

FILED
ALAMEDA COUNTY**AUG 20 2020****CLERK OF THE SUPERIOR COURT**By Danielle Salinas Deputy**FILED BY FAX****ALAMEDA COUNTY**

June 24, 2020

CLERK OF
THE SUPERIOR COURT
By Shabira Iyamu, Deputy

CASE NUMBER:

RG20061138

1 Michael Freund SBN 99687
2 Michael Freund & Associates
3 1919 Addison Street, Suite 105
4 Berkeley, CA 94704
5 Telephone: (510) 540-1992
6 Email: freund1@aol.com

Attorney for Plaintiff Environmental Research Center, Inc.

7 Jennifer M. Adams SBN 319347
8 Amin Talati Wasserman, LLP
9 100 S. Wacker Dr., Suite 2000
10 Chicago, IL 60606
11 Telephone: 312-327-3325
12 Email: jennifer@amintalati.com

Attorney for Defendant Kion LLC

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

14 **ENVIRONMENTAL RESEARCH**
15 **CENTER, INC., a California non-profit**
16 **corporation**

Plaintiff,

vs.

19 **KION LLC and DOES 1-100**

Defendants.

CASE NO. RG20061138**STIPULATED CONSENT
JUDGMENT**

Health & Safety Code § 25249.5 et seq.

Action Filed: May 13, 2020

Trial Date: None set

I. INTRODUCTION

24 1.1 On May 13, 2020, Plaintiff Environmental Research Center, Inc. ("ERC"), a
25 non-profit corporation, as a private enforcer and in the public interest, initiated this action by
26 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the "Complaint")
27 pursuant to the provisions of California Health and Safety Code section 25249.5 et seq.
28 ("Proposition 65"), against Kion LLC ("Kion") and Does 1-100. In this action, ERC alleges

1 that a number of products manufactured, distributed, or sold by Kion contain lead, a chemical
2 listed under Proposition 65 as a carcinogen and reproductive toxin, and expose consumers to
3 this chemical at a level requiring a Proposition 65 warning. These products (referred to
4 hereinafter individually as a "Covered Product" or collectively as "Covered Products") are: (1)
5 Tiánchi Brighten Your Mind, (2) Kion Lean, and (3) Kion Clean Energy Bar Cocoa Nibs
6 Coconut Almond Honey.

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

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

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

17 **1.5** The Complaint is based on allegations contained in ERC's Notice of Violation
18 dated February 13, 2020 that was served on the California Attorney General, other public
19 enforcers, and Kion ("Notice"). A true and correct copy of the 60-Day Notice dated February
20 13, 2020 is attached hereto as **Exhibit A** and incorporated herein by reference. More than 60
21 days have passed since the Notice was served on the Attorney General, public enforcers, and
22 Kion and no designated governmental entity has filed a Complaint against Kion with regard to
23 the Covered Products or the alleged violations.

24 **1.6** ERC's Notice 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. Kion denies all material allegations
27 contained in the Notice 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 it is entered
11 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 Kion as to the acts alleged in the Complaint, that venue is proper in Alameda County, and
17 that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
18 claims up through and including the Effective Date which were or could have been asserted in this
19 action based on the facts alleged in the Notice and Complaint.

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

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

1 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. If the label contains no
8 recommended daily servings, then the number of recommended daily servings shall be one.

9 **3.2 Clear and Reasonable Warnings**

10 If Kion is required to provide a warning pursuant to Section 3.1, the following warning
11 must be utilized ("Warning"):

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

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

19 Kion shall provide an interim Warning up to and including sixty (60) days after the
20 Effective Date via a postcard, measuring no less than 5 inches by 7 inches, that shall be
21 included with the Covered Product(s) in each package containing the Covered Product(s) that
22 is delivered to a customer in California. The postcard content shall consist of only the Warning
23 and an identification of the associated Covered Product(s) (a representation on the postcard that
24 all products in a shipment are associated with the Warning is compliant with this Consent
25 Judgment so long as all products in the shipment would require a Warning). Commencing
26 sixty-one (61) days after the Effective Date, Kion shall, if the "Daily Lead Exposure Level"
27 continues to be greater than 0.5 micrograms of lead per day, ensure that the Warning shall be
28 securely affixed to or printed upon the label of each Covered Product. The warning on the
label must be set off from other surrounding information and enclosed in a box. Kion may also

1 continue to provide the postcard Warning. In addition, beginning on the Effective Date, for
2 any Covered Product sold over the internet, the Warning shall appear either (a) prior to
3 checkout on the primary product page, (b) as a pop-up when a California zip code is input into
4 the shipping instructions, or (c) on the checkout page when a California delivery address is
5 indicated for any purchase of any Covered Product. An asterisk or other identifying method
6 must be utilized to identify which products on the checkout page are subject to the Warning.
7 The Warning may be provided with a conspicuous hyperlink stating "WARNING" in all
8 capital and bold letters so long as the hyperlink goes directly to a page prominently displaying
9 the Warning without content that detracts from the Warning. Given Kion's lack of control
10 over third-party websites, the online warning requirements expressed in this Section apply only
11 to Covered Products sold through Kion's website so long as Kion complies with the
12 requirements of 27 CCR 25600.2 (in effect on the date of entry of this Consent Judgment).

13 The Warning shall be at least the same size as the largest of any other health or safety
14 warnings also appearing on the website or on the label of the Covered Product, and the word
15 "**WARNING**" shall be in all capital letters and in bold print. No statements intended to or likely
16 to have the effect of diminishing the impact of the Warning on the average lay person shall
17 accompany the Warning. Further, no statements may accompany the Warning that state or imply
18 that the source of the listed chemical has an impact on or results in a less harmful effect of the
19 listed chemical.

20 Kion must display the above Warning with such conspicuousness, as compared with other
21 words, statements or designs on the label, or on its website, if applicable, to render the Warning
22 likely to be read and understood by an ordinary individual under customary conditions of
23 purchase or use of the product. If subsequently enacted changes to Proposition 65 or its
24 implementing regulations require the use of additional or different information on any warning
25 specifically applicable to the Covered Products, the Parties agree that the new safe harbor warning
26 may be utilized in place of or in addition to the warnings set forth in this Section.

27 For purposes of this Consent Judgment, the term "label" means a display of written,
28 printed or graphic material that is printed on or affixed to a Covered Product or its immediate

1 container or wrapper.

2 **3.3 Conforming Covered Products**

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

6 **3.4 Testing and Quality Control Methodology**

7 **3.4.1** Beginning within one year of the Effective Date, Kion shall arrange for
8 lead testing of the Covered Products at least once a year for a minimum of three (3)
9 consecutive years by arranging for testing of three (3) randomly selected samples of each of
10 the Covered Products, in the form intended for sale to the end-user, which Kion intends to sell
11 or is manufacturing for sale in California, directly selling to a consumer in California or
12 "Distributing into the State of California." If tests conducted pursuant to this Section
13 demonstrate that no Warning is required for a Covered Product during each of three
14 consecutive years, then the testing requirements of this Section will no longer be required as to
15 that Covered Product. However, if during or after the three-year testing period, Kion changes
16 ingredient suppliers for any of the Covered Products and/or reformulates any of the Covered
17 Products, Kion shall test that Covered Product annually for at least three (3) consecutive years
18 after such change is made.

19 **3.4.2** For purposes of measuring the "Daily Lead Exposure Level," the highest
20 lead detection result of the three (3) randomly selected samples of the Covered Products will
21 be controlling.

22 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a
23 laboratory method that complies with the performance and quality control factors appropriate
24 for the method used, including limit of detection, qualification, accuracy, and precision that
25 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")
26 achieving a limit of quantification of less than or equal to 0.010 mg/kg.

27 **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an
28 independent third party laboratory certified by the California Environmental Laboratory

1 Accreditation Program or an independent third-party laboratory that is registered with the
2 United States Food & Drug Administration.

3 **3.4.5** Nothing in this Consent Judgment shall limit Kion's ability to conduct,
4 or require that others conduct, additional testing of the Covered Products, including the raw
5 materials used in their manufacture.

6 **3.4.6** Within thirty (30) days of ERC's written request, Kion shall deliver lab
7 reports obtained pursuant to Section 3.4 to ERC. Kion shall retain all test results and
8 documentation for a period of three years from the date of each test.

9 **3.4.7** The testing requirements of Section 3.4 do not apply to any Covered
10 Product for which Kion has provided the Warning specified in Section 3.2 continuously and
11 uninterrupted after the Effective Date; however, in the event Kion ceases to provide the
12 Warning specified in Section 3.2, Kion shall be required to comply with the testing
13 requirements of this section beginning immediately after the date the Warning ceases to be
14 provided or one year after the Effective Date, whichever date is later.

15 **4. SETTLEMENT PAYMENT**

16 **4.1** In full satisfaction of all potential civil penalties, additional settlement
17 payments, attorney's fees, and costs, Kion shall make a total payment of \$65,000.00 ("Total
18 Settlement Amount") to ERC, with an initial payment of \$16,250.00 ("Initial Payment") to be
19 paid within 5 days of the Effective Date, \$16,250.00 ("Second Payment") to be paid within 35
20 days of the Effective Date, \$16,250.00 ("Third Payment") to be paid within 65 days of the
21 Effective Date, and \$16,250.00 ("Final Payment") to be paid within 95 days of the Effective
22 Date (these payments are collectively referred to as "Periodic Payments"). Kion shall make
23 these Periodic Payments by wire transfer to ERC's account, for which ERC will give Kion the
24 necessary account information. The Total Settlement Amount shall be apportioned as follows:

25 **4.2** \$26,250.00 shall be considered a civil penalty pursuant to California Health and
26 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$19,687.50) of the civil penalty to
27 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
28 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety

1 Code section 25249.12(c). ERC will retain the remaining 25% (\$6,562.50) of the civil penalty.

2 **4.3** \$2,534.43 shall be distributed to ERC as reimbursement to ERC for reasonable
3 costs incurred in bringing this action.

4 **4.4** \$19,672.23 shall be distributed to ERC as an Additional Settlement Payment
5 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d)
6 and 3204. ERC will utilize the ASP for activities that address the same public harm as
7 allegedly caused by Defendant in this matter. These activities are detailed
8 below and support ERC's overarching goal of reducing and/or eliminating hazardous and toxic
9 chemicals in dietary supplement products in California. ERC's activities have had, and will
10 continue to have, a direct and primary effect within the State of California because California
11 consumers will be benefitted by the reduction and/or elimination of exposure to lead in dietary
12 supplements and/or by providing clear and reasonable warnings to California consumers prior
13 to ingestion of the products.

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

1 contaminated products that reach California consumers by providing access to free testing for
2 lead in dietary supplement products (Products submitted to the program are screened for
3 ingredients which are suspected to be contaminated, and then may be purchased by ERC,
4 catalogued, sent to a qualified laboratory for testing, and the results shared with the consumer
5 that submitted the product).

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

11 **4.5** \$12,450.00 shall be distributed to Michael Freund as reimbursement of ERC's
12 attorney's fees, while \$4,093.34 shall be distributed to ERC for its in-house legal fees. Except
13 as explicitly provided herein, each Party shall bear its own fees and costs.

14 **4.6** In the event that Kion fails to remit, in full, any of the Periodic Payments owed
15 under Section 4 of this Consent Judgment on or before their applicable due date, Kion shall be
16 deemed to be in material breach of its obligations under this Consent Judgment. ERC shall
17 provide written notice of the delinquency to Kion via electronic mail. If Kion fails to deliver
18 the applicable delinquent payment (the Initial Payment and/or the Second Payment and/or the
19 Third Payment and/or the Final Payment) within five (5) days from the written notice, the
20 Total Settlement Amount, less any amounts previously paid to ERC pursuant to Section 4.1,
21 shall be immediately due and owing and shall accrue interest at the statutory judgment interest
22 rate provided in the California Code of Civil Procedure section 685.010. Additionally, Kion
23 agrees to pay ERC's reasonable attorney's fees and costs for any efforts to collect the
24 payment(s) due under this Consent Judgment.

25 **5. MODIFICATION OF CONSENT JUDGMENT**

26 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by
27 written stipulation of the Parties and upon entry by the Court of a modified consent judgment
28 or (ii) by motion of either Party pursuant to Section 5.3 and upon entry by the Court of a

1 modified consent judgment.

2 **5.2** If Kion seeks to modify this Consent Judgment under Section 5.1, then Kion
3 must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to meet and
4 confer regarding the proposed modification in the Notice of Intent, then ERC must provide
5 written notice to Kion within thirty (30) days of receiving the Notice of Intent. If ERC notifies
6 Kion in a timely manner of ERC's intent to meet and confer, then the Parties shall meet and
7 confer in good faith as required in this Section. The Parties shall meet in person or via
8 telephone within thirty (30) days of ERC's notification of its intent to meet and confer. Within
9 thirty (30) days of such meeting, if ERC disputes the proposed modification, ERC shall
10 provide to Kion a written basis for its position. The Parties shall continue to meet and confer
11 for an additional thirty (30) days in an effort to resolve any remaining disputes. Should it
12 become necessary, the Parties may agree in writing to different deadlines for the meet-and-
13 confer period.

14 **5.3** In the event that Kion initiates or otherwise requests a modification under
15 Section 5.1, and the meet and confer process leads to a joint motion or application for a
16 modification of the Consent Judgment, Kion shall reimburse ERC its costs and reasonable
17 attorney's fees for the time spent in the meet-and-confer process and filing and arguing the
18 motion or application. ERC shall not be reimbursed for costs or attorney's fees for an
19 uncontested motion, or for a ministerial motion (such as a change in name or contact
20 information) or if ERC does not expend more than two (2) hours of attorney time on the joint
21 motion.

22 **5.4** In the event that Proposition 65 is repealed or preempted as to food products,
23 then Kion shall have no further obligation pursuant to this Consent Judgment with respect to the
24 injunctive terms, but only to the extent that the Covered Products are affected by the repeal or
25 preemption.

26 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
27 **JUDGMENT**

28 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or

1 terminate this Consent Judgment.

2 **6.2** If ERC alleges that any Covered Product fails to qualify as a Conforming
3 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
4 inform Kion in a reasonably prompt manner of its test results, including information sufficient
5 to permit Kion to identify the Covered Products at issue. Kion shall, within thirty (30) days
6 following such notice, provide ERC with testing information, from an independent third-party
7 laboratory meeting the requirements of Sections 3.4.3 and 3.4.4, demonstrating Kion's
8 compliance with the Consent Judgment. The Parties shall first attempt to resolve the matter
9 prior to ERC taking any further legal action.

10 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

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

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

3 **8.2** ERC on its own behalf only, and Kion on its own behalf only, further waive
4 and release any and all claims they may have against each other for all actions or statements
5 made or undertaken in the course of seeking or opposing enforcement of Proposition 65 in
6 connection with the Notice and Complaint up through and including the Effective Date,
7 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to
8 enforce the terms of this Consent Judgment.

9 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
10 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
11 discovered. ERC on behalf of itself only, and Kion on behalf of itself only, acknowledge that
12 this Consent Judgment is expressly intended to cover and include all such claims up through
13 and including the Effective Date, including all rights of action therefore. ERC and Kion
14 acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown
15 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
16 claims. California Civil Code section 1542 reads as follows:

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

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

26 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
27 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
28 in the Covered Products as set forth in the Notice and Complaint.

29 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
30 environmental exposures arising under Proposition 65, nor shall it apply to any of Kion's

1 products other than the Covered Products.

2 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

6 **10. GOVERNING LAW**

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

9 **11. PROVISION OF NOTICE**

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

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

14 Chris Heptinstall, Executive Director, Environmental Research Center
15 3111 Camino Del Rio North, Suite 400
16 San Diego, CA 92108
17 Ph: (619) 500-3090
Email: chris.heptinstall@erc501c3.org

18 With a copy to:
19 Michael Freund
20 Michael Freund & Associates
21 1919 Addison Street, Suite 105
22 Berkeley, CA 94704
Ph: (510) 540-1992
Email: freund1@aol.com

23 **FOR KION LLC:**

24 Angelo Keely
25 Chief Executive Officer
26 Kion, LLC
27 3980 N Broadway, Suite 103-183
28 Boulder, CO 80304
Telephone: (855)387-5466
Email: support@getkion.com

1 With a copy to:

2 Abhishek K. Gurnani
3 Amin Talati Wasserman, LLP
4 100 S. Wacker Dr., Suite 2000
5 Chicago, IL 60606
6 Telephone: 312-327-3325
7 Email: abhishek@amintalati.com

8 **12. COURT APPROVAL**

9 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
10 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
11 Consent Judgment.

12 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
13 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
14 prior to the hearing on the motion.

15 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
16 void and have no force or effect.

17 **13. EXECUTION AND COUNTERPARTS**

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

21 **14. DRAFTING**

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

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

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

6 **16. ENFORCEMENT**

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

15 **17. ENTIRE AGREEMENT, AUTHORIZATION**

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

22 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
23 authorized by the Party he or she represents to stipulate to this Consent Judgment.

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

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

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

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

IT IS SO STIPULATED:

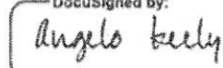
Dated: 6/5/, 2020

ENVIRONMENTAL RESEARCH
CENTER, INC.

By: 
Chris Herpin, Executive Director

Dated: 6/9/2020, 2020

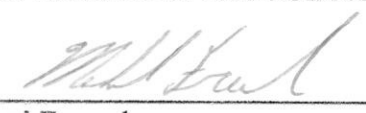
KION LLC

DocuSigned by:

By: Angelo Keely
Its: CEO

APPROVED AS TO FORM:


Dated: 6/9/, 2020

MICHAEL FREUND & ASSOCIATES

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

Dated: June 9, 2020

AMIN TALATI WASSERMAN, LLP

By: 
Jennifer M. Adams
Attorney for Kion LLC

DocuSign Envelope ID: 23EBFAFC-C6E0-485F-B259-93C873226C7B

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: 8-20, 2020



Judge of the Superior Court

JULIA A. SPAIN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Michael Freund & Associates

1919 Addison Street, Suite 105
Berkeley, CA 94704
Voice: 510.540.1992 • Fax: 510.371.0885

Michael Freund, Esq.

February 13, 2020

**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:

Kion LLC

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. Tiánchi Brighten Your Mind - Lead**
- 2. Kion Lean - Lead**
- 3. Kion Clean Energy Bar Cocoa Nibs Coconut Almond Honey - 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 February 13, 2017, 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 or at freund1@aol.com.**

Sincerely,



Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Kion LLC and its Registered Agent for Service of Process only)

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

CERTIFICATE OF MERIT

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

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: February 13, 2020

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 February 13, 2020 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
Kion LLC
3980 N Broadway St, Ste 103-183
Boulder, CO 80304

Angelo Steinhardt-Keely
(Registered Agent for Kion LLC)
4132 Autumn Ct
Boulder, CO 80304

On February 13, 2020 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 February 13, 2020 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

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

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

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

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

February 13, 2020

Page 5

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

Jeannine M. Pacioni, District Attorney
Monterey County
1200 Aguajito Road
Monterey, CA 93940
Prop65DA@co.monterey.ca.us

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

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

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

Summer Stephan, District Attorney
San Diego County
330 West Broadway
San Diego, CA 92101
SanDiegoDAProp65@sdcda.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@sfcityattys.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

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

February 13, 2020

Page 6

On February 13, 2020 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 February 13, 2020, in Fort Oglethorpe, Georgia.

Phyllis Dunwoody

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

February 13, 2020

Page 7

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 Bernadino, CA 92415

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 AGENCY

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

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

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

The text of Proposition 65 (Health and Safety Code Sections 25249.5 through 25249.13) is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.¹ These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

WHAT DOES PROPOSITION 65 REQUIRE?

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.