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16 Attorney for Defendants  
17 APEX ENERGETICS, INC.

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 APEX ENERGETICS, INC. and  
26 DOES 1-100,

27 Defendants.

CASE NO. CGC-14-541606

[PROPOSED] STIPULATED  
[PROPOSED] CONSENT JUDGMENT; [PROPOSED]  
ORDER

Health & Safety Code § 25249.5 et seq.

Action Filed: September 11, 2014  
Trial Date: None set

28 **1. INTRODUCTION**

29 **1.1** On September 11, 2014, Plaintiff Environmental Research Center (“ERC”), a  
30 non-profit corporation, as a private enforcer and in the public interest, initiated this action by  
31 filing a Complaint for Injunctive and Declaratory relief and Civil Penalties (the “Complaint”)  
32 pursuant to the provisions of California Health and Safety Code section 25249.5 et seq.  
33 (“Proposition 65”), against APEX ENERGETICS, INC. (“Apex”) and DOES 1-100. In this  
34 action, ERC alleges that the products manufactured, distributed or sold by Apex, as more fully

1 described below, contain lead, a chemical listed under Proposition 65 as a carcinogen and  
2 reproductive toxin, and that such products expose consumers to lead at a level requiring a  
3 Proposition 65 warning. These products are:

- 4 1) Apex Energetics Inc. Nourish Greens (K-67)
- 5 2) Apex Energetics Inc. ClearVite-PSF (K-84)
- 6 3) Apex Energetics Inc. ClearVite-CR Chocolate (K-36)
- 7 4) Apex Energetics Inc. ClearVite-SF (K-24)
- 8 5) Apex Energetics Inc. Cellegion (L-2) Cellestim
- 9 6) Apex Energetics Inc. Thyro-CNV (K-9)

10 (collectively “Covered Products”). ERC and Apex are referred to individually as a “Party” or  
11 collectively as the “Parties.”

## 12 1.2 Definitions

13 Whereas Apex sells the Covered Products to Authorized Distributors, Authorized  
14 Retailers and to consumers upon recommendation or prescriptions from an Authorized Retailer,  
15 and does not otherwise release the Covered Products for unrestricted sale to the general public.

16 1.2.1 The word “Authorized” as used herein shall mean “under contractual  
17 agreement with Apex Energetics, Inc.”

18 1.2.2 The word “Distributor” as used herein shall mean “an entity that  
19 purchases the Covered Products from Apex, and sells the Covered Products to an Authorized  
20 Retailer,” as those terms are defined herein.

21 1.2.3 The word “Retailer” as used herein shall mean “a healthcare practitioner  
22 with an active, current license to practice and who sells or provides any of the Covered  
23 Products to an end-user as a result of a professional therapeutic relationship established  
24 between the practitioner and the end-user on the basis of a personal consultation, for the  
25 purpose of providing healthcare assistance.”

26 1.2.4 The word “lot” as used herein shall mean “one manufacturing cycle of one  
27 Covered Product,” which lot is designated by an individual number assigned by Apex, so that  
28



1 each lot of each Covered Product will have its own unique identification number affixed on  
2 every bottle of the Covered Product for the lot.

3 **1.3** ERC is a California non-profit corporation dedicated to, among other causes,  
4 helping safeguard the public from health hazards by reducing the use and misuse of hazardous  
5 and toxic chemicals, facilitating a safe environment for consumers and employees, and  
6 encouraging corporate responsibility.

7 **1.4** Apex is a business entity that employed ten or more persons. Apex arranges the  
8 manufacture, distribution and sale of the Covered Products.

9 **1.5** The Complaint is based on allegations contained in ERC's Notice of Violations,  
10 dated September 13, 2013, that was served on the California Attorney General, other public  
11 enforcers, and Apex. A true and correct copy of the Notice of Violations is attached as Exhibit  
12 A. More than 60 days have passed since the Notice of Violations was mailed, and no  
13 designated governmental entity has filed a complaint against Apex with regard to the Covered  
14 Products or the alleged violations.

15 **1.6** ERC's Notice of Violations and the Complaint allege that use of the Covered  
16 Products exposes persons in California to lead without first providing clear and reasonable  
17 warnings in violation of California Health and Safety Code section 25249.6. Apex denies all  
18 material allegations contained in the Notice of Violations and Complaint and specifically  
19 denies that the Covered Products required a Proposition 65 warning or otherwise caused harm  
20 to any person. Apex asserts that any detectible levels of lead in the Covered Products are below  
21 the safe harbor levels for Proposition 65 or are the result of naturally occurring lead levels, as  
22 provided for in California Code of Regulations, Title 27, Section 25501(a).

23 **1.7** The Parties have entered into this Consent Judgment in order to settle,  
24 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.  
25 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of  
26 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,  
27 parent companies, subsidiaries, divisions, affiliates, franchises, licensees, customers, suppliers,  
28 distributors, wholesalers, or retailers. Except for the representations made above, nothing in

1 this Consent Judgment shall be construed as an admission by Apex or ERC of any fact, issue of  
2 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an  
3 admission by Apex or ERC of any fact, issue of law, or violation of law, at any time, for any  
4 purpose.

5 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall  
6 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
7 other or future legal proceeding unrelated to these proceedings.

8 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered as  
9 a Judgment by this Court. The date by which Apex must comply with the injunctive relief listed  
10 in Section 3 of this Consent Judgment shall be January 15, 2014 ("Compliance Date").

## 11 **2. JURISDICTION AND VENUE**

12 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
13 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction  
14 over Apex as to the acts alleged in the Complaint, that venue is proper in San Francisco County,  
15 and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of  
16 all claims which were or could have been asserted in this action based on the facts alleged in the  
17 Notice of Violations and the Complaint.

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

### 19 **3.1 Generally**

20 **3.1.1** On and after the Compliance Date, Apex shall be permanently  
21 enjoined from manufacturing for sale in California, distributing into California, selling to any  
22 consumer located in California, supplying its Authorized Distributors or Authorized Retailers  
23 that have shipping addresses in California, or supplying its Authorized Distributors or  
24 Authorized Retailers that ship or sell to any person or entity located in California, any of the  
25 Covered Products that have a daily lead exposure rate of more than 0.5 micrograms of lead,  
26 unless: (a) each individual product (in the form intended for sale to the end-user) bears one of  
27 the warning statements specified in Section 3.2 on its individual unit label or unit packaging, or  
28 (b) such Authorized Distributors or Authorized Retailers have agreed with Apex that if they sell



1 or provide any of the Covered Products received after the Compliance Date, to end-users  
2 located in California, they will affix warnings in accordance with the requirements set forth in  
3 Section 3.2 on all Covered Products so sold or provided and will not remove any warnings  
4 provided by Apex on the products. This provision does not require Apex to take any action  
5 with regard to Covered Products that were manufactured or distributed by Apex before the  
6 Compliance Date.

7           **3.1.2** For purposes of Section 3.1.1, the term “distributing into California”  
8 means shipping any of the Covered Products to: (a) any person or entity located in California;  
9 or (b) any Authorized Distributor or Authorized Retailer selling or providing any of the  
10 Covered Products to any person or entity located in California. This provision does not require  
11 Apex, or any Authorized Distributor, or any Authorized Retailer to take any action with regard  
12 to Covered Products that were manufactured or distributed by Apex before the Compliance  
13 Date.

14           **3.1.3** Apex agrees to continue at or above its current level of efforts to  
15 enforce its Vendor Distribution Policy, including making reasonable efforts to bar any  
16 unauthorized persons or entities from purchasing Apex products.

17           **3.1.4** If at any time after the Compliance Date Apex sells its products to end-  
18 users at retail, then Apex shall ensure that any of the Covered Products sold at retail in  
19 California that has a daily lead exposure rate of more than 0.5 micrograms of lead (in the form  
20 intended for sale to the end-user) bears one of the warning statements specified in Section 3.2  
21 on its individual unit label or unit packaging.

22           **3.2 Clear and Reasonable Warnings**

23           If the daily lead exposure level is greater than 0.5 micrograms (mcg) for any lot of the  
24 Covered Products, Apex must provide the following warning:

25           **WARNING: This product contains lead, a chemical known to the State of**  
26           **California to cause [cancer and] birth defects or other reproductive harm.**

27 Apex shall use the term “cancer” in the warning only if the maximum daily dose recommended on  
28 the label contains more than 15 micrograms of lead as determined pursuant to the quality control

1 methodology set forth in Section 3.4.

2 The warning shall be prominently and securely affixed to or printed upon the product label  
3 so as to be clearly conspicuous, as compared with other statements or designs on the label, so as to  
4 render it likely to be read and understood by an ordinary purchaser or user of the product. If the  
5 warning is affixed to the product with a sticker, a permanent adhesive shall be used. The warning  
6 appearing on the label or container shall be at least the same size as the largest of any other health  
7 or safety warnings correspondingly appearing on the label or container, as applicable, or such  
8 product, and the word “WARNING” shall be in all capital letters and in bold print. No  
9 Statements about Proposition 65 may directly precede or directly follow the Warning.

### 10 **3.3 Calculation of Lead Levels; Reformulated Covered Products**

11 A Reformulated Covered Product is one for which the maximum recommended daily  
12 serving on the label contains no more than 0.5 micrograms of lead per day as determined by the  
13 quality control methodology described in Section 3.4. As used in this Consent Judgment, “no  
14 more than 0.5 micrograms of lead per day” means that the samples of the testing performed by  
15 Apex under Section 3.4 yield a daily exposure of no more than 0.5 micrograms of lead (with  
16 daily exposure calculated pursuant to Section 3.4 of this Consent Judgment). For products that  
17 cause exposures in excess of 0.5 micrograms of lead per day, Apex shall provide the warning  
18 set forth in Section 3.2. For purposes of determining which warning, if any, is required  
19 pursuant to Section 3.2, the second highest lead detection result of the four (4) randomly  
20 selected samples of the Covered Products will be controlling.

### 21 **3.4 Testing and Quality Control Methodology**

22 **3.4.1** For purposes of this Consent Judgment, daily lead exposure levels  
23 shall be measured in micrograms, and shall be calculated using the following formula:  
24 micrograms of lead per gram of product, multiplied by grams of product per serving of the  
25 product (using the largest serving size appearing on the product label), multiplied by servings  
26 of the product per day (using the largest number of servings in a recommended dosage  
27 appearing on the product label), which equals micrograms of lead exposure per day.



1           **3.4.2**     All testing pursuant to this Consent Judgment shall be performed  
2 using a laboratory method that complies with the performance and quality control factors  
3 appropriate for the method used, including limit of detection, limit of qualification, accuracy,  
4 and precision and meets the following criteria: Inductively Coupled Plasma-Mass  
5 Spectrometry (ICP-MS) achieving a limit of quantification of less than or equal to 0.010 mg/kg  
6 or any other testing method subsequently agreed upon in writing by the Parties.

7           **3.4.3**     All testing pursuant to this Consent Judgment shall be performed by  
8 an independent third-party laboratory certified by the California Environmental Laboratory  
9 Accreditation Program for the analysis of heavy metals or an independent third-party laboratory  
10 that is registered with the United States Food & Drug Administration. Apex may perform this  
11 testing itself only if it provides, in an attachment to the test results Apex provides to ERC,  
12 proof that its laboratory meets the requirements in Section 3.4.2 and this Section 3.4.3.  
13 Nothing in this Consent Judgment shall limit Apex's ability to conduct, or require that others  
14 conduct, additional testing of the Covered Products, including the raw materials used in their  
15 manufacture.

16           **3.4.4**     For the next five (5) consecutive years, Apex shall arrange for the lead  
17 testing at least once per year of four (4) randomly selected samples of each Covered Product in  
18 the form intended for sale to the end-user whether the Covered Products are to be sold by Apex  
19 or a third-party in California. If tests conducted pursuant to this Section demonstrate that no  
20 warning is required for a Covered Product during each of five (5) consecutive years, then the  
21 testing requirements of this Section will no longer be required as to that Covered Product.  
22 However, if after the five-year period, Apex changes ingredient suppliers for any of the  
23 Covered Products and/or reformulates any of the Covered Products, Apex shall test that  
24 Covered Product at least once after such change is made. The testing requirements discussed in  
25 Section 3.4 are not applicable to any Covered Product for which Apex has provided the  
26 warning as specified in Section 3.2.

27           **3.4.5**     Apex shall retain all test results and documentation for a period of two  
28 (2) years from the date of each test.





1     **5.     MODIFICATION OF CONSENT JUDGMENT**

2             **5.1**         This Consent Judgment may be modified only (i) by written stipulation of the  
3 Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent  
4 judgment.

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

16            **5.3**         If either party initiates or otherwise requests a modification under Section 5.1,  
17 the moving party shall reimburse the other party for its costs and reasonable attorney’s fees for  
18 the time spent in the meet-and-confer process and filing and arguing a joint motion or  
19 application in support of a modification of the Consent Judgment.

20            **5.4**         Where the meet-and-confer process does not lead to a joint motion or  
21 application in support of a modification of the Consent Judgment, then either Party may seek  
22 judicial relief on its own. In such a situation, the prevailing party may seek to recover costs and  
23 reasonable attorney’s fees. As used in the preceding sentence, the term “prevailing party”  
24 means a party who is successful in obtaining relief more favorable to it than the relief that the  
25 other party was amenable to providing during the Parties’ good faith attempt to resolve the  
26 dispute that is the subject of the modification.

1     **6.     RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
2     **JUDGMENT**

3             **6.1**       This Court shall retain jurisdiction of this matter to enforce, modify or  
4 terminate this Consent Judgment.

5             **6.2**       Only after it complies with Section 15 below may any Party, by motion or  
6 application for an order to show cause filed with this Court, enforce the terms and conditions  
7 contained in this Consent Judgment.

8             **6.3**       If ERC alleges that any Covered Product fails to qualify as a Reformulated  
9 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall  
10 inform Apex in a reasonably prompt manner of its test results, including information sufficient  
11 to permit Apex to identify the Covered Products at issue. Apex shall, within thirty days  
12 following such notice, provide ERC with testing information, from an independent third-party  
13 laboratory meeting the requirements of Sections 3.4.2 and 3.4.3, demonstrating Defendant's  
14 compliance with the Consent Judgment, if warranted. The Parties shall first attempt to resolve  
15 the matter prior to ERC taking any further legal action.

16     **7.     APPLICATION OF CONSENT JUDGMENT**

17             This Consent Judgment may apply to, be binding upon, and benefit the Parties and their  
18 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,  
19 divisions, affiliates, franchisees, licensees, customers (excluding private labelers), distributors,  
20 wholesalers, retailers, predecessors, successors, and assigns. This Consent Judgment shall have no  
21 application to Covered Products which are distributed or sold exclusively outside the State of  
22 California and which are not used by California consumers. This Consent Judgment shall  
23 terminate without further action by any Party when Apex no longer manufactures, distributes or  
24 sells all of the Covered Products and all of such Covered Products previously "distributed for sale  
25 in California" have reached their expiration dates and are no longer sold.

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

27             **8.1**       This Consent Judgment is a full, final, and binding resolution between ERC,  
28 on behalf of itself and in the public interest, and Apex, of any alleged violation of Proposition



1 65 or its implementing regulations for failure to provide Proposition 65 warnings of exposure to  
2 lead from the handling, use, or consumption of the Covered Products and fully resolves all  
3 claims that have been or could have been asserted in this action up to and including the  
4 Effective Date for failure to provide Proposition 65 warnings for the Covered Products. ERC,  
5 on behalf of itself, its past and current agents, representatives, attorneys, successors, assignees  
6 and in the public interest, hereby discharges Apex and its respective officers, directors,  
7 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,  
8 franchisees, cooperative members, licensees, customers, downstream distributors, wholesalers,  
9 retailers, attorneys, predecessors, successors and assigns of any of them (collectively,  
10 "Released Parties"), from any and all claims, actions, causes of action, suits, demands,  
11 liabilities, damages, penalties, fees, costs and expenses asserted, or that could have been  
12 asserted, as to any alleged violation of Proposition 65 arising from the failure to provide  
13 Proposition 65 warnings on the Covered Products regarding lead.

14 **8.2** ERC, on behalf of itself only, hereby releases and discharges the Released  
15 Parties from all known and unknown claims for alleged violations of Proposition 65 arising  
16 from or relating to alleged exposures to lead in the Covered Products as set forth in the Notice  
17 of Violations up to and including the Effective Date. It is possible that other claims not known  
18 to the Parties arising out of the facts alleged in the Notice of Violations or the Complaint and  
19 relating to the Covered Products will develop or be discovered. ERC, on behalf of itself only,  
20 acknowledges that this Consent Judgment is expressly intended to cover and include all such  
21 claims, including all rights of action therefore. ERC has full knowledge of the contents of  
22 California Civil Code section 1542. ERC, on behalf of itself only, acknowledges that the  
23 claims released in Sections 8.1 and 8.2 above may include unknown claims, and nevertheless  
24 waives California Civil Code section 1542 as to any such unknown claims. California Civil  
25 Code section 1542 reads as follows:

26 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
27 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
28 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF

1 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
2 OR HER SETTLEMENT WITH THE DEBTOR.

3 ERC, on behalf of itself only, acknowledges and understands the significance and  
4 consequences of this specific waiver of California Civil Code Section 1542.

5 **8.3** Compliance with the terms of this Consent Judgment shall be deemed to  
6 constitute compliance by any of the Released Parties with Proposition 65 regarding alleged  
7 exposures to lead in the Covered Products as set forth in the Notice of Violations and the  
8 Complaint.

9 **8.4** ERC and Apex each release and waive all claims they may have against each  
10 other for any statements or actions made or undertaken by them in connection with the Notice  
11 of Violations or the Complaint; provided, however, that nothing in Section 8 shall affect or  
12 limit any Party's right to seek to enforce the terms of this Consent Judgment.

13 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

16 **10. GOVERNING LAW**

17 The terms and conditions of this Consent Judgment shall be governed by and construed in  
18 accordance with the laws of the State of California. Should there be an amendment to Proposition  
19 65 or should OEHHA promulgate regulation to Proposition 65 that establishes a Maximum  
20 Allowable Dose Level that is more or less stringent than 0.5 micrograms per day, this Consent  
21 Judgment shall be deemed modified on the date the amendment becomes final or the date on  
22 which the regulations become effective to incorporate that new standard into this Consent  
23 Judgment.

24 **11. PROVISION OF NOTICE**

25 All notices required to be given to either Party to this Consent Judgment by the other shall  
26 be in writing and sent to the following agents listed below by: (a) first-class, registered, or certified  
27 mail; (b) overnight courier; or (c) personal delivery. Courtesy copies via email may also be sent.

28 **FOR ENVIRONMENTAL RESEARCH CENTER:**



1 Chris Heptinstall, Executive Director  
2 Environmental Research Center  
3 3111 Camino Del Rio North, Suite 400  
4 San Diego, CA 92108

5 With a copy to:

6 Michael Freund  
7 Ryan Hoffman  
8 Michael Freund & Associates  
9 1919 Addison Street, Suite 105  
10 Berkeley, CA 94704  
11 Telephone: (510) 540-1992  
12 Facsimile: (510) 540-5543

13 Karen Evans  
14 Coordinating Counsel  
15 Environmental Research Center  
16 4218 Biona Place  
17 San Diego, CA 92116  
18 Telephone: (619) 640-8100

19 **FOR APEX ENERGETICS, INC.**

20 Yael Karabelnik  
21 Apex Energetics  
22 16592 Hale Ave.  
23 Irvine, CA 92606

24 With a copy to:

25 Melissa A. Jones  
26 Stoel Rives LLP  
27 500 Capitol Mall, Suite 1600  
28 Sacramento, CA 95814  
Telephone: (916) 447-0700  
Facsimile: (916) 447-4781

**12. COURT APPROVAL**

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

**12.2** ERC shall comply with California Health and Safety Code section 25249.7(f) and with Title II of the California Code Regulations, Section 3003.

1     **13. EXECUTION AND COUNTERPARTS**

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

5     **14. DRAFTING**

6             The terms of this Consent Judgment have been reviewed by the respective counsel for the  
7 each Party to this Settlement prior to its signing, and each Party has had an opportunity to fully  
8 discuss the terms with counsel. The Parties agree that, in any subsequent interpretation and  
9 construction of this Consent Judgment entered thereon, the terms and provisions shall not be  
10 construed against any Party.

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

12             If a dispute arises with respect to either Party's compliance with the terms of this Consent  
13 Judgment entered by the Court, the Parties shall meet in person or by telephone and endeavor to  
14 resolve the dispute in an amicable manner. No action or motion may be filed in the absence of  
15 such a good faith attempt to resolve the dispute beforehand. In the event an action or motion is  
16 filed, however, the prevailing party may seek to recover costs and reasonable attorney's fees. As  
17 used in the preceding sentence, the term "prevailing party" means a party who is successful in  
18 obtaining relief more favorable to it than the relief that the other party was amenable to providing  
19 during the Parties' good faith attempt to resolve the dispute that is the subject of such enforcement  
20 action.

21     **16. ENTIRE AGREEMENT, AUTHORIZATION**

22             **16.1**     This Consent Judgment contains the sole and entire agreement and  
23 understanding of the Parties with respect to the entire subject matter herein, and any and all  
24 prior discussions, negotiations, commitments and understandings related hereto. No  
25 representations, oral or otherwise, express or implied, other than those contained herein have  
26 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to  
27 herein, shall be deemed to exist or to bind any Party.



1           **16.2**       Each signatory to this Consent Judgment certifies that he or she is fully  
2 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as  
3 explicitly provided herein, each Party shall bear its own fees and costs.

4           **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
5           **CONSENT JUDGMENT**

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

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

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

14 **IT IS SO STIPULATED:**

15 Dated: 11/5/, 2014

ENVIRONMENTAL RESEARCH  
CENTER

16  
17 By:   
Chris Hepinstall, Executive Director

18  
19 Dated: 10-30, 2014


APEX ENERGETICS, INC.

20  
21 By:   
Armond Simonian, CEO

1 APPROVED AS TO FORM:


2 Dated: 11/19, 2014

MICHAEL FREUND AND ASSOCIATES

3  
4 By:   
5 Michael Freund  
6 Ryan Hoffman  
7 Attorneys for Environmental Research  
8 Center

8 Dated: November 3 2014

STOLE RIVES LLP

9  
10 By:   
11 Melissa A. Jones  
12 Attorney for Apex Energetics, Inc

13  
14  
15  
16  
17 **JUDGMENT**

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

20  
21  
22 Dated: \_\_\_\_\_, 2014

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



LAW OFFICE OF  
**KAREN A. EVANS**  
4218 Biona Place  
San Diego, CA 92116  
Tel: (619) 640-8100  
E-Mail: kaevans.erc@gmail.com

September 13, 2013

**NOTICE OF VIOLATIONS 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 (“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 Section 25249.7(d) of the statute, 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 an attachment with the copy of 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:

**Apex Energetics, Inc.**

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

**Apex Energetics Inc. Nourish Greens (K-67) - Lead**  
**Apex Energetics Inc. ClearVite-PSF (K-84) - Lead**  
**Apex Energetics Inc. ClearVite-CR Chocolate (K-36) - Lead**  
**Apex Energetics Inc. ClearVite-SF (K-24) - Lead**  
**Apex Energetics Inc. Cellegion (L-2) Cellestim - Lead**  
**Apex Energetics Inc. Thyro-CNV (K-9) - 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.

**Exhibit A**

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 purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least September 13, 2010, 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 these known toxic chemicals are 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 chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

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 chemicals, or provide appropriate warnings on the labels of these products; and (2) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, 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 Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



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Karen A. Evans

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Apex Energetics, Inc. 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 Apex Energetics, Inc.**

I, Karen A. Evans, declare:

1. This Certificate of Merit accompanies the attached 60-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 chemicals that are 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: September 13, 2013

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Karen A. Evans

**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. 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 September 13, 2013, 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 with the postage fully prepaid for delivery by Certified Mail:

President or CEO  
Apex Energetics, Inc.  
16592 Hale Avenue  
Irvine, CA 92606-5005

Registered Agent for Apex Energetics, Inc.  
Jeffrey Resnick  
4400 Macarthur Blvd., Suite 900  
Newport Beach, CA 92660

On September 13, 2013, I electronically 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 party by uploading a true and correct copy thereof 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 September 13, 2013, 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 with the postage fully prepaid for delivery by Priority Mail.

Executed on September 13, 2013, in Fort Oglethorpe, Georgia



Tiffany Capehart



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

September 13, 2013

Page 5

**Service List**

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Los Angeles County 210 West Temple Street, Suite 18000 Los Angeles, CA 90012	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Francisco County 850 Bryant Street, Suite 322 San Francisco, CA 94103	District Attorney, Ventura County 800 South Victoria Ave, Suite 314 Ventura, CA 93009
District Attorney, Amador County 708 Court Street Jackson, CA 95642	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, San Joaquin County 222 E. Weber Ave. Rm. 202 Stockton, CA 95202	District Attorney, Yolo County 301 2 <sup>nd</sup> Street Woodland, CA 95695
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, San Luis Obispo County 1035 Palm St, Room 450 San Luis Obispo, CA 93408	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Santa Mateo County 400 County Ctr., 3 <sup>rd</sup> Floor Redwood City, CA 94063	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Contra Costa County 900 Ward Street Martinez, CA 94553	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Santa Clara County 70 West Hedding Street San Jose, CA 95110	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060	San Jose City Attorney's Office 200 East Santa Clara Street, 16 <sup>th</sup> Floor San Jose, CA 95113
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Monterey County Post Office Box 1131 Salinas, CA 93902	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Napa County 931 Parkway Mall Napa, CA 94559	District Attorney, Sierra County PO Box 457 Downieville, CA 95936	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Nevada County 110 Union Street Nevada City, CA 95959	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Sonoma County 600 Administration Drive, Room 212J Santa Rosa, CA 95403	
District Attorney, Inyo County 230 W. Line Street Bishop, CA 93514	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Stanislaus County 832 12 <sup>th</sup> Street, Ste 300 Modesto, CA 95354	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Riverside County 3960 Orange Street Riverside, CA 92501	District Attorney, Sutter County 446 Second Street Yuba City, CA 95991	
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Sacramento County 901 "G" Street Sacramento, CA 95814	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Benito County 419 Fourth Street, 2 <sup>nd</sup> Floor Hollister, CA 95023	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093	
District Attorney, Lassen County 220 South Lassen Street, Ste. 8 Susanville, CA 96130	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92415-0004	District Attorney, Tulare County 221 S. Mooney Blvd., Room 224 Visalia, CA 93291	

## 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's 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.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. The statute is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

#### *WHAT DOES PROPOSITION 65 REQUIRE?*

***The "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 and/or reproductive toxicity. This means that 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

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<sup>1</sup> All further regulatory references are to sections of Title 27 of the California Code of Regulations unless otherwise indicated. The statute, regulations and relevant case law are available on the OEHHA website at: <http://www.oehha.ca.gov/prop65/law/index.html>.



damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at:

[http://www.oehha.ca.gov/prop65/prop65\\_list/Newlist.html](http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html).

Only those chemicals that are on the list are regulated under this law. 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; for example, when exposures are sufficiently low (see below). 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. 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 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” (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 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 a 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 a Food.** Certain exposures to chemicals that occur in foods naturally (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant<sup>2</sup> it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

**Discharges that do not result in a “significant amount” of the listed chemical entering 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 pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any detectable amount, except an amount that would meet the “no significant risk” level for chemicals that cause cancer or that is 1,000 times below the “no observable effect” level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

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



## *HOW IS PROPOSITION 65 ENFORCED?*

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of the regulations and in Title 11, sections 3100-3103. A private party may not pursue an independent enforcement action 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 to stop committing the violation.

## *FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...*

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov).

Revised: July, 2012

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.9, 25249.10 and 25249.11, Health and Safety Code.