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**FILED**  
ALAMEDA COUNTY

JUL 02 2019

CLERK OF THE SUPERIOR COURT  
By Pam Williams  
Deputy

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16 FOODSTATE, INC., individually and doing  
17 business as MEGAFOOD and INNATE RESPONSE  
18 FORMULAS

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
20 **COUNTY OF ALAMEDA**

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

24 **Plaintiff,**

25 **vs.**

26 FOODSTATE, INC., individually and doing  
27 business as MEGAFOOD and INNATE  
28 RESPONSE FORMULAS; and DOES 1-100

**Defendants.**

CASE NO. RG19004198

**STIPULATED CONSENT  
JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed: January 25, 2019

Trial Date: None set

**1. INTRODUCTION**

1.1 On January 25, 2019, Plaintiff Environmental Research Center, Inc. ("ERC"), a non-profit corporation, as a private enforcer and in the public interest, initiated this action (the

1 “Action”) by filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the  
2 “Complaint”) pursuant to the provisions of California Health and Safety Code section 25249.5  
3 *et seq.* (“Proposition 65”), against FoodState, Inc., individually and doing business as  
4 MegaFood and Innate Response Formulas (“FoodState”), and Does 1-100. In this action, ERC  
5 alleges that a number of products manufactured, distributed, or sold by FoodState 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) Innate Response Formulas Inflama-GI, (2) MegaFood Fresh From Farm to  
10 Powder Daily C-Protect, (3) MegaFood Fresh From Farm To Powder Daily Turmeric, (4)  
11 Innate Response Formulas Innate Detox, (5) MegaFood Fresh From Farm to Powder Daily  
12 Purify Nutrient Booster Powder, and (6) MegaFood Fresh From Farm To Tablet Prostate  
13 Strength.

14       **1.2**     ERC and FoodState are hereinafter referred to individually as a “Party” or  
15 collectively as the “Parties.”

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

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

24       **1.5**     The Complaint is based on allegations contained in ERC’s Notice of Violation  
25 dated August 24, 2018 that was served on the California Attorney General (the “Attorney  
26 General”), other public enforcers, and FoodState (“Notice”). A true and correct copy of the  
27 Notice is attached hereto as **Exhibit A** and is incorporated herein by reference. More than 60  
28 days have passed since the Notice was served on the Attorney General, public enforcers, and

1 at any time, for any purpose. Nothing in this Consent Judgment shall be construed as giving rise  
2 to any presumption or inference of admission, concession, or waiver of any defense by  
3 FoodState, or by any other person or entity, as to any fault, wrongdoing, or liability, including  
4 without limitation any alleged violation of Proposition 65.

5 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall  
6 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
7 current or future legal proceeding unrelated to these proceedings. This paragraph shall not  
8 diminish or otherwise affect the obligations, responsibilities, and duties of any Party with  
9 respect to this Consent Judgment.

10 **1.9** The Effective Date of this Consent Judgment is the date on which FoodState's  
11 counsel receives from ERC's counsel a copy of the written Notice of Entry of Judgment by this  
12 Court.

## 13 **2. JURISDICTION AND VENUE**

14 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
15 subject matter jurisdiction over the allegations of violations contained in the Complaint, personal  
16 jurisdiction over FoodState as to the acts alleged in the Complaint, that venue is proper in  
17 Alameda County, and that this Court has jurisdiction to enter this Consent Judgment as a full and  
18 final settlement, compromise, and resolution of all claims up through and including the  
19 Compliance Date (as defined below) which were or could have been asserted in this Action based  
20 on the facts alleged in the Notice and Complaint.

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

22 **3.1** Beginning on the date (the "Compliance Date") which is fifteen (15) calendar  
23 days after the Effective Date, subject to the last sentence in this Section 3.1 and the provisions  
24 set forth in Section 8.4, FoodState shall be permanently enjoined from manufacturing for sale  
25 in the State of California, "Distributing into the State of California" (as defined below), or  
26 directly selling in the State of California, any Covered Product which exposes a person to a  
27 "Daily Lead Exposure Level" of more than 0.5 micrograms of lead per day, after subtracting  
28 out the amount of lead deemed "naturally occurring" for each applicable ingredient listed in

1 **Table 1** ("Table 1") of Section 3.1.3(f), unless it meets the warning requirements under Section  
2 3.2. So long as FoodState can document the date of manufacture of the Covered Product, a  
3 Covered Product manufactured prior to the Compliance Date may be distributed or sold  
4 without a Warning (defined below) by any person after the Compliance Date without violation  
5 of the Consent Judgment or Proposition 65.

6 **3.1.1** As used in this Consent Judgment, the term "Distributing into the State  
7 of California" shall mean directly shipping a Covered Product into the State of California for  
8 sale in the State of California or selling a Covered Product to a distributor that FoodState  
9 knows will sell the Covered Product in the State of California.

10 **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure  
11 Level" shall be measured in micrograms, and shall be calculated using the following formula:  
12 micrograms of lead per gram of product, multiplied by the number of grams of product per  
13 serving of the product (using the largest recommended serving size appearing on the product  
14 label), multiplied by the number of servings of the product per day (using the largest number of  
15 recommended daily servings appearing on the label), which equals micrograms of lead  
16 exposure per day, but excluding, pursuant to Section 3.1.3, any allowances for the amounts of  
17 lead as set forth in **Table 1**. If the label contains no recommended daily servings, then the  
18 number of recommended daily servings shall be one.

19 **3.1.3** (a) In calculating the Daily Lead Exposure Level for a Covered Product,  
20 FoodState shall be allowed to deduct the respective amount of lead which is deemed "naturally  
21 occurring" in each of the ingredients listed in **Table 1** that is contained in that Covered Product  
22 in accordance with this Section 3.1.3.

23 (b) For each year that FoodState claims entitlement to a "naturally occurring"  
24 allowance and is obligated to perform lead testing of the Covered Products pursuant to Section  
25 3.4.1, FoodState shall provide ERC with the following information: (i) a written list of each  
26 ingredient in the Covered Product for which a "naturally occurring" allowance is claimed; and  
27 (ii) documentation of laboratory testing, conducted during the year for which the "naturally  
28 occurring" allowance is claimed, that complies with Sections 3.4.3 and 3.4.4 and that detects



1 lead, if any, in each ingredient listed in Table 1 that is contained in the Covered Product and  
2 for which FoodState intends to deduct "naturally occurring" lead.

3 (c) If the laboratory testing referred to in Section 3.1.3 (b) detects lead in any of  
4 the ingredients listed in Table 1 that are contained in the Covered Product, FoodState shall be  
5 entitled to deduct the full amount of the allowance for each of those ingredients, as listed in  
6 Table 1, in which lead was detected.

7 (d) If the Covered Product does not contain any of the ingredients listed in  
8 Table 1, FoodState shall not be entitled to a deduction for "naturally occurring" lead in the  
9 Covered Product for any such ingredient not contained in the Covered Product.

10 (e) The information required by Section 3.1.3 (b), if a "naturally occurring"  
11 allowance is claimed, shall be provided to ERC within thirty (30) days of FoodState's  
12 completion of its initial lead testing of the Covered Products pursuant to Section 3.4.1, or  
13 anniversary thereof, for any year that FoodState is obligated to perform lead testing of the  
14 Covered Products pursuant to Section 3.4.1.

15 (f) **TABLE 1**

16

Ingredient	Allowances of Amounts of Lead for Purposes of this Consent Judgment Only
Calcium (elemental)	0.8 mcg Pb per gram of elemental calcium
Ferrous Fumarate	0.4 mcg Pb per gram of ferrous fumarate
Zinc Oxide	8.0 mcg Pb per gram of zinc oxide
Magnesium Oxide	0.4 mcg Pb per gram of magnesium oxide
Magnesium Carbonate	0.332 mcg Pb per gram of magnesium carbonate
Magnesium Hydroxide	0.4 mcg Pb per gram of magnesium hydroxide
Zinc Gluconate	0.8 mcg Pb per gram of zinc gluconate
Potassium Chloride	1.1 mcg Pb per gram of potassium chloride
Cocoa powder	1.0 mcg Pb per gram of cocoa powder

17

18 **3.2 Clear and Reasonable Warnings**

19 If FoodState is required to provide a warning pursuant to Section 3.1, the following  
20 warning ("Warning") must be utilized :

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

1 FoodState shall use the phrase "cancer and" in the Warning if FoodState knows that the "Daily  
2 Lead Exposure Level" is greater than 15 micrograms of lead as determined pursuant to the quality  
3 control methodology set forth in Section 3.4 or if FoodState knows that another Proposition 65  
4 chemical is present which requires a cancer warning. Where the Warning is being provided for an  
5 exposure to a single chemical the words "chemicals including" may be deleted from the Warning;  
6 however, the words "chemicals including" shall be included when the Warning is being provided  
7 for exposure to both listed carcinogens and reproductive toxicants. The Warning, if required,  
8 shall be securely affixed to or printed upon the container or label of each Covered Product. If the  
9 Warning is provided on the label, it must be set off from other surrounding information and  
10 enclosed in a box. If the Warning is provided on the label or on the container of any Covered  
11 Product, it shall be in a type size no smaller than the largest type size used for other consumer  
12 information on the product's consumer information panel and in no case shall such a Warning  
13 appear in a type size smaller than 6-point type. For any Covered Product sold over the internet,  
14 the Warning shall either (a) appear on the checkout page or (b) be provided via a clearly marked  
15 hyperlink using the word "WARNING" (in all capital and bold print) on such Covered Product's  
16 display page or product details page, when a California delivery address is indicated for any  
17 purchase of any Covered Product. If the Warning is provided on the label or container of any  
18 Covered Product, the Warning on the website may use the same content as the Warning on the  
19 label or container of such Covered Product. An asterisk or other identifying method must be  
20 utilized to identify which products on the checkout page are subject to the Warning.

21 FoodState must display the Warning with such conspicuousness, as compared with other  
22 words, statements or designs on the label or container, or on its website, if applicable, to render the  
23 Warning likely to be read and understood by an ordinary individual under customary conditions of  
24 purchase or use of the product.

### 25 3.3 Conforming Covered Products

26 A Conforming Covered Product is a Covered Product for which the "Daily Lead Exposure  
27 Level" is no greater than 0.5 micrograms of lead per day as determined by the quality control  
28 methodology described in Section 3.4 and excluding the amount of lead deemed "naturally

1 occurring” pursuant to Section 3.1.3 and Table 1 above. Conforming Covered Products shall be  
2 deemed to comply with this Consent Judgment and with Proposition 65 without being required to  
3 provide a Warning pursuant to Proposition 65.

### 4 3.4 Testing and Quality Control Methodology

5 3.4.1 (a) Beginning within one year after the Effective Date, FoodState shall  
6 arrange for lead testing of the Covered Products at least once a year for a minimum of three  
7 consecutive years (the “Three-Year Testing Period”) by arranging for testing of three to five  
8 randomly selected samples of each of the Covered Products, in the form intended for sale to the  
9 end-user, which FoodState intends to sell or is manufacturing for sale in California, directly  
10 selling to a consumer in California or “Distributing into the State of California.” If any  
11 Covered Product is not manufactured yearly, testing for such product shall occur for the three  
12 next occurring years of such a product’s manufacture, and those three years shall constitute the  
13 Three Year Testing Period for that Covered Product. If tests conducted pursuant to this  
14 Section 3.4.1 (a) demonstrate that no Warning is required for a Covered Product during each of  
15 three consecutive years, then the testing requirements of this Section 3.4.1(a) will no longer be  
16 required as to that Covered Product.

17 (b) If during or after the Three-Year Testing Period set forth in Section  
18 3.4.1(a), there is a change in the Covered Product’s formula, manufacturing process,  
19 ingredients, suggested use or recommended serving size, that is reasonably likely to affect the  
20 lead levels in a Covered Product sufficiently to alter that Covered Product’s compliance status  
21 under this Consent Judgment, FoodState shall conduct additional testing (the “Additional  
22 Testing”) of that Covered Product pursuant to the testing and quality control methodology set  
23 forth in Section 3.4.3, within sixty (60) days after such change. (i) If the Additional Testing  
24 does not alter that Covered Product’s compliance status under the Consent Judgment, then the  
25 testing requirements of this Section 3.4.1(b) shall no longer be required as to that Covered  
26 Product unless and until a subsequent change occurs which meets the criteria set forth in this  
27 Section 3.4.1(b) for requiring Additional Testing. (ii) If, however, the Additional Testing  
28 alters that Covered Product’s compliance status, then, except as set forth in Section 3.4.1(c),

1 FoodState shall test the Covered Product annually for at least two (2) consecutive years after  
2 such change is made. If tests conducted pursuant to this Section 3.4.1(b)(ii) demonstrate that  
3 no Warning is required for a Covered Product during each of two consecutive years, then,  
4 except as set forth in Section 3.4.1(c), the testing requirements of this Section 3.4.1(b) will no  
5 longer be required as to that Covered Product.

6 (c) In no event shall the total period for testing as required by this  
7 Section 3.4.1 be for less than the original Three Year Testing Period. Additionally, the testing  
8 requirements of this Section 3.4.1 shall cease after the sixth anniversary of the Effective Date.

9 **3.4.2** For purposes of measuring the "Daily Lead Exposure Level" the  
10 arithmetic mean of the lead testing analytical results for the three to five randomly selected  
11 representative samples of the Covered Products will be controlling and shall be used for  
12 calculating the Daily Lead Exposure Level for that Covered Product as set forth in Section 3.1.  
13 To establish representativeness, no fewer than three samples shall be tested.

14 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a  
15 laboratory method that complies with the performance and quality control factors appropriate  
16 for the method used, including limit of detection, qualification, accuracy, and precision that  
17 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")  
18 achieving a limit of quantification of less than or equal to 0.010 mg/kg, or any other testing  
19 method agreed upon in writing by the Parties.

20 **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an  
21 independent third party laboratory certified by the State of California or accredited by the State  
22 of California, a United States federal agency, the National Environmental Laboratory  
23 Accreditation Program, or an independent third-party laboratory that is registered with the  
24 United States Food & Drug Administration.

25 **3.4.5** Nothing in this Consent Judgment shall limit FoodState's ability to  
26 conduct, or require that others conduct, additional testing of the Covered Products, including  
27 the raw materials used in their manufacture.

28 **3.4.6** Within thirty (30) days of ERC's written request, FoodState shall deliver

1 lab reports obtained pursuant to Section 3.4 with respect to the Covered Products during the  
2 testing period required pursuant to Section 3.4 to ERC. FoodState shall retain all test results and  
3 documentation for a period of three years from the date of each test.

#### 4 4. SETTLEMENT PAYMENT

5 4.1 In full satisfaction of all potential civil penalties, additional settlement payments,  
6 attorney's fees, and costs for any alleged violations of Proposition 65 occurring on or before the  
7 Compliance Date, FoodState shall make a total payment of \$55,000.00 (Fifty-five thousand  
8 dollars) ("Total Settlement Amount") to ERC no later than the date ("Due Date") which is ten  
9 (10) business days after the later of: (a) the date FoodState receives from ERC service of  
10 written notice of approval and entry of this Consent Judgment by the Court and (b) the date  
11 FoodState receives from ERC the ERC Information (as defined below) in writing. FoodState  
12 shall make this payment by wire transfer to ERC's account. For purposes of making such wire  
13 transfer, ERC shall give FoodState all necessary account information and a valid United States  
14 Department of the Treasury Internal Revenue Service Form W-9 ("Request for Taxpayer  
15 Identification Number and Certification") (collectively, the "ERC Information"). The Total  
16 Settlement Amount shall be apportioned as follows:

17 (a) (i) \$6,000.00 shall be considered a civil penalty pursuant to California Health and  
18 Safety Code section 25249.7(b)(1). (ii) ERC shall remit 75% (\$4,500.00) of the civil  
19 penalty to the Office of Environmental Health Hazard Assessment ("OEHHA") for  
20 deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with  
21 California Health and Safety Code section 25249.12(c). (iii) ERC shall retain the  
22 remaining 25% (\$1,500.00) of the civil penalty.

23 (b) \$6,870.78 shall be distributed to ERC as reimbursement to ERC for reasonable costs  
24 incurred in bringing this action.

25 (c)(i) \$15,954.40 shall be distributed to Michael Freund as reimbursement of ERC's  
26 attorney's fees, (ii) \$612.50 shall be distributed to Ryan Hoffman as reimbursement of  
27 ERC's attorney's fees, and (iii) \$25,362.32 shall be distributed to ERC for its in-house  
28



1 legal fees. Except as explicitly provided herein, each Party shall bear its own fees and  
2 costs.

3 4.2 In the event that FoodState fails to remit the Total Settlement Amount owed  
4 under Section 4 of this Consent Judgment on or before the Due Date,, FoodState shall be  
5 deemed to be in material breach of its obligations under this Consent Judgment. ERC shall  
6 provide written notice of the delinquency to FoodState via electronic mail. If FoodState fails to  
7 deliver the Total Settlement Amount within ten (10) days from FoodState's receipt of the  
8 written notice, any unpaid portion of the Total Settlement Amount shall accrue interest at the  
9 statutory judgment interest rate provided in the California Code of Civil Procedure section  
10 685.010. Additionally, FoodState agrees to pay ERC's reasonable attorney's fees and costs for  
11 any efforts necessary to collect the payment due under this Consent Judgment.

## 12 5. MODIFICATION OF CONSENT JUDGMENT

13 5.1 This Consent Judgment may be modified only as to injunctive terms (i) by  
14 written stipulation of the Parties and upon entry by the Court of a modified consent judgment or  
15 (ii) by motion of either Party pursuant to Section 5.3 or 5.4 and upon entry by the Court of a  
16 modified consent judgment.

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

1           **5.3**     In the event that FoodState initiates or otherwise requests a modification under  
2 Section 5.1, and the meet and confer process leads to a joint motion or application for a  
3 modification of the Consent Judgment, FoodState shall reimburse ERC its costs and reasonable  
4 attorney's fees for the time spent in the meet-and-confer process and filing and arguing the  
5 motion or application.

6           **5.4**     Where the meet-and-confer process does not lead to a joint motion or  
7 application in support of a modification of the Consent Judgment, then either Party may seek  
8 judicial relief on its own. In any such contested court proceeding, ERC may seek costs and  
9 reasonable attorney's fees incurred in opposing the motion pursuant to California Code of Civil  
10 Procedure section 1021.5 if it is successful in opposing the motion.

11       **6.     RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
12       **JUDGMENT**

13       **6.1**     This Court shall retain jurisdiction of this matter to enforce, modify, or terminate  
14 this Consent Judgment.

15       **6.2**     If ERC alleges that any Covered Product fails to qualify as a Conforming  
16 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall  
17 inform FoodState in writing in a reasonably prompt manner, which writing shall include ERC's  
18 test results, including such additional written information sufficient to permit FoodState to  
19 identify the Covered Products at issue. FoodState shall, within thirty (30) days following such  
20 notice, provide ERC with testing information, meeting the requirements of Sections 3.4.3 and  
21 3.4.4, demonstrating FoodState's contention that the Covered Product qualifies as a  
22 Conforming Covered Product. The Parties shall first attempt to resolve the matter prior to ERC  
23 taking any further legal action.

24       **7.     APPLICATION OF CONSENT JUDGMENT**

25       This Consent Judgment shall inure to the benefit of the Parties and their respective  
26 officers, directors, shareholders, employees, agents, parent companies, sister companies, affiliates,  
27 subsidiaries, divisions, franchisees, licensees, customers (excluding private labelers), distributors,  
28 wholesalers, retailers, predecessors, successors, and assigns, and shall be binding upon the Parties

1 and their respective successors and assigns. This Consent Judgment shall have no application to  
2 any Covered Product which is distributed or sold exclusively outside the State of California or  
3 which is not used by California consumers.

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

5 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,  
6 on behalf of itself and in the public interest, and FoodState and its respective officers, directors,  
7 shareholders, employees, agents, parent companies, sister companies, affiliates, subsidiaries,  
8 divisions, suppliers, franchisees, licensees, customers (not including private label customers of  
9 FoodState), distributors, wholesalers, retailers, and all other upstream and downstream entities  
10 in the manufacturing, distribution and sales chains of any Covered Product, and the  
11 predecessors, successors, and assigns of any of them (collectively, "Released Parties"). ERC,  
12 on behalf of itself and in the public interest, hereby fully releases and discharges the Released  
13 Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages,  
14 penalties, fees, costs, and expenses asserted, or that could have been asserted from the  
15 handling, use, or consumption of the Covered Products, as to any alleged violation of  
16 Proposition 65 or its implementing regulations arising from the failure to provide Proposition  
17 65 warnings on the Covered Products regarding lead up to and including the Compliance Date.

18 **8.2** ERC on its own behalf only, and FoodState on its own behalf only, further  
19 waive and release any and all claims they may have against each other for all actions or  
20 statements made or undertaken in the course of seeking or opposing enforcement of Proposition  
21 65 in connection with the Notice and Complaint up through and including the Compliance  
22 Date, provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek  
23 to enforce the terms of this Consent Judgment.

24 **8.3** It is possible that other claims not known to the Parties, arising out of the facts  
25 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be  
26 discovered. ERC on behalf of itself only, and FoodState on behalf of itself only, acknowledge  
27 that this Consent Judgment is expressly intended to cover and include all such claims up  
28 through and including the Compliance Date, including all rights of action therefore. ERC and

1 FoodState acknowledge that the claims released in Sections 8.1 and 8.2 above may include  
2 unknown claims, and nevertheless waive California Civil Code section 1542 as to any such  
3 unknown claims. California Civil Code section 1542 reads as follows:

4 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE  
5 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO  
6 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE  
7 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE  
8 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE  
9 DEBTOR OR RELEASED PARTY.

8 ERC on behalf of itself only, and FoodState on behalf of itself only, acknowledge and  
9 understand the significance and consequences of this specific waiver of California Civil Code  
10 section 1542.

11 8.4 Compliance with the terms of this Consent Judgment shall be deemed to  
12 constitute compliance with Proposition 65 by any and all Released Parties regarding alleged  
13 exposures to lead in the Covered Products as set forth in the Notice and Complaint. In addition  
14 to, and not in derogation of, any other provision or section of this Consent Judgment, the  
15 injunctive relief set forth in Section 3 shall not apply to any of the Covered Products that are  
16 manufactured prior to the Compliance Date as set forth in Section 3.1.

17 8.5 Nothing in this Consent Judgment is intended to apply to any occupational or  
18 environmental exposures arising under Proposition 65, nor shall it apply to any of FoodState's  
19 products other than the Covered Products.

20 8.6 Nothing in this Consent Judgment shall preclude, waive or prejudice  
21 FoodState's right to assert any defense or controvert any fact or claim in any future litigation  
22 between the Parties or in any subsequent proceedings under, or in relation to, this Consent  
23 Judgment.

## 24 9. SEVERABILITY OF UNENFORCEABLE PROVISIONS

25 In the event that any of the provisions of this Consent Judgment are held by a court to be  
26 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.  
27 If a material provision is held by a court to be unenforceable, the Parties shall use their best efforts  
28 to resolve the concern in a timely manner.

1     **10. GOVERNING LAW**

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

4     **11. PROVISION OF NOTICE**

5             All notices required to be given to either Party to this Consent Judgment by the other shall  
6 be in writing and sent to the following agents listed below via first-class mail, unless notice by  
7 electronic mail is required. Courtesy copies via email may also be sent.

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

9     Chris Heptinstall, Executive Director, Environmental Research Center  
10     3111 Camino Del Rio North, Suite 400  
11     San Diego, CA 92108  
12     Ph: (619) 500-3090  
13     Email: [chris.heptinstall@erc501c3.org](mailto:chris.heptinstall@erc501c3.org)

14     With a copy to:  
15     Michael Freund  
16     Michael Freund & Associates  
17     1919 Addison Street, Suite 105  
18     Berkeley, CA 94704  
19     Email: [freund1@aol.com](mailto:freund1@aol.com)

20     **FOR FOODSTATE, INC., individually and doing business as MEGAFOOD and INNATE  
21     RESPONSE FORMULAS:**

22     Andrew Dahlen, Chief Executive Officer and President  
23     380 Harvey Road  
24     Manchester, NH 03103  
25     Email: [andy.dahlen@megafood.com](mailto:andy.dahlen@megafood.com)

26     With a copy to:  
27     Brett Heiken, Senior Corporate Counsel  
28     Email: [brett.heiken@megafood.com](mailto:brett.heiken@megafood.com)

29     With a second copy to:  
30     Steven Tekosky  
31     Tatro Tekosky Sadwick LLP  
32     333 S Grand Avenue, Suite 4270  
33     Los Angeles, CA 90071  
34     Email: [steventekosky@ttsmlaw.com](mailto:steventekosky@ttsmlaw.com)

35     ///

36     ///



1     **12. COURT APPROVAL**

2           **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
3 Motion for Court Approval and comply with all statutes, laws and regulations applicable to  
4 submission to, and notice of, settlement to the Attorney General. The Parties shall use their  
5 best efforts to support entry of this Consent Judgment.

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

9           **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be  
10 void and have no force or effect.

11     **13. EXECUTION AND COUNTERPARTS**

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

15     **14. DRAFTING**

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

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

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

1     **16. ENFORCEMENT**

2             Any of ERC, FoodState, or the Released Parties may, by motion or order to show cause  
3 before the Superior Court of Alameda County, enforce the terms and conditions contained in this  
4 Consent Judgment. In any action brought by ERC, FoodState, or the Released Parties to enforce  
5 this Consent Judgment, ERC, FoodState, or the Released Parties may seek whatever fines, costs,  
6 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.

7     **17. ENTIRE AGREEMENT, AUTHORIZATION**

8             **17.1** This Consent Judgment contains the sole and entire agreement and  
9 understanding of the Parties with respect to the subject matter herein in connection with the  
10 Covered Products, and any and all prior discussions, negotiations, commitments, and  
11 understandings related hereto. Except for the September 6, 2018 Confidentiality Agreement  
12 between ERC and FoodState regarding confidential business and trade secret information,  
13 which remains in full force and effect, no representations, oral or otherwise, express or implied,  
14 other than those contained herein have been made by any Party with respect to the subject  
15 matter herein in connection with the Covered Products. No other agreements, oral or  
16 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party  
17 with respect to the subject matter herein in connection with the Covered Products.

18             **17.2** Each signatory to this Consent Judgment certifies that he or she is fully  
19 authorized by the Party he or she represents to stipulate to this Consent Judgment.

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

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

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

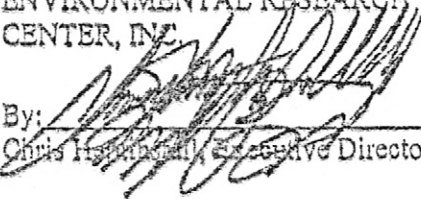
28             (2) Make the findings pursuant to California Health and Safety Code section

1 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

2 IT IS SO STIPULATED:

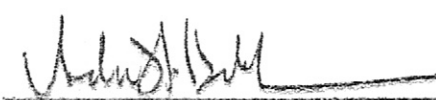
3 Dated: 3/24, 2019

ENVIRONMENTAL RESEARCH  
CENTER, INC.

By:   
Chris H. [unclear], Executive Director

7 Dated: 3/25, 2019


FOODSTATE, INC., individually and doing  
business as MEGAFOOD and INNATE  
RESPONSE FORMULAS

  
By: Andy Dahler  
Its: CEO

16 APPROVED AS TO FORM:

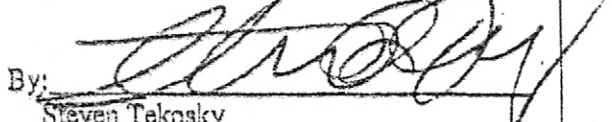
17 Dated: 3/25, 2019

MICHAEL FREUND & ASSOCIATES

By:   
Michael Freund  
Attorney for Plaintiff Environmental  
Research Center, Inc.

23 Dated: 3-25, 2019

TATRO TEKOSKY SADWICK LLP

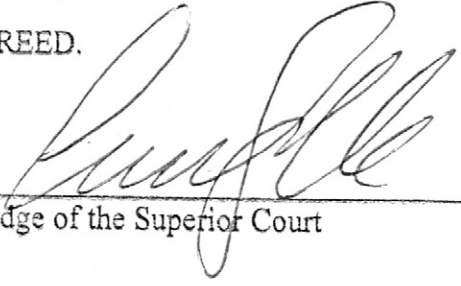
By:   
Steven Tekosky  
Attorney for Defendant FoodState, Inc.,  
individually and doing business as  
MegaFood and Innate Response Formulas

ORDER AND JUDGMENT

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

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: JUL 02 2019 2019

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

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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.

August 24, 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:

**FoodState, Inc., individually and doing business as MegaFood and Innate Response Formulas**

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. Innate Response Formulas Inflama-GI - Lead
2. MegaFood Fresh From Farm to Powder Daily C-Protect - Lead
3. MegaFood Fresh From Farm To Powder Daily Turmeric - Lead
4. Innate Response Formulas Clear Response Clinical Strength Purification & Cleanse Vanilla - Lead
5. Innate Response Formulas Innate Detox - Lead
6. MegaFood Fresh From Farm To Tablet Skin, Nails & Hair - Lead
7. Innate Response Formulas Bone Health Multivitamin - Lead
8. MegaFood Fresh From Farm To Tablet Baby & Me - Lead
9. MegaFood Fresh From Farm To Tablet Alpha-Teen - Lead
10. MegaFood Fresh From Farm to Powder Daily Purify Nutrient Booster Powder - Lead

### 11. MegaFood Fresh From Farm To Tablet Prostate Strength - 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.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least August 24, 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 ingesting 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

OEHHA Summary (to FoodState, Inc., individually and doing business as MegaFood and Innate Response Formulas and its 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 FoodState, Inc., individually and doing business as MegaFood and Innate Response Formulas

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: August 24, 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 August 24, 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  
FoodState, Inc., individually and doing business as  
MegaFood and Innate Response Formulas  
380 Harvey Road  
Manchester, NH 03103

Alan Reische, Esquire  
(Registered Agent for FoodState, Inc., individually  
and doing business as MegaFood and  
Innate Response Formulas)  
1000 Elm Street  
Manchester, NH 03101

Current President or CEO  
FoodState, Inc., individually and doing business as  
MegaFood and Innate Response Formulas  
Post Office Box 5244  
Manchester, NH 03108

CT Corporation System (C0168406)  
(Registered Agent for FoodState, Inc., individually  
and doing business as MegaFood and  
Innate Response Formulas)  
818 W 7<sup>th</sup> St., Ste 930  
Los Angeles, CA 90017

The Corporation Trust Company  
(Registered Agent for FoodState, Inc., individually  
and doing business as MegaFood and  
Innate Response Formulas)  
Corporation Trust Center  
1209 N. Orange Street  
Wilmington, DE 19801

Current President or CEO  
FoodState, Inc., individually and doing business as  
MegaFood and Innate Response Formulas  
8 Bowers Road  
Post Office Box 325  
Derry, NH 03038

On August 24, 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 August 24, 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:

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

August 24, 2018

Page 5

Nancy O'Malley, District Attorney  
Alameda County  
7677 Oakport Street, Suite 650  
Oakland, CA 94621  
CEPDProp65@acgov.org

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

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

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

Allison Haley, District Attorney  
Napa County  
1127 First Street, Suite C  
Napa, CA 94559  
CEPD@countyofnapa.org

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

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

Mark Ankcorn, Deputy City Attorney  
San Diego City Attorney  
1200 Third Avenue  
San Diego, CA 92101  
CityAttyProp65@sandiego.gov

Gregory Alker, Assistant District Attorney  
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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

Christopher Dalbay, Deputy District Attorney  
Santa Barbara County  
1112 Santa Barbara Street  
Santa Barbara, CA 93101  
DAProp65@co.santa-barbara.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@santaacruzcounty.us

Stephan R. Passalacqua, District Attorney  
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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



August 24, 2018

Page 6

On August 24, 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 August 24, 2018, in Fort Oglethorpe, Georgia.

---

Phyllis Dunwoody

Service List

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, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
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	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
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	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
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 Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95333	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
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, Sierra County 100 Courthouse Square, 2 <sup>nd</sup> Floor Downieville, CA 95936	
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
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, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
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, Sutter County 463 2 <sup>nd</sup> Street Yuba City, CA 95991	
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, Tehama County Post Office Box 519 Rad Bluff, CA 96080	
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, Trinity County Post Office Box 310 Weaverville, CA 96093	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370	
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230			

## 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?*

**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

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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>.

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 chemicals that cause cancer or that is 1,000 times below the "no observable effect" level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

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

## *HOW IS PROPOSITION 65 ENFORCED?*

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of 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).

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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.