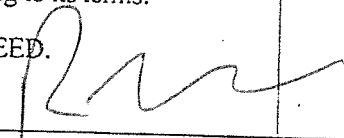
  
By: \_\_\_\_\_  
Daniel S. Silverman  
Attorney for Defendant BPI Sports, LLC dba Cutler Nutrition

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: 4/29, 2016

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

Robert D. McGuinness

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**EXHIBIT A**

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

501 GATEWAY BOULEVARD, SUITE 1000  
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 539-1660

FAX: (650) 539-5062

ccaro@adamsbroadwell.com

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CHRISTINA M. CARO  
THOMAS A. ENSLOW  
TANYA A. GULESSERIAN  
LAURA E. HORTON  
MARC D. JOSEPH  
RACHAEL E. KOSS  
JAMIE L. MAULDIN  
ELLEN L. WEHR

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350  
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201

FAX: (916) 444-6209

VIA CERTIFIED MAIL

Derek Ettinger or Current CEO  
BPI Sports, LLC dba Cutler Nutrition  
3149 SW 42<sup>nd</sup> Street, #200  
Fort Lauderdale, FL 33312

Derek Ettinger or Current CEO  
BPI Sports, LLC dba Cutler Nutrition  
3149 SW 42<sup>nd</sup> Street, #200  
Hollywood, FL 33312

Cary A Lubetsky, Esquire  
(BPI Sports, LLC dba Cutler Nutrition's  
Registered Agent for Service of Process)  
c/o Krinzman, Huss & Lubetsky  
800 Brickell Avenue, Suite 1501  
Miami, FL 33131

Ryan Deluca or Current CEO  
Bodybuilding.com, LLC dba  
Bodybuilding.com  
5777 North Meeker Avenue  
Boise, ID 83713

Ryan Deluca or Current CEO  
Bodybuilding.com, LLC dba  
Bodybuilding.com  
305 North Steelhead Way  
Boise, ID 83704

Ryan Deluca or Current CEO  
Bodybuilding.com, LLC dba  
Bodybuilding.com  
2026 South Silverstone Way  
Meridian, ID 83642

VIA CERTIFIED MAIL

The Prentice Hall Corporation System, Inc.  
(Bodybuilding.com, LLC  
dba Bodybuilding.com's  
Registered Agent for Service of Process)  
2711 Centerville Road, Suite 400  
Wilmington, DE 19808

Prentice Hall Corporation System  
(Bodybuilding.com, LLC  
dba Bodybuilding.com's  
Registered Agent for Service of Process)  
12550 West Explorer Drive, Suite 100  
Boise, ID 83713

VIA ELECTRONIC MAIL

Stacey Grassini, Deputy District Attorney  
Contra Costa County  
900 Ward Street  
Martinez, CA 94553  
sgrassini@contracostada.org

Michelle Latimer, Program Coordinator  
Lassen County  
220 S. Lassen Street  
Susanville, CA 96130  
mlatimer@co.lassen.ca.us

Dije Ndreu, Deputy District Attorney  
Monterey County  
1200 Aguajito Road  
Monterey, CA 93940  
Prop65DA@co.monterey.ca.us



Notice of Violations of California Health & Safety Code §25249.5 *et seq.*  
January 13, 2016  
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VIA ELECTRONIC MAIL

Gary Lieberstein, District Attorney  
Napa County  
931 Parkway Mall  
Napa, CA 94559  
CEPD@countyofnapa.org

Paul E. Zellerbach, District Attorney  
Riverside County  
3072 Orange Street  
Riverside, CA 92501  
Prop65@rivcoda.org

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

Gregory Alker, Assistant District Attorney  
San Francisco County  
732 Brannan Street  
San Francisco, CA 94103  
gregory.alker@sfgov.org

Yen Dang, Supervising Deputy District  
Attorney  
Santa Clara County  
70 W Hedding St  
San Jose, CA 95110  
EPU@da.sccgov.org

Stephan R. Passalacqua, District Attorney  
Sonoma County  
600 Administration Dr  
Sonoma, CA 95403  
jbarnes@sonoma-county.org

VIA ELECTRONIC MAIL

Phillip J. Cline, District Attorney  
Tulare County  
221 S Mooney Blvd  
Visalia, CA 95370  
Prop65@co.tulare.ca.us

Gregory D. Totten, District Attorney  
Ventura County  
800 S Victoria Ave  
Ventura, CA 93009  
daspecialops@ventura.org

Jeff W. Reisig, District Attorney  
Yolo County  
301 Second Street  
Woodland, CA 95695  
cfepd@yolocounty.org

VIA ONLINE SUBMISSION

Office of the California Attorney General

VIA PRIORITY MAIL

District Attorneys of Select California Counties  
and Select City Attorneys  
(See Attached Certificate of Service)

Re: Notice of Violations of California Health & Safety Code Section 25249.5 *et seq.*

Dear Addressees:

I represent the Environmental Research Center, Inc. ("ERC") in connection with this Notice of Violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986, which is codified at California Health & Safety Code Section 25249.5 *et seq.* and also referred to as Proposition 65.

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.

The names of the Companies covered by this notice that violated Proposition 65 (hereinafter the "Violators") are:

**BPI Sports, LLC dba Cutler Nutrition**  
**Bodybuilding.com, LLC dba Bodybuilding.com**

The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

1. **Cutler Nutrition Total Protein Banana Cream Pie - Lead**
2. **Cutler Nutrition Total Protein Strawberry Graham Cracker - Lead**
3. **Cutler Nutrition Total Protein S'mores - Lead**
4. **Cutler Nutrition Total Protein Chocolate Brownie - Lead**
5. **Cutler Nutrition Total Protein Creamy Vanilla - 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.

This letter is a notice to the Violators and the appropriate governmental authorities of the Proposition 65 violations concerning the listed products. This notice covers all violations of Proposition 65 involving the Violators currently known to ERC from the information now available. ERC may continue to investigate other products that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with the copy of this letter to the Violators.

The Violators have manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemical, lead. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and/or recommended use of these products by consumers. The primary route of exposure to lead has been through ingestion, but may have also occurred through inhalation and/or dermal contact. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to lead. The method of warning should be a warning that

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*  
January 13, 2016


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appears on the product's label. The Violators violated Proposition 65 because they failed to provide an appropriate warning to persons using and/or handling these products that they are being exposed to lead. Each of these ongoing violations has occurred on every day since January 13, 2013 as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users.

Pursuant to Section 25249.7(d) of the statute, ERC intends to file a citizen enforcement action sixty days after effective service of this notice unless the Violators agree in an enforceable written instrument to: (1) reformulate the listed products so as to eliminate further exposures to the identified chemical; (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. Consistent with the public interest goals of Proposition 65 and my client's objectives in pursuing this notice, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemical and expensive and time consuming litigation.

ERC's Executive Director is Chris Heptinstall, and is located at 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. 619-500-3090. ERC has retained me in connection with this matter. We suggest that communications regarding this Notice of Violations should be directed to my attention at the above listed law office address and telephone number.

Sincerely,



Christina M. Caro

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to BPI Sports, LLC dba Cutler Nutrition, Bodybuilding.com, LLC dba Bodybuilding.com and their Registered Agents for Service of Process only)

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

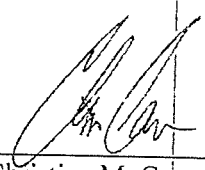
CERTIFICATE OF MERIT

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations  
by BPI Sports, LLC dba Cutler Nutrition and Bodybuilding.com, LLC dba  
Bodybuilding.com**

I, Christina Caro, declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am 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 Violators will be able to establish any of the affirmative defenses set forth in the statute.
5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: January 13, 2016

  
\_\_\_\_\_  
Christina M. Caro

**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 January 13, 2016, 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 in a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Derek Ettinger or Current CEO  
BPI Sports, LLC dba Cutler Nutrition  
3149 SW 42nd Street, #200  
Fort Lauderdale, FL 33312

Derek Ettinger or Current CEO  
BPI Sports, LLC dba Cutler Nutrition  
3149 SW 42nd Street, #200  
Hollywood, FL 33312

Ryan Deluca or Current CEO  
Bodybuilding.com, LLC dba  
Bodybuilding.com  
5777 North Meeker Avenue  
Boise, ID 83713

Ryan Deluca or Current CEO  
Bodybuilding.com, LLC dba  
Bodybuilding.com  
305 North Steelhead Way  
Boise, ID 83704

Ryan Deluca or Current CEO  
Bodybuilding.com, LLC dba  
Bodybuilding.com  
2026 South Silverstone Way  
Meridian, ID 83642

Cary A Lubetsky, Esquire  
(BPI Sports, LLC dba Cutler Nutrition's  
Registered Agent for Service of Process)  
c/o Krinzman, Huss & Lubetsky  
800 Brickell Avenue, Suite 1501  
Miami, FL 33131

The Prentice Hall Corporation System, Inc.  
(Bodybuilding.com, LLC dba Bodybuilding.com's  
Registered Agent for Service of Process)  
2711 Centerville Road, Suite 400  
Wilmington, DE 19808

Prentice Hall Corporation System  
(Bodybuilding.com, LLC dba Bodybuilding.com's  
Registered Agent for Service of Process)  
12550 West Explorer Drive, Suite 100  
Boise, ID 83713

On January 13, 2016, 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

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*  
January 13, 2016  
Page 7

On January 13, 2016, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to the party listed below:

Stacey Grassini, Deputy District Attorney  
Contra Costa County  
900 Ward Street  
Martinez, CA 94553  
sgrassini@contracostada.org

Gregory Alker, Assistant District Attorney  
San Francisco County  
732 Brannan Street  
San Francisco, CA 94103  
gregory.alker@sfgov.org

Michelle Latimer, Program Coordinator  
Lassen County  
220 S. Lassen Street  
Susanville, CA 96130  
mlatimer@co.lassen.ca.us

Yen Dang, Supervising Deputy District Attorney,  
Santa Clara County  
70 W Hedding St  
San Jose, CA 95110  
EPU@da.sccgov.org

Dije Ndreu, Deputy District Attorney  
Monterey County  
1200 Aguajito Road  
Monterey, CA 93940  
Prop65DA@co.monterey.ca.us

Stephan R. Passalacqua, District Attorney  
Sonoma County  
600 Administration Dr  
Sonoma, CA 95403  
jbarnes@sonoma-county.org

Gary Lieberstein, District Attorney  
Napa County  
931 Parkway Mall  
Napa, CA 94559  
CEPD@countyofnapa.org

Phillip J. Cline, District Attorney  
Tulare County  
221 S Mooney Blvd  
Visalia, CA 95370  
Prop65@co.tulare.ca.us

Paul E. Zellerbach, District Attorney  
Riverside County  
3072 Orange Street  
Riverside, CA 92501  
Prop65@rivcoda.org

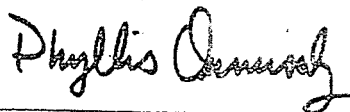
Gregory D. Totten, District Attorney  
Ventura County  
800 S Victoria Ave  
Ventura, CA 93009  
daspecialops@ventura.org

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

Jeff W. Reisig, District Attorney  
Yolo County  
301 Second Street  
Woodland, CA 95695  
cfepd@yolocounty.org

On January 13, 2016, I served the following documents: **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it with the U.S. Postal Service with the postage fully prepaid for delivery by Priority Mail.

Executed on January 13, 2016, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*  
January 13, 2016

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Service List

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Mateo County 400 County Ctr., 3 <sup>rd</sup> Floor Redwood City, CA 94063
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101
District Attorney, Amador County 708 Court Street Jackson, CA 95642	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Shasta County 1355 West Street Redding, CA 96001
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Sierra County PO Box 457 Downieville, CA 95936
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097
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, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Stanislaus County 832 12 <sup>th</sup> Street, Ste 300 Modesto, CA 95354
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Sutter County 446 Second Street Yuba City, CA 95991
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, San Benito County 419 Fourth Street, 2 <sup>nd</sup> Floor Hollister, CA 95023	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Inyo County 230 W. Line Street Bishop, CA 93514	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92415-0004	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, San Joaquin County 222 E. Weber Ave. Rm. 202 Stockton, CA 95202	San Diego City Attorney's Office 1230 3rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Luis Obispo County 1035 Palm St, Room 450 San Luis Obispo, CA 93408	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett Pl San Francisco, CA 94102
District Attorney, Los Angeles County 210 West Temple Street, Suite 18000 Los Angeles, CA 90012		San Jose City Attorney's Office 200 East Santa Clara Street, 16 <sup>th</sup> 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: January 13, 2016

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 1: 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.

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Date: January 13, 2016

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

<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

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