

FILED
ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT

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

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

20 **Plaintiff,**

21 **vs.**

22 **METAGENICS, INC. and DOES 1-100**

23 **Defendants.**

CASE NO. RG19041250

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: October 30, 2019

Trial Date: None set

24 **1. INTRODUCTION**

25 **1.1** On October 30, 2019, Plaintiff Environmental Research Center, Inc. ("ERC"), a
26 non-profit corporation, as a private enforcer and in the public interest, initiated this action by
27 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the "Complaint")
28 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
("Proposition 65"), against Metagenics, Inc. ("Metagenics") and Does 1-100. In this action,
ERC alleges that products manufactured, distributed, or sold by Metagenics contain lead, a

1 chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and expose
2 consumers to this chemical at a level requiring a Proposition 65 warning. These products
3 (referred to hereinafter individually as a "Covered Product" or collectively as "Covered
4 Products") are: (1) Metagenics UltraInflamX Plus 360° Medical Food Original Spice Flavor
5 and (2) Metagenics CandiBactin BR.

6 **1.2** ERC and Metagenics are hereinafter referred to individually as a "Party" or
7 collectively as the "Parties."

8 **1.3** ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
9 causes, helping safeguard the public from health hazards by reducing the use and misuse of
10 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
11 and encouraging corporate responsibility.

12 **1.4** For purposes of this Consent Judgment, the Parties agree that Metagenics is a
13 business entity that has employed ten or more persons at all times relevant to this action, and
14 qualifies as a "person in the course of doing business" within the meaning of Proposition 65.
15 Metagenics manufactures, distributes, and/or sells the Covered Products.

16 **1.5** The Complaint is based on allegations contained in ERC's Notices of Violation
17 dated May 30, 2019 and July 11, 2019 that were served on the California Attorney General,
18 other public enforcers, and Metagenics ("Notices"). True and correct copies of the 60-Day
19 Notices dated May 30, 2019 and July 11, 2019 are attached hereto as **Exhibits A and B**,
20 respectively, and each are incorporated herein by reference. More than 60 days have passed
21 since the Notices were served on the Attorney General, public enforcers, and Metagenics and
22 no designated governmental entity has filed a Complaint against Metagenics with regard to the
23 Covered Products or the alleged violations.

24 **1.6** ERC's Notices and Complaint allege that use of the Covered Products exposes
25 persons in California to lead without first providing clear and reasonable warnings in violation
26 of California Health and Safety Code section 25249.6. Metagenics denies all material
27 allegations contained in the Notices and Complaint.

28 **1.7** The Parties have entered into this Consent Judgment in order to settle,

1 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.
2 Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute
3 or be construed as an admission by any of the Parties or by any of their respective officers,
4 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
5 franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact,
6 issue of law, or violation of law.

7 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
8 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in
9 any current or future legal proceeding unrelated to these proceedings.

10 **1.9** The Effective Date of this Consent Judgment is the date on which notice is
11 given that it is entered as a Judgment by this Court.

12 **2. JURISDICTION AND VENUE**

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

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

21 **3.1** Beginning on the Effective Date, Metagenics shall be permanently enjoined
22 from manufacturing for sale in the State of California, "Distributing into the State of
23 California," or directly selling in the State of California, any Covered Products which expose a
24 person to a "Daily Lead Exposure Level" of more than 0.5 micrograms of lead per day unless it
25 meets the warning requirements under Section 3.2.

26 **3.1.1** As used in this Consent Judgment, the term "Distributing into the State
27 of California" shall mean to directly ship a Covered Product into California for sale in
28 California or to sell a Covered Product to a distributor that Metagenics knows or has reason to

1 know will sell the Covered Product in California.

2 **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure
3 Level" shall be measured in micrograms, and shall be calculated using the following formula:
4 micrograms of lead per gram of product, multiplied by grams of product per serving of the
5 product (using the largest serving size appearing on the product label), multiplied by servings
6 of the product per day (using the largest number of recommended daily servings appearing on
7 the label), which equals micrograms of lead exposure per day, excluding, pursuant to Section
8 3.1.3, the amount of lead in the ingredients listed in **Table 1** below, if applicable. If the label
9 contains no recommended daily servings, then the number of recommended daily servings
10 shall be one.

11 **3.1.3** In calculating the Daily Lead Exposure Level for a Covered Product,
12 Metagenics shall be allowed to deduct the amount of lead which is deemed "naturally occurring"
13 in the ingredients listed in **Table 1** that are contained in that Covered Product under the
14 following conditions: For each calendar year that Metagenics claims entitlement to a "naturally
15 occurring" allowance, Metagenics shall provide ERC, upon request, with the following
16 information: (a) Metagenics must produce to ERC a written list of each ingredient in the Covered
17 Product for which a "naturally occurring" allowance is claimed; (b) Metagenics must provide
18 ERC with documentation of laboratory testing conducted during the year for which the
19 "naturally occurring" allowance is claimed that complies with Sections 3.4.3 and 3.4.4 and that
20 shows the amount of lead, if any, contained in each ingredient listed in **Table 1** that is contained
21 in the Covered Product and for which Metagenics intends to deduct "naturally occurring" lead;
22 (c) If the laboratory testing reveals the presence of lead in any of the ingredients listed in **Table 1**
23 that are contained in the Covered Product, Metagenics shall be entitled to deduct up to the full
24 amount of the allowance for those ingredients, as listed in **Table 1**, but not to exceed the total
25 amount of lead actually contained in those ingredients that are in the Covered Product; and (d) If
26 the Covered Product does not contain any of the ingredients listed in **Table 1**, Metagenics shall
27 not be entitled to a deduction for "naturally occurring" lead in the Covered Product for those
28 ingredients. Within thirty (30) days of the Effective Date, or anniversary thereof for three years

1 following the Effective Date, ERC may make a written request to Metagenics for the information
2 required by Sections 3.1.3 (a) and (b), which shall be provided by Metagenics to ERC within
3 thirty (30) days of ERC's written request.

4 **TABLE 1**

5 INGREDIENT	ALLOWANCES OF AMOUNT OF LEAD
6 Calcium (elemental)	0.8 micograms/gram
7 Ferrous Fumarate	0.4 micograms/gram
8 Zinc Oxide	8.0 micograms/gram
9 Magnesium Oxide	0.4 micograms/gram
10 Magnesium Carbonate	0.332 micograms/gram
11 Magnesium Hydroxide	0.4 micograms/gram
12 Zinc Gluconate	0.8 micograms/gram
13 Potassium Chloride	1.1 micograms/gram

15
16 **3.2 Clear and Reasonable Warnings**

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

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

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

27 The Warning above is derived from Tit. 27, Cal. Code Regs. § 25607.2, effective August
28 30, 2018. If the warning language of this Regulation is amended after the date of entry of this

1 Consent Judgment in such a manner that this Warning is no longer the safe harbor warning
2 applicable to the Covered Products, Metagenics may seek to modify this Consent Judgment
3 pursuant to Section 5 herein.

4 The Warning shall be securely affixed to or printed upon the container or label of each
5 Covered Product. If the Warning is provided on the label, it must be set off from other
6 surrounding information and enclosed in a box. Alternatively, with respect only to
7 Metagenics's brick-and-mortar reseller customers who are subject to Proposition 65,
8 Metagenics may give written notice, including shelf signs bearing the Warning and all other
9 necessary warning materials, to the authorized agent for such brick-and-mortar reseller
10 customers. Such written notice shall instruct the brick-and-mortar reseller customers that the
11 shelf signs bearing the Warning must be displayed in proximity to the Covered Products with
12 such conspicuousness, as compared with other words, statements or designs as to render it
13 likely to be seen, read, and understood by an ordinary individual prior to sale. In addition, for
14 any Covered Product sold over the internet by Metagenics, the Warning shall appear on the
15 checkout page directly or through a hyperlink using the word "**WARNING**" (in capital letters
16 and bold print), so long as the hyperlink goes directly to a page prominently displaying the
17 Warning without any other content unless the content only identifies the source of the exposure
18 or provides information on how to avoid or reduce exposure to the identified chemical or
19 chemicals, when a California delivery address is indicated for any purchase of any Covered
20 Product. An asterisk or other identifying method must be utilized to identify which product on
21 the checkout page is subject to the Warning.

22 The Warning shall be at least the same size as the largest of any other health or safety
23 warnings also appearing on the website or on the label or container of Metagenics' product
24 packaging and the word "**WARNING**" shall be in all capital letters and in bold print. The
25 warning content may contain information that is supplemental to the content required by this
26 Consent Judgment only to the extent it identifies the source of the exposure or provides
27 information on how to avoid or reduce exposure to the identified chemical or chemicals. Further,
28 no statements may accompany the Warning that state or imply that the source of the listed

1 chemical has an impact on or results in a less harmful effect of the listed chemical.

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

6 **3.3 Conforming Covered Products**

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

10 **3.4 Testing and Quality Control Methodology**

11 **3.4.1** Beginning within one year of the Effective Date, Metagenics shall
12 arrange for lead testing of the Covered Products for which a Warning has not been provided
13 continuously and without interruption after the Effective Date at least once a year for a
14 minimum of three consecutive years by arranging for testing of five randomly selected samples
15 of the Covered Products, in the form intended for sale to the end-user, which Metagenics
16 intends to sell or is manufacturing for sale in California, directly selling to a consumer in
17 California or "Distributing into the State of California." If tests conducted pursuant to this
18 Section demonstrate that no Warning is required for a Covered Product during each of three
19 consecutive years, then the testing requirements of this Section will no longer be required as to
20 that Covered Product. However, if during or after the three-year testing period, Metagenics
21 changes ingredient suppliers for any of the Covered Products and/or reformulates any of the
22 Covered Products, Metagenics shall test that Covered Product annually for at least two (2)
23 consecutive years after such change is made.

24 **3.4.2** For purposes of measuring the "Daily Lead Exposure Level," the
25 average lead detection result of the five (5) randomly selected samples of the Covered Products
26 will be controlling.

27 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a
28 laboratory method that complies with the performance and quality control factors appropriate

1 for the method used, including limit of detection, qualification, accuracy, and precision that
2 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")
3 achieving a limit of quantification of less than or equal to 0.010 mg/kg.

4 **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an
5 independent third party laboratory certified by the California Environmental Laboratory
6 Accreditation Program or an independent third-party laboratory that is registered with the
7 United States Food & Drug Administration.

8 **3.4.5** Nothing in this Consent Judgment shall limit Metagenics' ability to
9 conduct, or require that others conduct, additional testing of the Covered Products, including
10 the raw materials used in their manufacture.

11 **3.4.6** Within thirty (30) days of ERC's written request, which request shall not
12 be made more than once per year, Metagenics shall deliver lab reports obtained pursuant to
13 Section 3.4 to ERC. Metagenics shall retain all test results and documentation for a period of
14 five years from the date of each test.

15 **4. SETTLEMENT PAYMENT**

16 **4.1** In full satisfaction of all potential civil penalties, additional settlement
17 payments, attorney's fees, and costs, Metagenics shall make a total payment of \$82,500.00
18 ("Total Settlement Amount") to ERC within 5 business days of the Effective Date ("Due
19 Date"). Metagenics shall make this payment by wire transfer to ERC's account. ERC will give
20 Metagenics the necessary account information and a W-9 in advance of the Effective Date. The
21 Total Settlement Amount shall be apportioned as follows:

22 **4.2** \$35,500.00 shall be considered a civil penalty pursuant to California Health and
23 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$26,625.00) of the civil penalty to
24 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
25 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
26 Code section 25249.12(c). ERC will retain the remaining 25% (\$8,875.00) of the civil penalty.

27 **4.3** \$1,000.42 shall be distributed to ERC as reimbursement to ERC for reasonable
28 costs incurred in bringing this action.

1 4.4 \$25,991.08 shall be distributed to ERC as an Additional Settlement Payment
2 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d)
3 and 3204. ERC will utilize the ASP for activities that address the same public harm as
4 allegedly caused by Defendant in this matter. These activities are detailed
5 below and support ERC's overarching goal of reducing and/or eliminating hazardous and toxic
6 chemicals in dietary supplement products in California. ERC asserts that its activities have had,
7 and will continue to have, a direct and primary effect within the State of California because
8 California consumers will be benefitted by the reduction and/or elimination of exposure to lead
9 in dietary supplements and/or by providing clear and reasonable warnings to California
10 consumers prior to ingestion of the products.

11 Based on a review of past years' actual budgets, ERC is providing the following list of
12 activities ERC engages in to protect California consumers through Proposition 65 citizen
13 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those
14 activities: (1) ENFORCEMENT (65-80%): obtaining, shipping, analyzing, and testing dietary
15 supplement products that may contain lead and are sold to California consumers. This work
16 includes continued monitoring and enforcement of past consent judgments and settlements to
17 ensure companies are in compliance with their obligations thereunder, with a specific focus on
18 those judgments and settlements concerning lead. This work also includes investigation of new
19 companies that ERC does not obtain any recovery through settlement or judgment; (2)
20 VOLUNTARY COMPLIANCE PROGRAM (10-20%): maintaining ERC's Voluntary
21 Compliance Program by acquiring products from companies, developing and maintaining a
22 case file, testing products from these companies, providing the test results and supporting
23 documentation to the companies, and offering guidance in warning or implementing a self-
24 testing program for lead in dietary supplement products; and (3) "GOT LEAD" PROGRAM
25 (up to 5%): maintaining ERC's "Got Lead?" Program which reduces the numbers of
26 contaminated products that reach California consumers by providing access to free testing for
27 lead in dietary supplement products (Products submitted to the program are screened for
28 ingredients which are suspected to be contaminated, and then may be purchased by ERC,

1 catalogued, sent to a qualified laboratory for testing, and the results shared with the consumer
2 that submitted the product).

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

8 **4.5** \$17,550.00 shall be distributed to Michael Freund as reimbursement of ERC's
9 attorney's fees, while \$2,458.50 shall be distributed to ERC for its in-house legal fees. Except
10 as explicitly provided herein, each Party shall bear its own fees and costs.

11 **4.6** In the event that Metagenics fails to remit the Total Settlement Amount owed
12 under Section 4 of this Consent Judgment on or before the Due Date, Metagenics shall be
13 deemed to be in material breach of its obligations under this Consent Judgment. ERC shall
14 provide written notice of the delinquency to Metagenics via electronic mail. If Metagenics
15 fails to deliver the Total Settlement Amount within five (5) days from the written notice, the
16 Total Settlement Amount shall accrue interest at the statutory judgment interest rate provided
17 in the California Code of Civil Procedure section 685.010. Additionally, Metagenics agrees to
18 pay ERC's reasonable attorney's fees and costs for any efforts to collect the payment due
19 under this Consent Judgment.

20 **5. MODIFICATION OF CONSENT JUDGMENT**

21 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by
22 written stipulation of the Parties and upon entry by the Court of a modified consent judgment
23 or (ii) by motion of either Party pursuant to Section 5.3 or 5.4 and upon entry by the Court of a
24 modified consent judgment.

25 **5.2** If either party seeks to modify this Consent Judgment under Section 5.1, that
26 party must provide written notice to the other party of its intent ("Notice of Intent"). If the
27 party not seeking the modification desires to meet and confer regarding the proposed
28 modification in the Notice of Intent, then such party must provide written notice to the party

1 seeking the modification within thirty (30) days of receiving the Notice of Intent. If notice is
2 given in a timely manner of an intent to meet and confer, then the Parties shall meet and confer
3 in good faith as required in this Section. The Parties shall meet in person or via telephone, or
4 via email if agreed, within thirty (30) days of notification of a party's intent to meet and confer.
5 Within thirty (30) days of such meeting, if the proposed modification is disputed, the disputing
6 party shall provide the other party a written basis for its position. The Parties shall continue to
7 meet and confer for an additional thirty (30) days in an effort to resolve any remaining
8 disputes. Should it become necessary, the Parties may agree in writing to different deadlines
9 for the meet-and-confer period.

10 **5.3** In the event that either party initiates or otherwise requests a modification under
11 Section 5.1, and the meet and confer process leads to a joint motion or application for a
12 modification of the Consent Judgment, the party requesting the modification shall prepare, file
13 and argue the motion or application.

14 **5.4** Where the meet-and-confer process does not lead to a joint motion or
15 application in support of a modification of the Consent Judgment, then either Party may seek
16 judicial relief on its own.

17 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
18 **JUDGMENT**

19 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or
20 terminate this Consent Judgment.

21 **6.2** If ERC alleges that any Covered Product fails to qualify as a Conforming
22 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
23 inform Metagenics in a reasonably prompt manner of its test results, including information
24 sufficient to permit Metagenics to identify the Covered Products at issue. Metagenics shall,
25 within thirty (30) days following such notice, provide ERC with testing information, from an
26 independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,
27 demonstrating Metagenics' compliance with the Consent Judgment. The Parties shall first
28 attempt to resolve the matter prior to ERC taking any further legal action.

1 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

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

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

28 **8.3** It is possible that other claims not known to the Parties, arising out of the facts

1 alleged in the Notices and Complaint, and relating to the Covered Products, will develop or be
2 discovered. ERC on behalf of itself only, and Metagenics on behalf of itself only, acknowledge
3 that this Consent Judgment is expressly intended to cover and include all such claims up
4 through and including the Effective Date, including all rights of action therefore. ERC and
5 Metagenics acknowledge that the claims released in Sections 8.1 and 8.2 above may include
6 unknown claims, and nevertheless waive California Civil Code section 1542 as to any such
7 unknown claims. California Civil Code section 1542 reads as follows:

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

12 ERC on behalf of itself only, and Metagenics on behalf of itself only, acknowledge and
13 understand the significance and consequences of this specific waiver of California Civil Code
14 section 1542.

15 8.4 Compliance with the terms of this Consent Judgment shall be deemed to
16 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
17 in the Covered Products as set forth in the Notices and Complaint.

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

21 9. SEVERABILITY OF UNENFORCEABLE PROVISIONS

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

25 10. GOVERNING LAW

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

28 ///

11. PROVISION OF NOTICE

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

FOR ENVIRONMENTAL RESEARCH CENTER, INC.:

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

With a copy to:

Michael Freund
Michael Freund & Associates
1919 Addison Street, Suite 105
Berkeley, CA 94704
Ph: (510) 540-1992
Email: freund1@aol.com

FOR METAGENICS, INC.:

Paul Konney
Executive VP, General Counsel & Head of Global Regulatory Affairs
Metagenics, Inc.
25 Enterprise, Ste 200
Alisa Viejo, CA 92656

With a copy to:

Amy P. Lally
Sidley Austin LLP
1999 Avenue of the Stars, 17th Floor
Los Angeles, CA 90067
Ph: (310) 595-9500
Email: alally@sidley.com

12. COURT APPROVAL

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

1 Consent Judgment.

2 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
3 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
4 prior to the hearing on the motion.

5 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
6 void and have no force or effect.

7 **13. EXECUTION AND COUNTERPARTS**

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

11 **14. DRAFTING**

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

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

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

25 **16. ENFORCEMENT**

26 ERC may, by motion or order to show cause before the Superior Court of Alameda
27 County, enforce the terms and conditions contained in this Consent Judgment. In any action
28 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,

1 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.
2 To the extent the failure to comply with the Consent Judgment constitutes a violation of
3 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent
4 Judgment, but may seek in another action whatever fines, costs, penalties, or remedies as are
5 provided by law for failure to comply with Proposition 65 or other laws.

6 **17. ENTIRE AGREEMENT, AUTHORIZATION**

7 **17.1** This Consent Judgment contains the sole and entire agreement and
8 understanding of the Parties with respect to the entire subject matter herein, and any and all
9 prior discussions, negotiations, commitments, and understandings related hereto. No
10 representations, oral or otherwise, express or implied, other than those contained herein have
11 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
12 herein, shall be deemed to exist or to bind any Party.

13 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
14 authorized by the Party he or she represents to stipulate to this Consent Judgment.

15 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
16 **CONSENT JUDGMENT**

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

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

23 (2) Make the findings pursuant to California Health and Safety Code section
24 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

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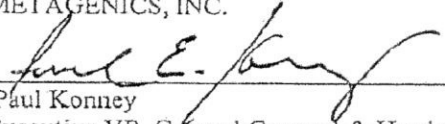
1 IT IS SO STIPULATED:

2 Dated: 2/17/, 2020ENVIRONMENTAL RESEARCH
CENTER, INC.By: 

Chris Kappas, Executive Director

6 Dated: 22 Feb., 2020

METAGENICS, INC.


Paul KonneyExecutive VP, General Counsel & Head of
Global Regulatory Affairs

15 APPROVED AS TO FORM:

17 Dated: 2/24/, 2020

MICHAEL FREUND & ASSOCIATES

By: Michael Freund
Attorney for Environmental Research
Center, Inc.22 Dated: 2-22, 2020

SIDLEY AUSTIN LLP

By: Amy P. Lally
Attorney for Metagenics, Inc.

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 2020

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: 510.371.0885

Michael Freund, Esq.

May 30, 2019

**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 product 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 this product. 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:

Metagenics, Inc.

Consumer Product and Listed Chemical. The product that is the subject of this notice and the chemical in that product identified as exceeding allowable levels are:

Metagenics UltraInflamX Plus 360° Medical Food Original Spice Flavor - 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.

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

May 30, 2019

Page 2

Route of Exposure. The consumer exposures that are the subject of this notice result from the recommended use of this product. 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 May 30, 2016, as well as every day since the product was 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 product. 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 this product 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 product so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of this product; (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 product 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 or at freund1@aol.com.**

Sincerely,



Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Metagenics, Inc. and its Registered Agents for Service of Process only)

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

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
May 30, 2019
Page 3

CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Metagenics, Inc.

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

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

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

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



Dated: May 30, 2019

Michael Freund

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
May 30, 2019
Page 4

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 May 30, 2019, 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
Metagenics, Inc.
25 Enterprise, Ste 200
Aliso Viejo, CA 92656

The Corporation Trust Company
(Registered Agent for Metagenics, Inc.)
1209 N. Orange St
Wilmington, DE 19801

Paul E. Konney
(Registered Agent for Metagenics, Inc.)
25 Enterprise, Ste 200
Aliso Viejo, CA 92656

On May 30, 2019, 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 May 30, 2019, 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:

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

Barbara Yook, District Attorney
Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249
Prop65Env@co.calaveras.ca.us

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

May 30, 2019

Page 5

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

Thomas L. Hardy, District Attorney
Inyo County
168 North Edwards Street
Independence, CA 93526
inyoda@inyocounty.us

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 Marie 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
San Francisco County
732 Brannan Street
San Francisco, CA 94103
gregory.alker@sfgov.org

Valerie Lopez, Deputy City Attorney
San Francisco City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
Valerie.Lopez@sfcityatt.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

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

Bud Porter, 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

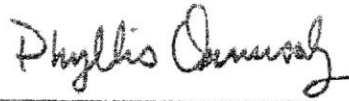
Gregory D. Totten, District Attorney
Ventura County
800 S Victoria Ave
Ventura, CA 93009
daspecialops@ventura.org

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
May 30, 2019
Page 6

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

On May 30, 2019, 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 May 30, 2019, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

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

May 30, 2019

Page 7

Service List

District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	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 Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	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	
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Sierra County 100 Courthouse Square, 2nd Floor Downieville, CA 95936	
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, El Dorado County 778 Pacific St Placerville, CA 95667	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, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	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, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Sutter County 463 2nd Street Yuba City, CA 95991	
District Attorney, Humboldt County 825 5th Street 4th Floor Eureka, CA 95501	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	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	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, Lake County 255 N. Forbes Street Lakeport, CA 95453	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, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012			

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCYTHE 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?

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

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>.

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 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.

² 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.

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.

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EXHIBIT B

Michael Freund & Associates

1919 Addison Street, Suite 105

Berkeley, CA 94704

Voice: 510.540.1992 • Fax: 510.371.0885

Michael Freund, Esq.

July 11, 2019

**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 product 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 this product. 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:

Metagenics, Inc.

Consumer Product and Listed Chemical. The product that is the subject of this notice and the chemical in that product identified as exceeding allowable levels are:

Metagenics CandiBactin-BR - 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.

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
July 11, 2019
Page 2

Route of Exposure. The consumer exposures that are the subject of this notice result from the recommended use of this product. 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 July 11, 2016, as well as every day since the product was 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 product. 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 this product 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 product so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of this product; (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 product 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 or at freund1@aol.com.**

Sincerely,



Michael Freund

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to Metagenics, Inc. and its Registered Agents for Service of Process only)
Additional Supporting Information for Certificate of Merit (to AG only)

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
July 11, 2019
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CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Metagenics, Inc.

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

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

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

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



Dated: July 11, 2019

Michael Freund

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
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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 July 11, 2019, 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
Metagenics, Inc.
25 Enterprise, Ste 200
Aliso Viejo, CA 92656

The Corporation Trust Company
(Registered Agent for Metagenics, Inc.)
1209 N. Orange St
Wilmington, DE 19801

Paul E. Konney
(Registered Agent for Metagenics, Inc.)
25 Enterprise, Ste 200
Aliso Viejo, CA 92656

On July 11, 2019, 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 July 11, 2019, 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:

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

Barbara Yook, District Attorney
Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249
Prop65Env@co.calaveras.ca.us

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

July 11, 2019

Page 5

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

Thomas L. Hardy, District Attorney
Inyo County
168 North Edwards Street
Independence, CA 93526
inyoda@inyocounty.us

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@rivecoda.org

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

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

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

Valerie Lopez, Deputy City Attorney
San Francisco City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
Valerie.Lopez@sfcityatty.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

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

Bud Porter, 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
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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

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
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Page 6

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

On July 11, 2019, 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 July 11, 2019, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

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

July 11, 2019

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Service List

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

District Attorney, Amador
County
708 Court Street, Suite 202
Jackson, CA 95642

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

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

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

District Attorney, El Dorado
County
778 Pacific St
Placerville, CA 95667

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

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

District Attorney, Humboldt
County
825 5th Street 4th Floor
Eureka, CA 95501

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

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

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

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

District Attorney, Los Angeles
County
Hall of Justice
211 West Temple St., Ste 1200
Los Angeles, CA 90012

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

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

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

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

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

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

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

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

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

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

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

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

District Attorney, San
Bernardino County
303 West Third Street
San Bernardino, CA 92415

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

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

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

District Attorney, Sierra
County
100 Courthouse Square, 2nd
Floor
Downieville, CA 95936

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

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

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

District Attorney, Sutter
County
463 2nd Street
Yuba City, CA 95991

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

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

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

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

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

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

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCYTHE 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?

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

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>.

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 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.

² 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.

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.

**CLERK'S CERTIFICATE OF MAILING
(CCP 1013a)**

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is **24405 Amador Street Hayward, California 94544**. I served this **ORDER** by placing copies in envelope(s) addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail in **Hayward**, California, following standard court practices.

▼ Freund, Michael
Michael Freund & Associates
1919 Addison Street
Suite 105
Berkeley, CA 94704_____

▼ Lally, Amy P.
Sidley Austin LLP
1999 Avenue of the Stars, 17th Fl.
Los Angeles, CA 90067

Date: 7/2/2020

Executive Officer/Clerk of the Superior Court

By 
Kasha Clarke, Deputy Clerk