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**FILED**  
 ALAMEDA COUNTY

MAY 22 2018

CLERK OF THE SUPERIOR COURT  
 By Pam Williams  
 Deputy

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11 Attorney for Defendants Performance Enhancing Supplements,  
 12 LLC, individually and doing business as Physique Enhancing  
 Science and PEScience; PEScience LLC, individually and doing  
 13 business as Physique Enhancing Science and PEScience

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

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

19 **Plaintiff,**

20 vs.

21 PERFORMANCE ENHANCING  
 22 SUPPLEMENTS, LLC, individually and  
 doing business as PHYSIQUE  
 23 ENHANCING SCIENCE and  
 PESCIENCE; PESCIENCE LLC,  
 24 individually and doing business as  
 PHYSIQUE ENHANCING SCIENCE and  
 25 PESCIENCE and DOES 1-100

26 **Defendants.**

CASE NO. **RG18890168**

**STIPULATED CONSENT  
 JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed:

Trial Date: None set

1     **1. INTRODUCTION**

2           **1.1** Plaintiff Environmental Research Center, Inc. (“ERC”), a non-profit  
3 corporation, as a private enforcer and in the public interest, initiated this action by filing a  
4 Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”) pursuant  
5 to the provisions of California Health and Safety Code section 25249.5 *et seq.* (“Proposition  
6 65”), against Performance Enhancing Supplements, LLC, individually and doing business as  
7 Physique Enhancing Science and PEScience and PEScience LLC, individually and doing  
8 business as Physique Enhancing Science and PEScience (collectively “PEScience”) and Does  
9 1-100. In this action, ERC alleges that a number of products manufactured, distributed, or sold  
10 by PEScience contain lead and/or cadmium, chemicals listed under Proposition 65 as  
11 carcinogens and reproductive toxins, and expose consumers to these chemicals at a level  
12 requiring a Proposition 65 warning. These products (referred to hereinafter individually as a  
13 “Covered Product” or collectively as “Covered Products”) are: (1) PEScience Select Protein  
14 Vegan Series Indulgent Chocolate Bliss (lead, cadmium), (2) PEScience Select Protein Vegan  
15 Series Amazing Vanilla Indulgence (lead, cadmium), (3) PEScience High Volume Supreme  
16 Nitric Oxide Matrix Caffeine Free Paradise Cooler (lead), (4) PEScience Select Protein Vegan  
17 Series Amazing Wild Berry (lead, cadmium), (5) PEScience Ergonine Daily Ergogen Blue  
18 Frost (lead), (6) PEScience Select Protein Vegan Series Amazing Peanut Butter Delight (lead,  
19 cadmium), and (7) PEScience Shift Leaning Agent (lead).

20           **1.2** ERC and PEScience are hereinafter referred to individually as a “Party” or  
21 collectively as the “Parties.”

22           **1.3** ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other  
23 causes, helping safeguard the public from health hazards by reducing the use and misuse of  
24 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,  
25 and encouraging corporate responsibility.

26           **1.4** For purposes of this Consent Judgment, the Parties agree that each defendant is a  
27 business entity each of which has employed ten or more persons at all times relevant to this action,  
28

1 and qualifies as a "person in the course of business" within the meaning of Proposition 65.

2 PEScience manufactures, distributes, and/or sells the Covered Products.

3       **1.5**     The Complaint is based on allegations contained in ERC's Notices of Violation  
4 dated October 20, 2017 and November 13, 2017 that were served on the California Attorney  
5 General, other public enforcers, and PEScience ("Notices"). True and correct copies of the 60-  
6 Day Notices dated October 20, 2017 and November 13, 2017 are attached hereto as **Exhibits A**  
7 and **B** respectively and each is incorporated herein by reference. More than 60 days have  
8 passed since the Notices were served on the Attorney General, public enforcers, and PEScience  
9 and no designated governmental entity has filed a complaint against PEScience with regard to  
10 the Covered Products or the alleged violations.

11       **1.6**     ERC's Notices and Complaint allege that use of the Covered Products exposes  
12 persons in California to lead and/or cadmium without first providing clear and reasonable  
13 warnings in violation of California Health and Safety Code section 25249.6. PEScience denies  
14 all material allegations contained in the Notices and Complaint. Nothing in the Consent  
15 Judgment shall be construed as an admission by PEScience of any fact, issue of law or  
16 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as  
17 an admission by PEScience of any fact, issue of law or violation of law, at any time, for any  
18 purpose.

19       **1.7**     The Parties have entered into this Consent Judgment in order to settle,  
20 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.  
21 Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute or  
22 be construed as an admission by any of the Parties or by any of their respective officers,  
23 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates  
24 under common ownership (full or partial), franchisees, licensees, customers, suppliers,  
25 distributors, wholesalers, or retailers of any fact, issue of law, or violation of law.

26       **1.8**     Except as expressly set forth herein, nothing in this Consent Judgment shall  
27 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have,  
28 individually or jointly, in any current or future legal proceeding unrelated to these proceedings.

1           **1.9**     The Effective Date of this Consent Judgment is the date on which it is entered as  
2 a Judgment by this Court.

3           **2.     JURISDICTION AND VENUE**

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

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

12           **3.1**     Beginning six (6) months after the Effective Date, PEScience shall be  
13 permanently enjoined from “Distributing into the State of California”, or directly selling in the  
14 State of California, any Covered Products which expose a person to a “Daily Lead Exposure  
15 Level” of more than 0.5 micrograms of lead per day and/or “Daily Cadmium Exposure Level”  
16 of more than 4.1 micrograms of cadmium per day unless it meets the warning requirements  
17 under Section 3.2.

18           **3.1.1**   As used in this Consent Judgment, the term “Distributing into the State  
19 of California” shall mean to directly ship a Covered Product into California for sale in  
20 California or to sell a Covered Product to a distributor that PEScience knows or has reason to  
21 know will sell the Covered Product in California.

22           **3.1.2**   For purposes of this Consent Judgment, the “Daily Lead Exposure  
23 Level” and “Daily Cadmium Exposure Level” shall be measured in micrograms, and shall be  
24 calculated using the following formula: micrograms of lead or cadmium per gram of product,  
25 multiplied by grams of product per serving of the product (using the largest serving size  
26 appearing on the product label), multiplied by servings of the product per day (using the largest  
27 number of servings in a recommended dosage appearing on the product label), which equals  
28

1 micrograms of lead or cadmium exposure per day. If no recommended daily serving size is  
2 provided on the label, then the daily serving size shall equal one unit.

### 3 3.2 Clear and Reasonable Warnings

4 If PESCience is required to provide a warning pursuant to Section 3.1, the following  
5 warning must be utilized (“Warning”):

6 **WARNING:** Consuming this product can expose you to chemicals including [lead] [and]  
7 [cadmium] which is [are] known to the State of California to cause [cancer and] birth  
8 defects or other reproductive harm. For more information go to  
9 [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

9 PESCience shall use the phrase “cancer and” in the Warning if PESCience has reason to  
10 believe that the the “Daily Lead Exposure Level” is greater than 15 micrograms of lead as  
11 determined pursuant to the quality control methodology set forth in Section 3.4 or if PESCience  
12 has reason to believe that another Proposition 65 chemical is present which may require a cancer  
13 warning. As identified in the brackets, the warning shall appropriately reflect whether there is  
14 lead, cadmium, or both chemicals present in each of the Covered Products.

15 The Warning shall appear on the label of each Covered Product or on PESCience’s  
16 checkout page on its website for California consumers identifying any Covered Product, or a link  
17 to the Warning, using the word “WARNING” shall appear prior to completing checkout on  
18 PESCience’s website when a California delivery address is indicated for any purchase of any  
19 Covered Product. An asterisk or other identifying method, such as text accompanying the  
20 product, must be utilized to identify which product(s) on the checkout page are subject to the  
21 Warning. The Warning may be used in conjunction with a more general warning in the checkout  
22 procedures indicating that item(s) in the customer’s order are subject to a California Proposition  
23 65 warning.

24 The Warning shall be at least the same size as the largest of any other health or safety  
25 warnings also appearing on its website or on the label or container of Covered Product’s  
26 packaging and the word “WARNING” shall be in all capital letters and in bold print. No  
27 statements intended to or likely to have the effect of diminishing the impact of the Warning on the  
28 average lay person shall accompany the Warning unless required by Proposition 65 implementing

1 regulations. Further no statements may accompany the Warning that state or imply that the source  
2 of the listed chemical has an impact on or results in a less harmful effect of the listed chemical.

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

7 If subsequently enacted changes to Proposition 65 or its implementing regulations require  
8 the use of additional or different information on any warning, the Parties agree that the new safe  
9 harbor warning may be utilized in place of the warning set forth in this Section.

### 10 **3.3 Reformulated Covered Products**

11 A Reformulated Covered Product is one for which the "Daily Lead Exposure Level" is no  
12 greater than 0.5 micrograms of lead per day and/or "Daily Cadmium Exposure Level" is no more  
13 than 4.1 micrograms of cadmium per day as determined by the quality control methodology  
14 described in Section 3.4.

### 15 **3.4 Testing and Quality Control Methodology**

16 **3.4.1** Beginning within one year of the Effective Date, PESCience shall  
17 arrange for lead and/or cadmium testing of the Covered Products at least once a year for a  
18 minimum of three (3) consecutive years by arranging for testing of five randomly selected  
19 samples of each of the Covered Products, in the form intended for sale to the end-user, which  
20 PESCience intends to sell or is manufacturing for sale in California, directly selling to a  
21 consumer in California or "Distributing into the State of California." If tests conducted  
22 pursuant to this Section demonstrate that no Warning is required for a Covered Product during  
23 each of three (3) consecutive years, then the testing requirements of this Section will no longer  
24 be required as to that Covered Product. However, if during or after the three-year testing  
25 period, PESCience changes ingredient suppliers for any of the Covered Products and/or  
26 reformulates any of the Covered Products, PESCience shall test that Covered Product annually  
27 for at least three (3) consecutive years after such change is made.

1           3.4.2 For purposes of measuring the “Daily Lead Exposure Level” and/or  
2 “Daily Cadmium Exposure Level,” the highest lead and/or cadmium detection result of the five  
3 (5) randomly selected samples of the Covered Products will be controlling.

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

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

15           3.4.5 Nothing in this Consent Judgment shall limit PEScience’s ability to  
16 conduct, or require that others conduct, additional testing of the Covered Products, including  
17 the raw materials used in their manufacture.

18           3.4.6 Within thirty (30) days of ERC’s written request, PEScience shall deliver  
19 lab reports obtained pursuant to Section 3.4 to ERC. PEScience shall retain all test results and  
20 documentation for a period of from the date of each test.

#### 21    **4. SETTLEMENT PAYMENT**

22           4.1 In full satisfaction of all potential civil penalties, additional settlement payments,  
23 attorney’s fees, and costs, PEScience shall make a total payment of \$70,000.00 (“Total  
24 Settlement Amount”) to ERC. The first payment of \$35,000.00 shall be due within 5 days of  
25 the Effective Date with a second payment of \$35,000.00 due and owing 35 days from the  
26 Effective Date (“Due Dates”). PEScience shall make this payment by wire transfer to ERC’s  
27 escrow account, for which ERC will give PEScience the necessary account information. The  
28 Total Settlement Amount shall be apportioned as follows:

1           4.2     \$20,048.23 shall be considered a civil penalty pursuant to California Health and  
2 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$15,036.17) of the civil penalty to  
3 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe  
4 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety  
5 Code section 25249.12(c). ERC will retain the remaining 25% (\$5,012.06) of the civil penalty.

6           4.3     \$4,551.83 shall be distributed to ERC as reimbursement to ERC for reasonable  
7 costs incurred in bringing this action.

8           4.4     \$15,036.15 shall be distributed to ERC as an Additional Settlement Payment  
9 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d) and  
10 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly  
11 caused by Defendant in this matter. These activities are detailed below and support ERC's  
12 overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary  
13 supplement products in California. ERC's activities have had, and will continue to have, a direct  
14 and primary effect within the State of California because California consumers will be benefitted  
15 by the reduction and/or elimination of exposure to lead and/or cadmium in dietary supplements  
16 and/or by providing clear and reasonable warnings to California consumers prior to ingestion of  
17 the products.

18           Based on a review of past years' actual budgets, ERC is providing the following list of  
19 activities ERC engages in to protect California consumers through Proposition 65 citizen  
20 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those  
21 activities: (1) ENFORCEMENT (65-80%): obtaining, shipping, analyzing, and testing dietary  
22 supplement products that may contain lead and/or cadmium and are sold to California  
23 consumers. This work includes continued monitoring and enforcement of past consent judgments  
24 and settlements to ensure companies are in compliance with their obligations thereunder, with a  
25 specific focus on those judgments and settlements concerning lead and/or cadmium. This work  
26 also includes investigation of new companies that ERC does not obtain any recovery through  
27 settlement or judgment; (2) VOLUNTARY COMPLIANCE PROGRAM (10-20%): maintaining  
28 ERC's Voluntary Compliance Program by acquiring products from companies, developing and



1 maintaining a case file, testing products from these companies, providing the test results and  
2 supporting documentation to the companies, and offering guidance in warning or implementing a  
3 self-testing program for lead and/or cadmium in dietary supplement products; and (3) "GOT  
4 LEAD" PROGRAM (up to 5%): maintaining ERC's "Got Lead?" Program which reduces the  
5 numbers of contaminated products that reach California consumers by providing access to free  
6 testing for lead in dietary supplement products (Products submitted to the program are screened  
7 for ingredients which are suspected to be contaminated, and then may be purchased by ERC,  
8 catalogued, sent to a qualified laboratory for testing, and the results shared with the consumer  
9 that submitted the product).

10 ERC shall be fully accountable in that it will maintain adequate records to document and  
11 will be able to demonstrate how the ASP funds will be spent and can assure that the funds are  
12 being spent only for the proper, designated purposes described in this Consent Judgment. ERC  
13 shall provide the Attorney General, within thirty days of any request, copies of documentation  
14 demonstrating how such funds have been spent.

15 4.5 \$9,590.00 shall be distributed to Michael Freund as reimbursement of ERC's  
16 attorney's fees, \$192.50 shall be distributed to Ryan Hoffman as reimbursement of ERC's  
17 attorney's fees, while \$20,581.29 shall be distributed to ERC for its in-house legal fees. Except  
18 as explicitly provided herein, each Party shall bear its own fees and costs.

19 4.6 In the event that PEScience fails to remit any payment owed under Section 4 of  
20 this Consent Judgment on or before the respective Due Dates, PEScience shall be deemed to be  
21 in material breach of its obligations under this Consent Judgment. ERC shall provide written  
22 notice of the delinquency to PEScience via electronic mail. If PEScience fails to deliver the  
23 delinquent payment within ten (10) business days from the written notice, the Total Settlement  
24 Amount shall be immediately due and owing and shall accrue interest at the statutory judgment  
25 interest rate provided in the California Code of Civil Procedure section 685.010. Additionally,  
26 PEScience agrees to pay ERC's reasonable attorney's fees and costs for any efforts to collect  
27 the payment due under this Consent Judgment.

1     **5. MODIFICATION OF CONSENT JUDGMENT**

2           **5.1**     This Consent Judgment may be modified only (i) by written stipulation of the  
3 Parties and upon entry by the Court of a modified consent judgment or (ii) by motion of either  
4 Party pursuant to Section 5.3 or 5.4 and upon entry by the Court of a modified consent  
5 judgment.

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

18           **5.3**     Where the meet-and-confer process does not lead to a joint motion or  
19 application in support of a modification of the Consent Judgment, then either Party may seek  
20 judicial relief on its own.

21           **5.4**     In the event that Proposition 65 is repealed or preempted, then PEScience shall  
22 have no further obligation pursuant to this Consent Judgment with respect to, and to the extent  
23 that the Covered Products are so affected.

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

26           **6.1**     This Court shall retain jurisdiction of this matter to enforce, modify, or terminate  
27 this Consent Judgment.

28           **6.2**     If ERC alleges that any Covered Product fails to qualify as a Reformulated

1 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall  
2 inform PESCience in a reasonably prompt manner of its test results, including information  
3 sufficient to permit PESCience to identify the Covered Products at issue. PESCience shall,  
4 within thirty (30) days following such notice, provide ERC with testing information, from an  
5 independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,  
6 demonstrating PESCience's compliance with the Consent Judgment, if warranted. The Parties  
7 shall first attempt to resolve the matter prior to ERC taking any further legal action.

#### 8 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

17 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,  
18 on behalf of itself and in the public interest, and PESCience and its respective officers,  
19 directors, shareholders, owners, employees, agents, parent, subsidiaries, divisions, affiliated  
20 entities under common (full or partial) ownership, attorneys, suppliers, franchisees, licensees,  
21 customers (not including private label customers of PESCience), distributors, wholesalers,  
22 retailers, and all other upstream and downstream entities in the distribution chain of any  
23 Covered Product, and the predecessors, successors, and assigns of any of them (collectively,  
24 "Released Parties"). ERC, on behalf of itself and in the public interest, hereby fully releases  
25 and discharges the Released Parties from any and all claims, actions, causes of action, suits,  
26 demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have  
27 been asserted from the handling, use, or consumption of the Covered Products, as to any  
28 alleged violation of Proposition 65 or its implementing regulations arising from the failure to

1 provide Proposition 65 warnings on the Covered Products regarding lead and/or cadmium up to  
2 and including the Effective Date.

3           **8.2**           ERC on its own behalf only, and PEScience on its own behalf only, further  
4 waive and release any and all claims they may have against each other and their respective  
5 officers, directors, shareholders, owners, employees, agents, parents, subsidiaries, divisions,  
6 affiliated entities under common (full or partial) ownership, and attorneys for all actions or  
7 statements made or undertaken in the course of seeking or opposing enforcement of Proposition  
8 65 in connection with the Notices and Complaint up through and including the Effective Date,  
9 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to  
10 enforce the terms of this Consent Judgment.

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

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

24 ERC on behalf of itself only, and PEScience on behalf of itself only, acknowledge and  
25 understand the significance and consequences of this specific waiver of California Civil Code  
26 section 1542.

27           **8.4**           Compliance with the terms of this Consent Judgment shall be deemed to  
28 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead  
and/or cadmium in the Covered Products as set forth in the Notices and Complaint.

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

4           **9.     SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

7           **10.    GOVERNING LAW**

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

10          **11.    PROVISION OF NOTICE**

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

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

15 Chris Heptinstall, Executive Director, Environmental Research Center  
16 3111 Camino Del Rio North, Suite 400  
17 San Diego, CA 92108  
18 Tel: (619) 500-3090  
19 Email: chris\_erc501c3@yahoo.com

20          With a copy to:

21 Michael Freund  
22 Ryan Hoffman  
23 Michael Freund & Associates  
24 1919 Addison Street, Suite 105  
25 Berkeley, CA 94704  
26 Telephone: (510) 540-1992  
27 Facsimile: (510) 540-5543

28          **PERFORMANCE ENHANCING SUPPLEMENTS, LLC, individually  
and doing business as PHYSIQUE ENHANCING SCIENCE and PESCIENCE;  
PESCIENCE LLC, individually and doing business as PHYSIQUE ENHANCING  
SCIENCE and PESCIENCE**

Wesley Poole  
PEScience, LLC  
4400 118<sup>th</sup> Avenue N

1 Suite 303  
2 Clearwater, FL 33762

3 With a copy to:  
4 Abhishek K. Gurnani  
5 Amin Talati Upadhye, LLP  
6 100 South Wacker Drive, Suite 2000  
7 Chicago, IL 60606  
8 Telephone: (312) 466-1033  
9 Facsimile: (312) 884-7352

## 10 **12. COURT APPROVAL**

11 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
12 Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
13 Consent Judgment.

14 **12.2** If the California Attorney General objects to any term in this Consent Judgment,  
15 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible  
16 prior to the hearing on the motion.

17 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be  
18 void and have no force or effect.

## 19 **13. EXECUTION AND COUNTERPARTS**

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

## 23 **14. DRAFTING**

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

1 equally in the preparation and drafting of this Consent Judgment.

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

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

7 **16. ENFORCEMENT**

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

16 **17. ENTIRE AGREEMENT, AUTHORIZATION**

17 **17.1** This Consent Judgment contains the sole and entire agreement and  
18 understanding of the Parties with respect to the entire subject matter herein, and any and all  
19 prior discussions, negotiations, commitments, and understandings related hereto. No  
20 representations, oral or otherwise, express or implied, other than those contained herein have  
21 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to  
22 herein, shall be deemed to exist or to bind any Party.

23 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully  
24 authorized by the Party he or she represents to stipulate to this Consent Judgment.

25 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
26 **CONSENT JUDGMENT**

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

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

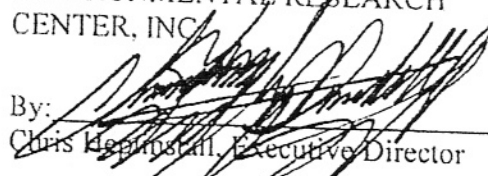
2 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
3 equitable settlement of all matters raised by the allegations of the Complaint that the matter has  
4 been diligently prosecuted, and that the public interest is served by such settlement; and

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

7  
8 **IT IS SO STIPULATED:**

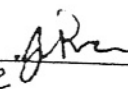
9 Dated: 1/4/, 2018

ENVIRONMENTAL RESEARCH  
CENTER, INC.

10  
11 By:   
Chris Heppinstall, Executive Director


12  
13  
14 Dated: 1/8/, 2018

PERFORMANCE ENHANCING  
SUPPLEMENTS, LLC, individually and  
doing business as PHYSIQUE  
ENHANCING SCIENCE and PESCIENCE

15  
16  
17  
18 By:   
Its: president

19  
20  
21 Dated: 1-8, 2018

PESCIENCE LLC, individually and doing  
business as PHYSIQUE ENHANCING  
SCIENCE and PESCIENCE

22  
23  
24  
25 By:   
Its: vice president



1 APPROVED AS TO FORM:

2 Dated: 1 / 9 /, 2018

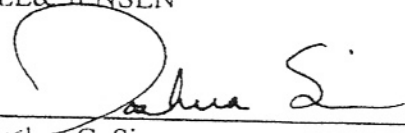
MICHAEL FREUND & ASSOCIATES

3 By: 

4 Michael Freund  
5 Ryan Hoffman  
6 Attorneys for Plaintiff Environmental  
7 Research Center, Inc.

8 Dated: January 9, 2018

CALL & JENSEN

9 By: 

10 Joshua G. Simon  
11 Attorney for Defendants Performance  
12 Enhancing Supplements, LLC, individually  
13 and doing business as Physique Enhancing  
14 Science and PEScience; PEScience LLC,  
15 individually and doing business as  
16 Physique Enhancing Science and  
17 PEScience

18 **ORDER AND JUDGMENT**

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

21 IT IS SO ORDERED, ADJUDGED AND DECREED.

22 Dated: 5/22, 2018

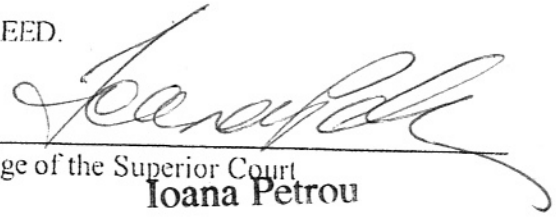
23   
24 Judge of the Superior Court  
25 **Ioana Petrou**

EXHIBIT A

**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.

October 20, 2017

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

Dear Alleged Violators and the Appropriate Public Enforcement Agencies:

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

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

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

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

**Performance Enhancing Supplements, LLC, individually and doing business as Physique Enhancing Science and PEScience  
PEScience LLC, individually and doing business as Physique Enhancing Science and PEScience**

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

1. PEScience Select Protein Vegan Series Indulgent Chocolate Bliss – Lead, Cadmium
2. PEScience Select Protein Vegan Series Amazing Vanilla Indulgence – Lead, Cadmium
3. PEScience High Volume Supreme Nitric Oxide Matrix Caffeine Free Paradise Cooler - Lead
4. PEScience Select Protein Vegan Series Amazing Wild Berry – Lead, Cadmium
5. PEScience Ergonine Daily Ergogen Blue Frost - 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.

October 20, 2017

Page 2

Cadmium was officially listed as a chemical known to cause developmental toxicity and male reproductive toxicity on May 1, 1997, while cadmium and cadmium compounds were listed as chemicals known to the State of California to cause cancer on October 1, 1987.

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

**Route of Exposure.** The consumer exposures that are the subject of this notice result from the recommended use of these products. Consequently, the route of exposure to these chemicals has been and continues to be through ingestion.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least October 20, 2014, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violators violated Proposition 65 because they failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

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

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

Sincerely,



---

Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Performance Enhancing Supplements, LLC, individually and doing business as Physique Enhancing Science and PEScience, PEScience LLC, individually and doing business as Physique Enhancing Science and PEScience, 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 Performance Enhancing Supplements, LLC, individually and doing business as Physique Enhancing Science and PScience; PScience LLC, individually and doing business as Physique Enhancing Science and PScience**

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

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

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

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



---

Michael Freund

Dated: October 20, 2017

**CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903**

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States and over the age of 18 years of age. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On October 20, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO  
PEScience LLC, individually and doing business as  
Physique Enhancing Science and PEScience  
3665 East Bay Drive #204, Suite 155  
Largo, FL 33771

CT Corporation System  
(PEScience LLC, individually and doing business  
as Physique Enhancing Science and PEScience's  
Registered Agent for Service of Process)  
1200 South Pine Island Road  
Plantation, FL 33324

Current President or CEO  
PEScience LLC, individually and doing business as  
Physique Enhancing Science and PEScience  
4400 118<sup>th</sup> Avenue North, Suite 303  
Clearwater, FL 33762

The Corporation Trust Company  
(Performance Enhancing Supplements, LLC  
individually and doing business as Physique  
Enhancing Science and PEScience's Registered  
Agent for Service of Process)  
Corporation Trust Center  
1209 North Orange Street  
Wilmington, DE 19801

On October 20, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

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

On October 20, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

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

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

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

Allison Haley, District Attorney  
Napa County  
931 Parkway Mall  
Napa, CA 94559  
CEPD@countyofnapa.org

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

October 20, 2017

Page 5

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

Tori Verber Salazar, District Attorney  
San Joaquin County  
222 E. Weber Avenue, Room 202  
Stockton, CA 95202  
DAConsumer.Environmental@sjcda.org

Eric J. Dobroth, Deputy District Attorney  
San Luis Obispo County  
County Government Center Annex, 4<sup>th</sup> Floor  
San Luis Obispo, CA 93408  
edobroth@co.slo.ca.us

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

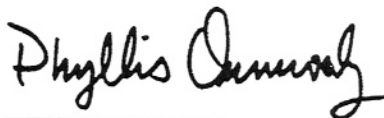
Phillip J. Cline, District Attorney  
Tulare County  
221 S Mooney Blvd  
Visalia, CA 95370  
Prop65@co.tulare.ca.us

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

On October 20, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by First Class Mail.

Executed on October 20, 2017, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

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, Suite 202  
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, 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  
P.O. Drawer D  
Independence, CA 93526

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  
Lakeport, CA 95453

District Attorney, Los Angeles County  
Hall of Justice  
211 West Temple St., Ste 1200  
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, 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, San Benito County  
419 Fourth Street, 2nd Floor  
Hollister, CA 95023

District Attorney, San Bernardino County  
316 N. Mountain View Avenue  
San Bernardino, CA 92401

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

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

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

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  
Downieville, 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, 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, Tuolumne County  
423 N. Washington Street  
Sonora, CA 95370

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



## APPENDIX A

### OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

#### THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and OEHHA implementing regulations (see citations below) for further information.

FOR INFORMATION CONCERNING THE BASIS FOR THE ALLEGATIONS IN THE NOTICE RELATED TO YOUR BUSINESS, CONTACT THE PERSON IDENTIFIED ON THE NOTICE.

The text of Proposition 65 (Health and Safety Code Sections 25249.5 through 25249.13) is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

#### *WHAT DOES PROPOSITION 65 REQUIRE?*

---

<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>.

**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 make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

**Prohibition from discharges into drinking water.** A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Some discharges are exempt from this requirement under certain circumstances discussed below.

#### **DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?**

Yes. You should consult the current version of the statute and regulations (<http://www.oehha.ca.gov/prop65/law/index.html>) to determine all applicable exemptions, the most common of which are the following:

**Grace Period.** Proposition 65 warning requirements do not apply until 12 months after the chemical has been listed. The Proposition 65 discharge prohibition does not apply to a discharge or release of a chemical that takes place less than 20 months after the listing of the chemical.

**Governmental agencies and public water utilities.** All agencies of the federal, state or local government, as well as entities operating public water systems, are exempt.

**Businesses with nine or fewer employees.** Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. This includes all employees, not just those present in California.

**Exposures that pose no significant risk of cancer.** For chemicals that are listed under Proposition 65 as known to the State to cause cancer, a warning is not required if the business causing the exposure can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "No Significant Risk Levels" (NSRLs) for many listed carcinogens. Exposures below these levels are exempt from the warning requirement. See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of NSRLs, and Section 25701 *et seq.* of the regulations for information concerning how these levels are calculated.

**Exposures that will produce no observable reproductive effect at 1,000 times the level in question.** For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business causing the exposure can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level" divided by 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

**Exposures to Naturally Occurring Chemicals in Food.** Certain exposures to chemicals that naturally occur in foods (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant<sup>2</sup> it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

**Discharges that do not result in a "significant amount" of the listed chemical entering any source of drinking water.** The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" level for

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

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

*FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...*

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov).

Revised: May 2017

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11, Health and Safety Code.

EXHIBIT B

**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 13, 2017

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

Dear Alleged Violators and the Appropriate Public Enforcement Agencies:

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

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

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

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

**Performance Enhancing Supplements, LLC, individually and doing business as Physique Enhancing Science and PEScience  
PEScience LLC, individually and doing business as Physique Enhancing Science and PEScience**

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

- 1. PEScience Select Protein Vegan Series Amazing Peanut Butter Delight – Lead, Cadmium**
- 2. PEScience Shift Leaning Agent - Lead**

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

Cadmium was officially listed as a chemical known to cause developmental toxicity and male reproductive toxicity on May 1, 1997, while cadmium and cadmium compounds were listed as chemicals known to the State of California to cause cancer on October 1, 1987.

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

**Route of Exposure.** The consumer exposures that are the subject of this notice result from the recommended use of these products. Consequently, the route of exposure to these chemicals has been and continues to be through ingestion.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least November 13, 2014, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violators violated Proposition 65 because they failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

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

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

Sincerely,



---

Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Performance Enhancing Supplements, LLC, individually and doing business as Physique Enhancing Science and PEScience, PEScience LLC, individually and doing business as Physique Enhancing Science and PEScience, 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 Performance Enhancing Supplements, LLC, individually and doing business as Physique Enhancing Science and PEScience; PEScience LLC, individually and doing business as Physique Enhancing Science and PEScience**

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

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

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

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



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Michael Freund

Dated: November 13, 2017

**CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903**

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States and over the age of 18 years of age. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On November 13, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO  
PEScience LLC, individually and doing business as  
Physique Enhancing Science and PEScience  
3665 East Bay Drive #204, Suite 155  
Largo, FL 33771

CT Corporation System  
(PEScience LLC, individually and doing business  
as Physique Enhancing Science and PEScience's  
Registered Agent for Service of Process)  
1200 South Pine Island Road  
Plantation, FL 33324

Current President or CEO  
PEScience LLC, individually and doing business as  
Physique Enhancing Science and PEScience  
4400 118<sup>th</sup> Avenue North, Suite 303  
Clearwater, FL 33762

The Corporation Trust Company  
(Performance Enhancing Supplements, LLC  
individually and doing business as Physique  
Enhancing Science and PEScience's Registered  
Agent for Service of Process)  
Corporation Trust Center  
1209 North Orange Street  
Wilmington, DE 19801

On November 13, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

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

On November 13, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

Stacey Grassini, Deputy District Attorney  
Contra Costa County  
900 Ward Street  
Martinez, CA 94553  
[sgrassini@contracostada.org](mailto:sgrassini@contracostada.org)

Dije Ndreu, Deputy District Attorney  
Monterey County  
1200 Aguajito Road  
Monterey, CA 93940  
[Prop65DA@co.monterey.ca.us](mailto:Prop65DA@co.monterey.ca.us)

Michelle Latimer, Program Coordinator  
Lassen County  
220 S. Lassen Street  
Susanville, CA 96130  
[mlatimer@co.lassen.ca.us](mailto:mlatimer@co.lassen.ca.us)

Allison Haley, District Attorney  
Napa County  
931 Parkway Mall  
Napa, CA 94559  
[CEPD@countyofnapa.org](mailto:CEPD@countyofnapa.org)

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

November 13, 2017

Page 5

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

Tori Verber Salazar, District Attorney  
San Joaquin County  
222 E. Weber Avenue, Room 202  
Stockton, CA 95202  
DAConsumer.Environmental@sjcda.org

Eric J. Dobroth, Deputy District Attorney  
San Luis Obispo County  
County Government Center Annex, 4<sup>th</sup> Floor  
San Luis Obispo, CA 93408  
edobroth@co.slo.ca.us

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

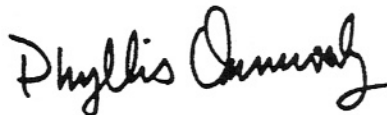
Phillip J. Cline, District Attorney  
Tulare County  
221 S Mooney Blvd  
Visalia, CA 95370  
Prop65@co.tulare.ca.us

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

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

On November 13, 2017 between 10:00 a.m. and 4:30 p.m. Eastern Time, I served the following documents: NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by First Class Mail.

Executed on November 13, 2017, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

Service List

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92401	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, San Mateo County 400 County Ctr., 3rd Floor Redwood City, CA 94063	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Shasta County 1355 West Street Redding, CA 96001	San Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Sierra County PO Box 457 Downieville, CA 95936	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
District Attorney, Inyo County P.O. Drawer D Independence, CA 93526	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Sutter County 446 Second Street Yuba City, CA 95991	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301			

## APPENDIX A

### OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

#### THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and OEHHA implementing regulations (see citations below) for further information.

FOR INFORMATION CONCERNING THE BASIS FOR THE ALLEGATIONS IN THE NOTICE RELATED TO YOUR BUSINESS, CONTACT THE PERSON IDENTIFIED ON THE NOTICE.

The text of Proposition 65 (Health and Safety Code Sections 25249.5 through 25249.13) is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

#### *WHAT DOES PROPOSITION 65 REQUIRE?*

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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>.

**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 make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

**Prohibition from discharges into drinking water.** A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Some discharges are exempt from this requirement under certain circumstances discussed below.

#### **DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?**

Yes. You should consult the current version of the statute and regulations (<http://www.oehha.ca.gov/prop65/law/index.html>) to determine all applicable exemptions, the most common of which are the following:

**Grace Period.** Proposition 65 warning requirements do not apply until 12 months after the chemical has been listed. The Proposition 65 discharge prohibition does not apply to a discharge or release of a chemical that takes place less than 20 months after the listing of the chemical.

**Governmental agencies and public water utilities.** All agencies of the federal, state or local government, as well as entities operating public water systems, are exempt.

**Businesses with nine or fewer employees.** Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. This includes all employees, not just those present in California.

**Exposures that pose no significant risk of cancer.** For chemicals that are listed under Proposition 65 as known to the State to cause cancer, a warning is not required if the business causing the exposure can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "No Significant Risk Levels" (NSRLs) for many listed carcinogens. Exposures below these levels are exempt from the warning requirement. See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of NSRLs, and Section 25701 *et seq.* of the regulations for information concerning how these levels are calculated.

**Exposures that will produce no observable reproductive effect at 1,000 times the level in question.** For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business causing the exposure can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level" divided by 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

**Exposures to Naturally Occurring Chemicals in Food.** Certain exposures to chemicals that naturally occur in foods (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant<sup>2</sup> it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

**Discharges that do not result in a "significant amount" of the listed chemical entering any source of drinking water.** The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" level for

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

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

*FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...*

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov).

Revised: May 2017

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11, Health and Safety Code.