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8 Environmental Research Center

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16 Attorneys for Defendant
17 BODYBUILDING.COM, LLC

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 COUNTY OF SAN FRANCISCO

20 ENVIRONMENTAL RESEARCH
21 CENTER, a California non-profit
22 corporation,

23 Plaintiff,

24 v.

25 ATF FITNESS PRODUCTS, INC.;;
26 BODYBUILDING.COM, LLC; and DOES
27 1-50, inclusive,

28 Defendants.

Case No. CGC-11-514211

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

1.1 On September 13, 2011, Plaintiff Environmental Research Center (“ERC”), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by filing a Complaint for Injunctive Relief and Civil Penalties under to the provisions of

1 California's Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
2 Safety Code § 25249.5, *et seq.* (also known as and hereinafter referred to as "Proposition 65"),
3 against Defendant Bodybuilding.com, LLC ("Bodybuilding.com"). In this action, ERC claims
4 that certain products manufactured, distributed, and/or sold by Bodybuilding.com contain lead, a
5 chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and expose
6 consumers to levels of lead requiring Proposition 65 warnings. ERC and Bodybuilding.com are
7 hereinafter sometimes referred to individually as a "Party" or collectively as the "Parties".

8 1.2 The Complaint with respect to Bodybuilding.com is based on allegations
9 contained in a Notice of Violations of California Health & Safety Code Section 25249.5 *et seq.*
10 ("Notice of Violations"), which was dated March 11, 2011, and served on the California
11 Attorney General, other public enforcers and Bodybuilding.com. A true and correct copy of the
12 Notice of Violations is attached hereto as Exhibit A. The following products were identified in
13 the Notice of Violations: (1) SciFit PROCUTS Ephedra Free Energy Metabolism Definition; (2)
14 SciFit Hunger Strike; (3) SciFit Fat Burner Plus; (4) SciFit TZ3 Stack; (5) SciFit T-500 Extreme;
15 (6) SciFit Tribesterone 1500; (7) SciFit 3-Test Stack; (8) SciFit G.H.T. Stack; (9) SciFit Procuts
16 Ephedra Free; (10) SciFit Eurycoma 1500 EX; (11) SciFit T-Max Daytime Anabolic Formula;
17 and (12) SciFit T-Max Nighttime Anabolic Formula. (These listed products are hereinafter
18 referred to collectively as the "Covered Products" and in the singular as a "Covered Product.")¹
19 More than 60 days have passed since the Notice of Violations was served and no public
20 enforcement entity has filed a complaint against Bodybuilding.com with regard to the Covered
21 Products or the alleged violations.

22 1.3 ERC is a California non-profit corporation dedicated to, among other causes,
23 helping safeguard the public from health hazards by reducing the use and misuse of hazardous
24 and toxic chemicals, facilitating a safe environment for consumers and employees, and
25 encouraging corporate responsibility. ERC has diligently prosecuted this matter and is settling

26 _____
27 ¹ The Notice of Violations identifies various product package sizes – e.g., both the 120 and 240 capsule size bottles
28 of SciFit Fat Burner Plus are identified in the Notice of Violations. However, the Complaint does not include the
product package size information. For purposes of this Consent Judgment, the Covered Products include all sizes of
product packaging for each of the Covered Products.

1 this case in the public interest.

2 1.4 Bodybuilding.com is a business entity that employs ten or more persons, and is a
3 "person in the course of doing business" within the meaning of Proposition 65.

4 Bodybuilding.com sold the Covered Products at retail through its website
5 www.bodybuilding.com.

6 1.5 The Notice of Violations and the Complaint allege that the Covered Products
7 exposed persons in California to lead without first providing clear and reasonable warnings, in
8 violation of California Health and Safety Code Section 25249.6. Bodybuilding.com denies all
9 material allegations contained in the Notice of Violations and the Complaint and specifically
10 denies that the Covered Products required a Proposition 65 warning or otherwise cause harm to
11 any person.

12 1.6 The Parties have entered into this Consent Judgment in order to settle,
13 compromise and resolve disputed claims and thus avoid prolonged and costly litigation. Nothing
14 in this Consent Judgment shall constitute or be construed as an admission by any of the Parties,
15 or by any of their respective officers, directors, shareholders, employees, agents, parent
16 companies, subsidiaries, divisions, affiliates, franchises, licensees, distributors, wholesalers, or
17 retailers, of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or
18 liability, including without limitation, any admission concerning any alleged violation of
19 Proposition 65, nor shall this Consent Judgment be offered or admitted as evidence in any
20 administrative or judicial proceeding or litigation in any court, agency, or forum, except with
21 respect to an action seeking to enforce the terms of this Consent Judgment.

22 1.7 Except as expressly set forth herein, nothing in this Consent Judgment shall
23 prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any
24 other or future legal proceeding unrelated to these proceedings. This paragraph shall not
25 diminish or otherwise affect the obligations, responsibilities, and duties of any Party with respect
26 to this Consent Judgment.

27 1.8 The "Effective Date" of this Consent Judgment shall be the date this Consent
28 Judgment is entered by the Court.

1 1.9 The only products covered by this Consent Judgment are the Covered Products,
2 and the only chemical covered by this Consent Judgment is the chemical lead as related to the
3 Covered Products only. This Consent Judgment does not cover any products using the SciFit
4 name other than the Covered Products.

5 1.10 Bodybuilding.com claims it stopped selling the Covered Products after receiving
6 the Notice of Violations and has no plans to sell the Covered Products in the future.

7 **2. JURISDICTION AND VENUE**

8 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
9 jurisdiction over the subject matter of this action and personal jurisdiction over the Parties as to
10 the acts alleged in the Complaint, that venue is proper in San Francisco County, and that this
11 Court has jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.

12 **3. INJUNCTIVE RELIEF**

13 3.1 On and after the Effective Date, Bodybuilding.com shall be permanently enjoined
14 from manufacturing for sale in California, "Distributing into California," or directly selling to
15 any consumer located in California any of the Covered Products. The term "Distributing into
16 California," as used herein, means to ship any of the Covered Products into California for sale in
17 California or to sell or provide any of the Covered Products to any person or entity
18 Bodybuilding.com knows intends to or will ship any of the Covered Products into or sell any of
19 the Covered Products in California.

20 3.2 **Products in the Stream of Commerce**

21 The injunctive relief set forth in Section 3 shall not apply to any of the Covered Products
22 that Bodybuilding.com puts into the stream of commerce before the Effective Date. On the
23 Effective Date, Bodybuilding.com shall provide ERC with the last lot number and expiration
24 date for each of the Covered Products sold by Bodybuilding.com as of the Effective Date.

25 **4. SETTLEMENT PAYMENT**

26 4.1 **Total Payment**

27 In full and final satisfaction of civil penalties, payment in lieu of further civil penalties,
28 ERC's expenses and costs of litigation, and ERC's attorneys' fees, Bodybuilding.com shall,

1 within 10 business days after receiving the Notice of Entry of this Consent Judgment, issue a
2 single check in the amount of \$45,000 (“Total Settlement Amount”), made payable to
3 “Environmental Research Center – ERC Escrow Account”, and send the check by first-class
4 registered or certified mail, or overnight delivery, directly to ERC at the following address:

5 Environmental Research Center
6 3111 Camino Del Rio North, Suite 400
7 San Diego, CA 92108

8 Bodybuilding.com shall also issue a single IRS Federal Tax Form 1099 for the above payment to
9 ERC. Sections 4.2-4.5 below describe the agreed partition of the Total Settlement Amount.

10 4.2 Civil Penalty

11 As a portion of the Total Settlement Amount, \$2,832 shall be considered a civil penalty
12 pursuant to California Health and Safety Code § 25249.7(b)(1). ERC shall remit 75% (\$2,124)
13 of the civil penalties to the Office of Environmental Health Hazard Assessment (“OEHHHA”) for
14 deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with California
15 Health and Safety Code § 25249.12(c), and a copy of the transmittal letter will be sent to
16 Defendant’s counsel. ERC will retain the remaining 25% (\$708) of the civil penalty.

17 4.3 Payment in Lieu of Further Civil Penalties

18 As a portion of the Total Settlement Amount, \$8,473.50 shall be considered a payment to
19 ERC in lieu of further civil penalties for activities such as (1) funding the investigating,
20 researching and testing of consumer products that may contain Proposition 65 listed chemicals;
21 (2) funding grants to California non-profit foundations/entities dedicated to public health;
22 (3) funding ERC’s Got Lead? Program to assist consumers in testing products for lead content;
23 (4) funding post-settlement monitoring of past consent judgments; (5) funding to maintain ERC’s
24 database of lead-free products, Proposition 65-compliant products and contaminated products;
25 (6) funding to track and catalog Proposition 65-compliant, contamination-free sources of
26 ingredients used in the products ERC tests; and (7) funding the continued day to day business of
27 enforcement of Proposition 65 matters which address contaminated ingestible products, similar
28 to the subject matter of this action.

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1 **4.4 Reimbursement of Expenses and Costs**

2 As a portion of the Total Settlement Amount, \$14,382 shall be considered a
3 reimbursement to ERC for its reasonable analysis and preparation costs associated with the
4 enforcement of Proposition 65 and other expenses and costs incurred as a result of investigating,
5 bringing this matter to Bodybuilding.com's attention, litigating and negotiating a settlement in
6 the public interest.

7 **4.5 Attorney Fees**

8 As a portion of the Total Settlement Amount, \$19,312.50 shall be considered a payment
9 to ERC for its attorneys' fees of Philip T. Emmons (\$18,337.50) and Karen A. Evans (\$975).

10 **5. COSTS AND FEES**

11 Except as expressly set forth herein in Section 4, each Party shall bear its own attorneys'
12 fees, costs and expenses in this action.

13 **6. RELEASE**

14 6.1 ERC, acting on its own behalf and in the public interest, releases
15 Bodybuilding.com and its officers, directors, shareholders, employees, agents, representatives,
16 parent companies, subsidiaries, divisions, subdivisions, affiliates, franchisees, licensees,
17 successors, assigns and attorneys (collectively "Released Parties") from all claims for violations
18 of Proposition 65 up through the Effective Date based on exposure to lead from the Covered
19 Products as set forth in the Notice of Violations and the Complaint.

20 6.2 Compliance with the terms of this Consent Judgment constitutes compliance by
21 the Released Parties with Proposition 65 with respect to consumer exposures to lead from the
22 Covered Products as set forth in the Notice of Violations and the Complaint.

23 6.3 ERC on behalf of itself only, on the one hand, and Bodybuilding.com, on the
24 other hand, release and waive all claims they may have against each other and their respective
25 officers, directors, employees, agents, representatives and attorneys for any statements or actions
26 made or undertaken by them or their respective officers, directors, employees, agents,
27 representatives and attorneys in connection with the Notice of Violations or this action.

28 6.4 Nothing in this release is intended to apply to any occupational or environmental

1 exposures arising under Proposition 65, nor shall it apply to any products other than the Covered
2 Products.

3 **7. MOTION FOR COURT APPROVAL**

4 7.1 Upon execution of this Consent Judgment by the Parties, ERC shall prepare,
5 notice, and file a Motion for Approval & Entry of Consent Judgment pursuant to 11 California
6 Code of Regulations § 3000, *et seq.* This motion shall be served upon Bodybuilding.com and
7 upon the California Attorney General's Office. Bodybuilding.com and ERC shall use their best
8 efforts to support entry of this Consent Judgment in the form submitted to the Court for approval.

9 7.2 If, after service of the Motion for Approval & Entry of Consent Judgment, the
10 California Attorney General objects in writing to any term in this Consent Judgment or files an
11 opposition to the motion, the Parties shall use their best efforts to resolve the concern in a timely
12 manner prior to the hearing on the motion. If the concern of the California Attorney General is
13 not resolved prior to the hearing on the motion, any Party may withdraw from this Consent
14 Judgment prior to the date of the hearing, with notice to all Parties in accordance with Paragraph
15 17 below and notice to the California Attorney General's Office, and upon such notice this
16 Consent Judgment shall be null and void.

17 7.3 This Consent Judgment shall be effective only after it has been entered by the
18 Court. Otherwise, it shall be of no force or effect and cannot be used in any other proceeding for
19 any purpose.

20 **8. RETENTION OF JURISDICTION**

21 This Court shall retain jurisdiction of this matter to enforce, modify, or terminate this
22 Consent Judgment.

23 **9. MODIFICATION OF CONSENT JUDGMENT**

24 This Consent Judgment after its entry by the Court may be modified only upon written
25 agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon.
26 In the event of an agreed upon modification, Bodybuilding.com shall reimburse ERC its
27 attorneys' fees and costs associated with a joint motion or application to the Court in support of
28 the agreed upon modification of the Consent Judgment.

1 **10. ENFORCEMENT OF CONSENT JUDGMENT; GOOD FAITH ATTEMPT TO**
2 **RESOLVE DISPUTES**

3 In the event a dispute arises with respect to any Party's compliance with the terms and/or
4 conditions of this Consent Judgment after its entry by the Court, the Party seeking compliance of
5 another Party shall make a good faith attempt to resolve the dispute by conferring with the other
6 Party in person, by telephone or by written communication before seeking relief from the Court.
7 If the dispute is not resolved after such an attempt, this Consent Judgment may be enforced in
8 this Court pursuant to Code of Civil Procedure § 664.4 or any other valid provision of the law.
9 The prevailing party in any such dispute brought to this Court for resolution shall be awarded all
10 reasonable costs and attorney's fees. As used in the preceding sentence, the term "prevailing
11 party" means a party who is successful in obtaining relief more favorable to it than the relief the
12 other party was agreeable to providing during the Parties' good faith attempt to resolve the
13 dispute that is the subject of such an enforcement proceeding.

14 **11. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

15 In the event that, after entry of this Consent Judgment in its entirety, any of the provisions
16 hereof are subsequently held by a court to be unenforceable, the validity of the enforceable
17 provisions shall not be adversely affected.

18 **12. GOVERNING LAW**

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

21 **13. RELATION TO OTHER ACTIONS**

22 This Consent Judgment shall have no application or effect on Bodybuilding.com for sales
23 of the Covered Products to consumers outside the State of California.

24 **14. DRAFTING**

25 The terms of this Consent Judgment have been reviewed by the respective legal counsel
26 for the Parties prior to its signing, and each Party has had an opportunity to fully discuss the
27 terms and conditions with its legal counsel. The Parties agree that, in any subsequent
28 interpretation or construction of this Consent Judgment, no inference, assumption or presumption

1 shall be drawn, and no provision of this Consent Judgment shall be construed against any Party,
2 based on the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or
3 drafted all or any portion of this Consent Judgment. It is conclusively presumed that all of the
4 Parties participated equally in the preparation and drafting of this Consent Judgment.

5 **15. ENTIRE AGREEMENT**

6 This Consent Judgment contains the sole and entire agreement and understanding of the
7 Parties with respect to the entire subject matter hereof, and supersedes and replaces any and all
8 prior agreements or understandings, written or oral, with regard to the matters set forth herein.
9 No other agreements or understandings not specifically referred to herein, oral or otherwise, shall
10 be deemed to exist or to bind any of the Parties.

11 **16. EXECUTION IN COUNTERPARTS**

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

15 **17. NOTICES**

16 All notices required by this Consent Judgment to be given to any Party shall be sent by
17 first-class registered or certified mail, or overnight delivery, to all of the following:

18 **FOR ERC:**

19 Chris Heptinstall, Executive Director
20 Environmental Research Center
21 3111 Camino Del Rio North, Suite 400
22 San Diego, CA 92108

23 Philip T. Emmons
24 Law Office of Philip T. Emmons
25 1990 North California Blvd., 8th Floor
26 Walnut Creek, CA 94596-3742

27 Karen A. Evans
28 Law Office of Karen A. Evans
4218 Biona Place
San Diego, CA 92116

1 **FOR BODYBUILDING:**

2 Bill Carter
3 General Counsel
4 2026 S. Silverstone Way
5 Meridian, ID 83642

6 Greenberg Traurig, LLP
7 James Mattesich
8 Anthony J. Cortez
9 1201 K Street, Suite 1100
10 Sacramento, CA 95814-3938

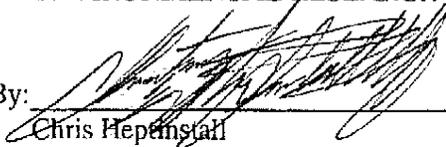
11 **18. AUTHORITY TO STIPULATE TO THIS CONSENT JUDGMENT**

12 Each person signing this Consent Judgment on behalf of a Party certifies that he or she is
13 fully authorized by that Party to stipulate to the terms and conditions of this Consent Judgment
14 on behalf of that Party, to enter into and execute this Consent Judgment on behalf of that Party,
15 and to legally bind that Party to this Consent Judgment. Each person signing this Consent
16 Judgment on behalf of a Party represents and warrants that he or she has read and understands
17 this Consent Judgment, and agrees to all of the terms and conditions of this Consent Judgment on
18 behalf of that Party.

19 **IT IS SO STIPULATED:**

20 Dated: 11/25/2013

ENVIRONMENTAL RESEARCH CENTER

21 By: 

22 Chris Hepinstall
23 Executive Director

24 Dated: _____

BODYBUILDING.COM, LLC

25 By: _____

26 Bill Carter
27 General Counsel
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FOR BODYBUILDING:

Bill Carter
General Counsel

~~2026 S Silverstone Way~~
Meridian, ID 83642

5777 N. MEEKER AVENUE
BOISE, ID 83713

B.

Greenberg Traurig, LLP
James Mattesich
Anthony J. Cortez
1201 K Street, Suite 1100
Sacramento, CA 95814-3938

18. AUTHORITY TO STIPULATE TO THIS CONSENT JUDGMENT

Each person signing this Consent Judgment on behalf of a Party certifies that he or she is fully authorized by that Party to stipulate to the terms and conditions of this Consent Judgment on behalf of that Party, to enter into and execute this Consent Judgment on behalf of that Party, and to legally bind that Party to this Consent Judgment. Each person signing this Consent Judgment on behalf of a Party represents and warrants that he or she has read and understands this Consent Judgment, and agrees to all of the terms and conditions of this Consent Judgment on behalf of that Party.

IT IS SO STIPULATED:

Dated: _____

ENVIRONMENTAL RESEARCH CENTER

By: _____

Chris Heptinstall
Executive Director

Dated: November 20, 2013

BODYBUILDING.COM, LLC

By: 

Bill Carter
General Counsel

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APPROVED AS TO FORM:

Dated: 11/25/13

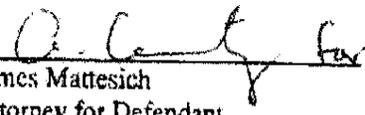
LAW OFFICE OF PHILIP T. EMMONS

By: 

Philip T. Emmons
Attorney for Plaintiff
ENVIRONMENTAL RESEARCH CENTER

Dated: 11/20/13

GREENBERG TRAURIG, LLP

By: 

James Mattesich
Attorney for Defendant
BODYBUILDING, LLC

ORDER AND JUDGMENT

Based on the Parties' stipulation, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____

Judge of the Superior Court

EXHIBIT A

LAW OFFICE OF
PHILIP T. EMMONS
208 Normandy Lane
Walnut Creek, CA 94598
Tel: (925) 349-4029
E-Mail: p-emmons@hotmail.com

March 11, 2011

VIA CERTIFIED MAIL

Current CEO or President
Bodybuilding.com, LLC
2026 S Silverstone Way
Meridian, ID 83642

The Prentice-Hall Corporation System, Inc.
(Bodybuilding.com, LLC's Agent
for Service of Process)
2711 Centerville Road, Suite 400
Wilmington, DE 19808

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550

VIA FIRST CLASS MAIL

District Attorneys of All California Counties
and Select City Attorneys
(See Attached Certificate of Service)

Re: Notice of Violations of California Health & Safety Code Section 25249.5 *et seq.*

Dear Addressees:

I represent the Environmental Research Center ("ERC") in connection with this Notice of Violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986, which is codified at California Health & Safety Code Section 25249.5 *et seq.* and also referred to as Proposition 65.

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.

The name of the Company covered by this notice that violated Proposition 65 (hereinafter "the Violators") is:

Bodybuilding.com, LLC

EXHIBIT A

The products that are the subject of this notice and the chemicals in those products identified as exceeding allowable levels are:

Sci Fit - PROCUTS Ephedra Free Energy Metabolism Definition - Lead
Sci Fit - Hunger Strike – Lead
Sci Fit – Fat Burner Plus 120 Capsules - Lead
SciFit TZ3 Stack 30 Capsules - Lead
SciFit T-500 Extreme 60 Capsules - Lead
SciFit Tribesterone 1500 60 Capsules - Lead
SciFit 3-Test Stack 60 Capsules - Lead
SciFit G.H.T. Stack 120 Capsules - Lead
SciFit Procuts Ephedra Free 120 Capsules - Lead
SciFit Eurycoma 1500 EX 60 Capsules - Lead
SciFit T-Max Daytime Anabolic Formula 90 Capsules - Lead
SciFit T-Max Nighttime Anabolic Formula 90 Capsules – Lead
SciFit Fat Burner Plus 240 Capsules - 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.

This letter is a notice to each of the Violators and the appropriate governmental authorities of the Proposition 65 violations concerning the listed products. This notice covers all violations of Proposition 65 involving the Violators currently known to ERC from the information now available. ERC may continue to investigate other products that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with the copy of this letter to each of the Violators.

Each of the Violators has manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemicals. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and/or recommended use of these products by consumers. The primary route of exposure to these chemicals has been through ingestion, but may have also occurred through inhalation and/or dermal contact. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product's label. Each of the Violators violated Proposition 65 because they failed to provide an appropriate warning to persons using and/or handling these products that they are being exposed to the identified chemicals. Each of these ongoing violations has occurred on every day since March 11, 2011, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users.

Pursuant to Section 25249.7(d) of the statute, ERC intends to file a citizen enforcement action sixty days after effective service of this notice unless each of the Violators agrees in an enforceable written instrument to: (1) reformulate the listed products so as to eliminate further exposures to the identified chemicals; and (2) pay an appropriate civil penalty. Consistent with the public interest goals of Proposition 65 and my client's objectives in pursuing this notice, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemicals and expensive and time consuming litigation.

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*
March 11, 2011
Page 3

ERC's address 5694 Mission Center Road #199, San Diego, CA 92108; Tel. (619) 309-4194.
However, ERC has retained me in connection with this matter, and all communications regarding this Notice of Violations should be directed to my attention at the above listed law office address and telephone number.

Sincerely,



Philip T. Emmons, Esq.

cc: Karen Evans

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to Bodybuilding.com, 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's Notice of Proposition 65 Violations by Bodybuilding.com, LLC

I, Philip T. Emmons, declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged 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: March 11, 2011

Philip T. Emmons

CERTIFICATE OF SERVICE

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, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742

On March 11, 2011, I served the following documents: **NOTICE OF VIOLATIONS 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 the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Current CEO or President
Bodybuilding.com, LLC
2026 S Silverstone Way
Meridian, ID 83642

The Prentice-Hall Corporation System, Inc.
(Bodybuilding.com, LLC’s Agent
for Service of Process)
2711 Centerville Road, Suite 400
Wilmington, DE 19808

On March 11, 2011, I served the following documents: **NOTICE OF VIOLATION, 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)** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, CA 94612-0550

On March 11, 2011, 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 with the U.S. Postal Service for delivery by First Class Mail.

Executed on March 11, 2011, in Fort Oglethorpe, Georgia.



Chris Heptinstall

Service List

District Attorney, Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612

District Attorney, Alpine County
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Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

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

The following summary has been prepared by the Office of Environmental Health Hazard Assessment, 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 its implementing regulations (see citations below) for further information. Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. 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 22 of the California Code of Regulations, Sections 12000 through 14000.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List." Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 550 chemicals have been listed as of May 1, 1996. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release or otherwise engage in activities involving those 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. 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. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of listing of the chemical.

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. Discharges are exempt from this requirement if they occur less than twenty months after the date of listing of the chemical.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts:

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.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business 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 for more than 250 listed carcinogens. Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause birth defects or other reproductive harm ("reproductive toxicants"), a warning is not required if the business 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 (NOEL)," divided by a 1,000-fold safety or uncertainty factor. The "no observable effect level" is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect. Discharges that do not result in a "significant amount" of the listed chemical entering into 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 enter any drinking water source, 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" or "no observable effect" test if an individual were exposed to such an amount in drinking water.

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). 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. A notice must comply with the information and procedural requirements specified in regulations (Title 22, California Code of Regulations, Section 12903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an 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 of law to stop committing the violation.