



Courtesy Copy

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

8 Attorneys for Plaintiff
 9 ENVIRONMENTAL RESEARCH CENTER, INC.

10 Garth Ward SBN 202965
 11 Lewis Brisbois Bisgaard & Smith LLP
 12 701 B Street, Suite 1900
 13 San Diego, CA 92101
 14 Telephone: (619) 233-1006
 15 Facsimile: (619) 233-8627

16 Attorney for Defendant
 17 ENDURANCE MARKETING GROUP, INC.,
 18 individually and doing business as HAMMER
 19 NUTRITION DIRECT

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 21 COUNTY OF ALAMEDA

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

25 Plaintiff,

26 vs.

27 ENDURANCE MARKETING GROUP,
 28 INC., individually and doing business as
 HAMMER NUTRITION DIRECT; and
 DOES 1-100

Defendants.

CASE NO. RG18898232

STIPULATED CONSENT
 JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: March 22, 2018

Trial Date: None set

1. INTRODUCTION

1.1 On March 22, 2018, Plaintiff Environmental Research Center, Inc. ("ERC"), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by

JUN 21 2018

1 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the "Complaint")
2 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
3 ("Proposition 65"), against Endurance Marketing Group, Inc., individually and doing business as
4 Hammer Nutrition Direct ("Hammer Nutrition") and Does 1-100. In this action, ERC alleges
5 that a number of products manufactured, distributed, or sold by Hammer Nutrition contain lead,
6 a chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and expose
7 consumers to this chemical at a level requiring a Proposition 65 warning. These products
8 (referred to hereinafter individually as a "Covered Product" or collectively as "Covered
9 Products") are: (1) Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Orange
10 Vanilla, (2) Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Chocolate, and
11 (3) Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Strawberry.

12 1.2 ERC and Hammer Nutrition are hereinafter referred to individually as a "Party"
13 or collectively as the "Parties."

14 1.3 ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
15 causes, helping safeguard the public from health hazards by reducing the use and misuse of
16 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
17 and encouraging corporate responsibility.

18 1.4 For purposes of this Consent Judgment, the Parties agree that Hammer Nutrition is
19 a business entity that has employed ten or more persons at all times relevant to this action, and
20 qualifies as a "person in the course of doing business" within the meaning of Proposition 65.
21 Hammer Nutrition manufactures, distributes, and/or sells the Covered Products.

22 1.5 The Complaint is based on allegations contained in ERC's Notice of Violation
23 dated January 10, 2018 that was served on the California Attorney General, other public
24 enforcers, and Hammer Nutrition ("Notice"). A true and correct copy of the 60-Day Notice
25 dated January 10, 2018 is attached hereto as Exhibit A and is incorporated herein by reference.
26 More than 60 days have passed since the Notice was served on the Attorney General, public
27 enforcers, and Hammer Nutrition and no designated governmental entity has filed a complaint
28 against Hammer Nutrition with regard to the Covered Products or the alleged violations.

1 1.6 ERC's Notice and Complaint allege that use of the Covered Products exposes
2 persons in California to lead without first providing clear and reasonable warnings in violation
3 of California Health and Safety Code section 25249.6. Hammer Nutrition denies all material
4 allegations contained in the Notice and Complaint.

5 1.7 The Parties have entered into this Consent Judgment in order to settle,
6 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.
7 Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute or
8 be construed as an admission by any of the Parties or by any of their respective officers,
9 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees,
10 licensees, customers, suppliers, distributors, manufacturers, contract packers, wholesalers, or
11 retailers of any fact, issue of law, or violation of law.

12 1.8 Except as expressly set forth herein, nothing in this Consent Judgment shall
13 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
14 current or future legal proceeding unrelated to these proceedings.

15 1.9 The Effective Date of this Consent Judgment is the date on which it is entered as a
16 Judgment by this Court.

17 2. JURISDICTION AND VENUE

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

25 3. INJUNCTIVE RELIEF, REFORMULATION, TESTING AND WARNINGS

26 3.1 Beginning sixty (60) days after the Effective Date (the "Compliance Date"),
27 Hammer Nutrition shall be permanently enjoined from manufacturing for sale in the State of
28 California, "Distributing into the State of California," or directly selling in the State of

1 California, any Covered Products which expose a person to a "Daily Lead Exposure Level" of
2 more than 0.5 micrograms of lead per day unless it meets the warning requirements under
3 Section 3.2.

4 3.1.1 As used in this Consent Judgment, the term "Distributing into the State
5 of California" shall mean to directly ship a Covered Product into California for sale in
6 California or to sell a Covered Product to a distributor that Hammer Nutrition knows or has
7 reason to know will sell the Covered Product in California.

8 3.1.2 For purposes of this Consent Judgment, the "Daily Lead Exposure
9 Level" shall be measured in micrograms, and shall be calculated using the following formula:
10 micrograms of lead per gram of product, multiplied by grams of product per serving of the
11 product (using the largest serving size appearing on the product label), multiplied by servings
12 of the product per day (using the largest number of recommended daily servings appearing on
13 the label), which equals micrograms of lead exposure per day. If the label contains no
14 recommended daily servings, then the number of recommended daily servings shall be one.

15 3.2 Clear and Reasonable Warnings

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

18 **WARNING:** Consuming this product can expose you to chemicals including lead which is
19 [are] known to the State of California to cause [cancer and] birth defects or other
20 reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

21 Hammer Nutrition shall use the phrase "cancer and" in the Warning if Hammer Nutrition has
22 reason to believe that the "Daily Lead Exposure Level" is greater than 15 micrograms of lead as
23 determined pursuant to the quality control methodology set forth in Section 3.4 or if Hammer
24 Nutrition has reason to believe that another Proposition 65 chemical is present which may require
25 a cancer warning.

26 The Warning shall be securely affixed to or printed upon the container or label of each
27 Covered Product. If the Warning is provided on the label, it must be set off from other
28 surrounding information and the warning label must have a printed square or box surrounding
the label text.. In addition, for any Covered Product sold over the internet where a California

1 delivery address is indicated, the Warning shall be provided either by including the Warning on
2 the product display page, by otherwise prominently displaying the Warning to the purchaser
3 during the checkout process prior to completing the purchase, or by any other means authorized
4 under Section 25602 of Title 27 of the California Code of Regulations. An asterisk or other
5 identifying method must be utilized to identify which products on the checkout page are subject
6 to the Warning. .

7 The Warning shall be at least the same size as the largest of any other health or safety
8 warnings also appearing on its website or on the label or container of Hammer Nutrition's
9 product packaging and the word "WARNING" shall be in all capital letters and in bold print.

10 No statements intended to or likely to have the effect of diminishing the impact of the Warning
11 on the average lay person shall accompany the Warning. Further no statements may accompany
12 the Warning that state or imply that the source of the listed chemical has an impact on or results
13 in a less harmful effect of the listed chemical.

14 Hammer Nutrition must display the above Warning with such conspicuousness, as
15 compared with other words, statements, or designs on the label or container, or on its website, if
16 applicable, to render the Warning likely to be read and understood by an ordinary individual
17 under customary conditions of purchase or use of the product.

18 3.3 Reformulated Covered Products

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

22 3.4 Testing and Quality Control Methodology

23 3.4.1 Beginning within one year of the Effective Date, Hammer Nutrition shall
24 arrange for lead testing of the Covered Products at least once a year for a minimum of five
25 consecutive years by arranging for testing of five randomly selected samples of each of the
26 Covered Products, in the form intended for sale to the end-user, which Hammer Nutrition
27 intends to sell or is manufacturing for sale in California, directly selling to a consumer in
28 California or "Distributing into the State of California." If tests conducted pursuant to this

1 Section demonstrate that no Warning is required for a Covered Product during each of five
2 consecutive years, then the testing requirements of this Section will no longer be required as to
3 that Covered Product. However, if during or after the five-year testing period, Hammer
4 Nutrition changes ingredient suppliers for any of the Covered Products and/or reformulates any
5 of the Covered Products, Hammer Nutrition shall test that Covered Product annually for at least
6 four (4) consecutive years after such change is made.

7 3.4.2 For purposes of measuring the "Daily Lead Exposure Level," the highest
8 lead detection result of the five (5) randomly selected samples of the Covered Products will be
9 controlling.

10 3.4.3 All testing pursuant to this Consent Judgment shall be performed using a
11 laboratory method that complies with the performance and quality control factors appropriate
12 for the method used, including limit of detection, qualification, accuracy, and precision that
13 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")
14 achieving a limit of quantification of less than or equal to 0.010 mg/kg.

15 3.4.4 All testing pursuant to this Consent Judgment shall be performed by an
16 independent third party laboratory certified by the California Environmental Laboratory
17 Accreditation Program or an independent third-party laboratory that is registered with the
18 United States Food & Drug Administration.

19 3.4.5 Nothing in this Consent Judgment shall limit Hammer Nutrition's ability
20 to conduct, or require that others conduct, additional testing of the Covered Products, including
21 the raw materials used in their manufacture.

22 3.4.6 Within thirty (30) days of ERC's written request, Hammer Nutrition
23 shall deliver lab reports obtained pursuant to Section 3.4 to ERC. Hammer Nutrition shall retain
24 all test results and documentation for a period of five years from the date of each test.

25 **4. SETTLEMENT PAYMENT**

26 4.1 In full satisfaction of all potential civil penalties, additional settlement payments,
27 attorney's fees, and costs, Hammer Nutrition shall make a total payment of \$100,000.00
28 ("Total Settlement Amount") to ERC within 10 days of the Effective Date ("Due Date").

1 Hammer Nutrition shall make this payment by wire transfer to ERC's account, for which ERC
2 will give Hammer Nutrition the necessary account information. The Total Settlement Amount
3 shall be apportioned as follows:

4 4.2 \$29,071.94 shall be considered a civil penalty pursuant to California Health and
5 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$21,803.95) of the civil penalty to
6 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
7 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
8 Code section 25249.12(c). ERC will retain the remaining 25% (\$7,267.99) of the civil penalty.

9 4.3 \$4,237.81 shall be distributed to ERC as reimbursement to ERC for reasonable
10 costs incurred in bringing this action.

11 4.4 \$21,803.92 shall be distributed to ERC as an Additional Settlement Payment
12 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d) and
13 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly
14 caused by Hammer Nutrition in this matter. These activities are detailed below and support
15 ERC's overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary
16 supplement products in California. ERC's activities have had, and will continue to have, a direct
17 and primary effect within the State of California because California consumers will be benefitted
18 by the reduction and/or elimination of exposure to lead in dietary supplements and/or by
19 providing clear and reasonable warnings to California consumers prior to ingestion of the
20 products.

21 Based on a review of past years' actual budgets, ERC is providing the following list of
22 activities ERC engages in to protect California consumers through Proposition 65 citizen
23 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those
24 activities: (1) ENFORCEMENT (65-80%): obtaining, shipping, analyzing, and testing dietary
25 supplement products that may contain lead and are sold to California consumers. This work
26 includes continued monitoring and enforcement of past consent judgments and settlements to
27 ensure companies are in compliance with their obligations thereunder, with a specific focus on
28 those judgments and settlements concerning lead. This work also includes investigation of new

1 companies that ERC does not obtain any recovery through settlement or judgment; (2)
2 VOLUNTARY COMPLIANCE PROGRAM (10-20%): maintaining ERC's Voluntary
3 Compliance Program by acquiring products from companies, developing and maintaining a case
4 file, testing products from these companies, providing the test results and supporting
5 documentation to the companies, and offering guidance in warning or implementing a self-
6 testing program for lead in dietary supplement products; and (3) "GOT LEAD" PROGRAM (up
7 to 5%): maintaining ERC's "Got Lead?" Program which reduces the numbers of contaminated
8 products that reach California consumers by providing access to free testing for lead in dietary
9 supplement products (Products submitted to the program are screened for ingredients which are
10 suspected to be contaminated, and then may be purchased by ERC, catalogued, sent to a
11 qualified laboratory for testing, and the results shared with the consumer that submitted the
12 product).

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

18 4.5 \$19,710.00 shall be distributed to Michael Freund as reimbursement of ERC's
19 attorney's fees, \$260.00 shall be distributed to Ryan Hoffman as reimbursement of ERC's
20 attorney's fees, while \$24,916.33 shall be distributed to ERC for its in-house legal fees. Except
21 as explicitly provided herein, each Party shall bear its own fees and costs.

22 4.6 In the event that Hammer Nutrition fails to remit the Total Settlement Amount
23 owed under Section 4 of this Consent Judgment on or before the Due Date, Hammer Nutrition
24 shall be deemed to be in material breach of its obligations under this Consent Judgment. ERC
25 shall provide written notice of the delinquency to Hammer Nutrition via electronic mail. If
26 Hammer Nutrition fails to deliver the Total Settlement Amount within five (5) days from the
27 written notice, the Total Settlement Amount shall accrue interest at the statutory judgment
28 interest rate provided in the California Code of Civil Procedure section 685.010. Additionally,

1 Hammer Nutrition agrees to pay ERC's reasonable attorney's fees and costs for any efforts to
2 collect the payment due under this Consent Judgment.

3 **5. MODIFICATION OF CONSENT JUDGMENT**

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

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

20 5.3 In the event that Hammer Nutrition initiates or otherwise requests a modification
21 under Section 5.1, and the meet and confer process leads to a joint motion or application for a
22 modification of the Consent Judgment, Hammer Nutrition shall reimburse ERC its costs and
23 reasonable attorney's fees for the time spent in the meet-and-confer process and filing and
24 arguing the motion or application.

25 5.4 Where the meet-and-confer process does not lead to a joint motion or
26 application in support of a modification of the Consent Judgment, then either Party may seek
27 judicial relief on its own. In any such contested court proceeding, ERC may seek costs and any
28

1 attorney's fees incurred in opposing the motion pursuant to California Code of Civil Procedure
2 section 1021.5.

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

5 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
6 this Consent Judgment.

7 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated
8 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
9 inform Hammer Nutrition in a reasonably prompt manner of its test results, including
10 information sufficient to permit Hammer Nutrition to identify the Covered Products at issue.
11 Hammer Nutrition shall, within thirty (30) days following such notice, provide ERC with
12 testing information, from an independent third-party laboratory meeting the requirements of
13 Sections 3.4.3 and 3.4.4, demonstrating Hammer Nutrition's compliance with the Consent
14 Judgment, if warranted. The Parties shall first attempt to resolve the matter prior to ERC taking
15 any further legal action.

16 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

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

1 distributors, manufacturers, contract packers, wholesalers, retailers, and all other upstream and
2 downstream entities in the distribution chain of any Covered Product, and the predecessors,
3 successors, and assigns of any of them (collectively, "Released Parties"), with respect to the
4 Covered Products. ERC, on behalf of itself and in the public interest, hereby fully releases and
5 discharges the Released Parties from any and all claims, actions, causes of action, suits,
6 demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have
7 been asserted from the handling, use, or consumption of the Covered Products, as to any
8 alleged violation of Proposition 65 or its implementing regulations arising from the failure to
9 provide Proposition 65 warnings on the Covered Products regarding lead up to and including
10 the Compliance Date.

11 8.2 ERC on its own behalf only, and Hammer Nutrition on its own behalf only,
12 further waive and release any and all claims they may have against each other for all actions or
13 statements made or undertaken in the course of seeking or opposing enforcement of Proposition
14 65 in connection with the Notice and Complaint up through and including the Effective Date,
15 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to
16 enforce the terms of this Consent Judgment.

17 8.3 It is possible that other claims not known to the Parties, arising out of the facts
18 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
19 discovered. ERC on behalf of itself only, and Hammer Nutrition on behalf of itself only,
20 acknowledge that this Consent Judgment is expressly intended to cover and include all such
21 claims up through and including the Effective Date, including all rights of action therefore.
22 ERC and Hammer Nutrition acknowledge that the claims released in Sections 8.1 and 8.2
23 above may include unknown claims, and nevertheless waive California Civil Code section
24 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

1 ERC on behalf of itself only, and Hammer Nutrition on behalf of itself only, acknowledge and
2 understand the significance and consequences of this specific waiver of California Civil Code
3 section 1542.

4 8.4 Compliance with the terms of this Consent Judgment shall be deemed to
5 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
6 in the Covered Products as set forth in the Notice and Complaint.

7 8.5 Nothing in this Consent Judgment is intended to apply to any occupational or
8 environmental exposures arising under Proposition 65, nor shall it apply to any of Hammer
9 Nutrition's products other than the Covered Products.

10 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

13 **10. GOVERNING LAW**

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

16 **11. PROVISION OF NOTICE**

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

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

21 Chris Heptinstall
22 Executive Director
23 Environmental Research Center
24 3111 Camino Del Rio North, Suite 400
25 San Diego, CA 92108
26 Tel: (619) 500-3090
27 Email: chris_crc501c3@yahoo.com

26 ///
27 ///
28 ///

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

9
10 **ENDURANCE MARKETING GROUP, INC., individually**
11 **and doing business as HAMMER NUTRITION DIRECT**
12 Brian Frank
13 Hammer Nutrition
14 4952 Whitefish Stage Road
15 Whitefish, MT 59937

16 With a copy to:
17 Garth Ward
18 Lewis Brisbois Bisgaard & Smith LLP
19 701 B Street, Suite 1900
20 San Diego, CA 92101
21 Telephone: (619) 233-1006
22 Facsimile: (619) 233-8627

23 **12. COURT APPROVAL**

24 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
25 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
26 Consent Judgment.

27 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
28 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
prior to the hearing on the motion.

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

13. EXECUTION AND COUNTERPARTS

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

1 **14. DRAFTING**

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

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

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

15 **16. ENFORCEMENT**

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

24 **17. ENTIRE AGREEMENT, AUTHORIZATION**

25 17.1 This Consent Judgment contains the sole and entire agreement and
26 understanding of the Parties with respect to the entire subject matter herein, and any and all
27 prior discussions, negotiations, commitments, and understandings related hereto. No
28 representations, oral or otherwise, express or implied, other than those contained herein have

1 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
2 herein, shall be deemed to exist or to bind any Party.

3 17.2 Each signatory to this Consent Judgment certifies that he or she is fully
4 authorized by the Party he or she represents to stipulate to this Consent Judgment.

5 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
6 **CONSENT JUDGMENT**

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

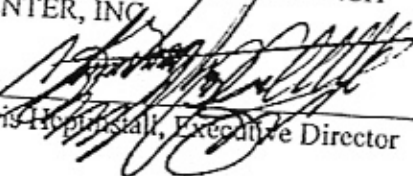
10 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
11 equitable settlement of all matters raised by the allegations of the Complaint that the matter has
12 been diligently prosecuted, and that the public interest is served by such settlement; and

13 (2) Make the findings pursuant to California Health and Safety Code section
14 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

15 **IT IS SO STIPULATED:**

16 Dated: 6/8/, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC

17
18 By: 
19 Chris Heppinstall, Executive Director

20
21 Dated: _____, 2018

22 ENDURANCE MARKETING GROUP,
23 INC., individually and doing business as
24 HAMMER NUTRITION DIRECT

25 By: _____
26 Its: _____

1 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
2 herein, shall be deemed to exist or to bind any Party.

3 17.2 Each signatory to this Consent Judgment certifies that he or she is fully
4 authorized by the Party he or she represents to stipulate to this Consent Judgment.

5 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
6 **CONSENT JUDGMENT**

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

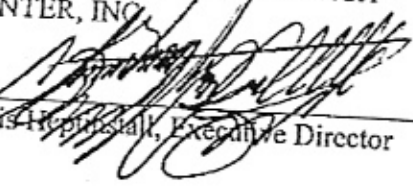
10 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
11 equitable settlement of all matters raised by the allegations of the Complaint that the matter has
12 been diligently prosecuted, and that the public interest is served by such settlement; and

13 (2) Make the findings pursuant to California Health and Safety Code section
14 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

15 **IT IS SO STIPULATED:**

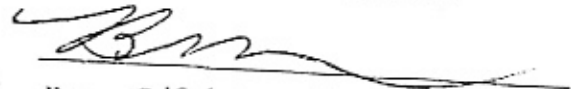
16 Dated: 6/8/, 2018

17 ENVIRONMENTAL RESEARCH
18 CENTER, INC.

19 By: 
Chris Hippert, Executive Director

20
21 Dated: 6/12, 2018

22 ENDURANCE MARKETING GROUP,
23 INC., individually and doing business as
24 HAMMER NUTRITION DIRECT

25 By: 
26 Its: Brian R Frank
27 President
28

1 APPROVED AS TO FORM:

2 Dated: 6/8, 2018

MICHAEL FREUND & ASSOCIATES

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

7
8 Dated: 6/12, 2018

9 LEWIS BRISBOIS BISGAARD & SMITH
10 LLP

11 By: [Signature]
12 Garth Ward
13 Attorney for Defendant Endurance
14 Marketing Group, Inc., individually and
15 doing business as Hammer Nutrition
16 Direct

17 ORDER AND JUDGMENT

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

20 IT IS SO ORDERED, ADJUDGED AND DECREED.

21 Dated: 6/18 9/4, 2018

22 [Signature]
23 Judge of the Superior Court

24 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 Ferklich Hoffman, Esq.

January 10, 2018

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

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

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

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

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

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

Endurance Marketing Group, Inc., individually and doing business as Hammer Nutrition Direct.

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

1. Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Orange Vanilla - Lead
2. Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Chocolate - Lead
3. Hammer Nutrition Recoverite Recovery Drink Optimal 3:1 Formula Strawberry - Lead

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

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

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

January 10, 2018

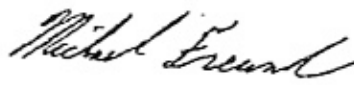
Page 2

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least January 10, 2015, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until this known toxic chemical is either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemical. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to this chemical.

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

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
- OEHLA Summary (to Endurance Marketing Group, Inc., individually and doing business as Hammer Nutrition Direct, and its Registered Agent for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Endurance Marketing Group, Inc., individually and doing business as Hammer Nutrition Direct

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am an attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the notice.
4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.
5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: January 10, 2018



Michael Freund

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

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

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

On January 10, 2018 between 8:00 a.m. and 5:00 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
Endurance Marketing Group, Inc., individually
and doing business as Hammer Nutrition Direct
4952 Whitefish Stage Road
Whitefish, MT 59937

Sallie A. Foley
(Endurance Marketing Group, Inc. individually
and doing business as Hammer Nutrition Direct's
Registered Agent for Service of Process)
Post Office Box 1398
Whitefish, MT 59937

Current President or CEO
Endurance Marketing Group, Inc., individually
and doing business as Hammer Nutrition Direct
Post Office Box 337
Whitefish, MT 59937

On January 10, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1) were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice>:

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

On January 10, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

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

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

January 10, 2018

Page 5

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

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

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

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

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

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, 4th 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

Jeffrey S. Rosell, District Attorney
Santa Cruz County
701 Ocean Street
Santa Cruz, CA 95060
Prop65DA@santacruzcounty.us

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

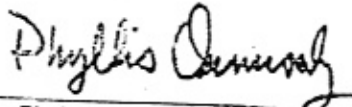
Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

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 January 10, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by First Class Mail.

Executed on January 10, 2018, 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, Trinity County Post Office Box 310 Weaverville, CA 96093
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, Tuolumne County 423 N. Washington Street Sonora, CA 95370
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 303 West Third Street San Bernardino, CA 92415	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
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	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
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	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101
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 Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	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, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Sierra County 100 Courthouse Square, 2nd Floor Downsville, CA 95936	
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, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Humboldt County 825 5th Street 4th Floor Eureka, CA 95501	District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
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, Sutter County 463 2nd Street Yuba City, CA 95991	
District Attorney, Inyo County P.O. Drawer 10 Independence, CA 93526	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, 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 27001.¹ These Implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

WHAT DOES PROPOSITION 65 REQUIRE?

¹ 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.

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 contaminant² 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

² 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.

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.