

1 Michael Freund SBN 99687
Ryan Hoffman SBN 283297
2 Michael Freund & Associates
1919 Addison Street, Suite 105
3 Berkeley, CA 94704
Telephone: (510) 540-1992
4 Facsimile: (510) 540-5543

5 Attorneys for Plaintiff
ENVIRONMENTAL RESEARCH CENTER

6 Daniel S. Silverman (SBN 137864)
7 Venable LLP
2049 Century Park East, Suite 2100
8 Los Angeles, CA 90067
Tel: (310) 229-0373
9 Fax: (310) 229-9901

10 Attorney for Defendant
BPI SPORTS, LLC

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA

14 ENVIRONMENTAL RESEARCH
15 CENTER, a California non-profit
corporation,

16 Plaintiff,

17 v.

18 BPI SPORTS, LLC and DOES 1-100

19
20 Defendants.

CASE NO. RG14728381

STIPULATED CONSENT JUDGMENT;
[PROPOSED] ORDER

Health & Safety Code § 25249.5 et seq.

Action Filed: June 9, 2014
Trial Date: None set

21
22 **1. INTRODUCTION**

23 **1.1** On June 9, 2014, Plaintiff Environmental Research Center (“ERC”), a non-profit
24 corporation, as a private enforcer, and in the public interest, initiated this action by filing a
25 Complaint for Injunctive and Declaratory relief and Civil Penalties (the “Complaint”) pursuant
26 to the provisions of California Health and Safety Code section 25249.5 et seq. (“Proposition
27 65”), against BPI Sports, LLC and DOES 1-100 (collectively “BPI”). In this action, ERC
28 alleges that the products manufactured, distributed or sold by BPI, as more fully described

1 below, contain lead, a chemical listed under Proposition 65 as a carcinogen and reproductive
2 toxin, and that such products expose consumers at a level requiring a Proposition 65 warning.
3 These products are: (1) "Image Sports Vein Watermelon"; (2) "Image Sports Racing Fruit
4 Punch"; (3) "BPI Sports A-HD Fruit Punch"; (4) "BPI Sports Stim-Elite Blue Raspberry"; (5)
5 "BPI Sports 1.MR Lemon Lime"; (6) "Image Sports 4D Pump Red Lemonade"; (7) "Image
6 Sports 4D Pump Arctic Ice"; (8) "BPI Sports 1.M.R Orange"; (9) "Image Sports Racing
7 Raspberry Lemonade"; (10) "BPI Sports A-HD Blue Raspberry"; (11) "BPI Sports A-HD
8 Watermelon"; and (12) "BPI Sports Stim-Elite Watermelon."

9 **1.2** On August 29, 2014 ERC will issue an additional Proposition 65 60-Day Notice
10 of Violation ("NOVII") to BPI that will be served on the California Attorney General, other
11 public enforcers, and BPI regarding the additional following products (13) Image Sports Pro
12 Grade Weight Loss Whey Vanilla Graham Cracker (14) BPI Sports Pump-H Blue Ice
13 Lemonade (15) BPI Sports Pump-HD Orange Twist (collectively "Additional Products"). All
14 fifteen (15) products listed in Section 1.1 and Section 1.2 shall be addressed by this Consent
15 Judgment and shall hereinafter be referred to as "Covered Products".

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

20 **1.4** BPI is a business entity that employed ten or more persons. BPI arranges the
21 manufacture, distribution and sale of the Covered Products.

22 **1.5** ERC and BPI are referred to individually as a "Party" or collectively as the
23 "Parties."

24 **1.6** The Complaint is based on allegations contained in ERC's Notice of Violation,
25 dated January 31, 2014, that was served on the California Attorney General, other public
26 enforcers, and BPI ("Notice"). A true and correct copy of the Notice is attached as Exhibit A
27 and is hereby incorporated by reference. Prior to filing the Complaint, more than 60 days have
28 passed since the Notice was mailed and uploaded onto the Attorney General's website, and no

1 designated governmental entity has filed a complaint against BPI with regard to the Covered
2 Products or the alleged violations. Upon expiration of the 60 day notice period after service of
3 NOVII, the parties will stipulate to allow Plaintiff to amend the Complaint to add the
4 Additional Products.

5 **1.7** ERC's Notice and Complaint allege that use of the Covered Products exposes
6 persons in California to lead without first providing clear and reasonable warnings in violation
7 of California Health and Safety Code section 25249.6. BPI denies all material allegations
8 contained in the Notice and Complaint.

9 **1.8** The Parties have entered into this Consent Judgment in order to settle,
10 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.
11 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of
12 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
13 parent companies, subsidiaries, divisions, affiliates, franchises, licensees, customers, suppliers,
14 distributors, wholesalers, or retailers. Except for the representations made above, nothing in
15 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of
16 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
17 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any
18 purpose.

19 **1.9** Except as expressly set forth herein, nothing in this Consent Judgment shall
20 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
21 other or future legal proceeding unrelated to these proceedings.

22 **1.10** The Effective Date of this Consent Judgment is the date on which it is entered as
23 a Judgment by this Court.

24 **1.11** BPI represents that as of June 2014 the company stopped manufacturing the
25 Covered Products.

26 **2. JURISDICTION AND VENUE**

27 For purposes of this Consent Judgment and for any further court action that may become
28 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter

1 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
2 over BPI as to the acts alleged in the Complaint, that venue is proper in Alameda County, and that
3 this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims
4 up through and including the Effective Date which were or could have been asserted in this action
5 based on the facts alleged in the Notice and Complaint.

6 **3. INJUNCTIVE RELIEF**

7 Except as expressly set forth herein, commencing on the Effective Date, BPI shall be
8 permanently enjoined from manufacturing for sale in the State of California, marketing or
9 "Distributing into the State of California", and directly selling any of the Covered Products in the
10 State of California. "Distributing into the State of California" shall mean to directly ship a
11 Covered Product into California for sale in California or to sell a Covered Product to a distributor
12 that BPI knows intends to or will sell the Covered Product in California. Covered
13 Products manufactured before the Effective Date are not subject to the obligations imposed by
14 section 3 irrespective of when they are sold. The final lot numbers of Covered Products
15 manufactured before the Effective Date will be provided to ERC no more than (20) twenty days
16 after the Effective Date and such Covered Products will not be covered by this permanent
17 injunction.

18 **4. SETTLEMENT PAYMENT**

19 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil
20 penalties, attorney's fees, and costs, BPI shall make a total payment of \$72,000.00 to ERC
21 within 5 days of the Effective Date. BPI shall make this payment by wire transfer to ERC's
22 escrow account, for which ERC will give BPI the necessary account information. Said payment
23 shall be for the following:

24 **4.2** As a portion of the Total Settlement Amount, \$17,242.00 shall be considered a
25 civil penalty pursuant to California Health and Safety Code §25249.7(b)(1). ERC shall remit
26 75% (\$12,931.50) of the civil penalty to the Office of Environmental Health Hazard
27 Assessment ("OEHHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund
28

1 in accordance with California Health and Safety Code §25249.12(c). ERC will retain the
2 remaining 25% (\$4,310.50) of the civil penalty.

3 **4.3** \$24,307.56 shall be distributed to Environmental Research Center as
4 reimbursement to ERC for (A) reasonable costs associated with the enforcement of Proposition
5 65 and other costs incurred as a result of work in bringing this action; and (B) \$17,242.94 shall
6 be distributed to Environmental Research Center in lieu of further civil penalties, for the day-
7 to-day business activities such as (1) continued enforcement of Proposition 65, which includes
8 work, analyzing, researching and testing consumer products that may contain Proposition 65
9 chemicals, focusing on the same or similar type of ingestible products that are the subject
10 matter of the current action; (2) the continued monitoring of past consent judgments and
11 settlements to ensure companies are in compliance with Proposition 65; and (3) giving a
12 donation of \$862.00 to the As You Sow to address reducing toxic chemical exposures in
13 California. Since 1992, As You Sow has been working to bring hundreds of manufacturers and
14 whole industries into compliance with Proposition 65. As You Sow encourages innovative
15 settlements that reduce hazardous emissions, eliminate consumer exposures to toxics, and
16 provide funds for employee training to lower occupational exposures to toxic chemicals.

17 **4.4** \$9,405.00 shall be distributed to Michael Freund as reimbursement of ERC's
18 attorney's fees and \$3,802.50 shall be distributed to Ryan Hoffman as reimbursement of ERC's
19 attorney's fees.

20 **5. MODIFICATION OF CONSENT JUDGMENT**

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

24 **5.2** If BPI seeks to modify this Consent Judgment under Section 5.1, then BPI must
25 provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to meet and
26 confer regarding the proposed modification in the Notice of Intent, then ERC must provide
27 written notice to BPI within thirty days of receiving the Notice of Intent. If ERC notifies BPI in
28 a timely manner of ERC's intent to meet and confer, then the Parties shall meet and confer in

1 good faith as required in this Section. The Parties shall meet in person or via telephone within
2 thirty (30) days of ERC's notification of its intent to meet and confer. Within thirty days of
3 such meeting, if ERC disputes the proposed modification, ERC shall provide to BPI a written
4 basis for its position. The Parties shall continue to meet and confer for an additional thirty (30)
5 days in an effort to resolve any remaining disputes. Should it become necessary, the Parties
6 may agree in writing to different deadlines for the meet-and-confer period.

7 **5.3** In the event that BPI initiates or otherwise requests a modification under Section
8 5.1, and the meet and confer process leads to a joint motion or application of the Consent
9 Judgment, BPI shall reimburse ERC its costs and reasonable attorney's fees for the time spent
10 in the meet-and-confer process and filing and arguing the motion or application.

11 **5.4** Where the meet-and-confer process does not lead to a joint motion or
12 application in support of a modification of the Consent Judgment, then either Party may seek
13 judicial relief on its own. In such a situation, the prevailing party may seek to recover costs and
14 reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"
15 means a party who is successful in obtaining relief more favorable to it than the relief that the
16 other party was amenable to providing during the Parties' good faith attempt to resolve the
17 dispute that is the subject of the modification.

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

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

22 **6.2** Only after it complies with Section 15 below may any Party, by motion or
23 application for an order to show cause filed with this Court, enforce the terms and conditions
24 contained in this Consent Judgment.

25 **6.3** If ERC alleges that any Covered Product fails to qualify as a Reformulated
26 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall
27 inform BPI in a reasonably prompt manner of its test results, including information sufficient to
28 permit BPI to identify the Covered Products at issue. BPI shall, within thirty days following

1 such notice, provide ERC with testing information, from an independent third-party laboratory
2 meeting the requirements of Sections 3.4.2 and 3.4.3, demonstrating Defendant's compliance
3 with the Consent Judgment, if warranted. The Parties shall first attempt to resolve the matter
4 prior to ERC taking any further legal action.

5 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

13 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC, on
14 behalf of itself and in the public interest, and BPI, of any alleged violation of Proposition 65 or
15 its implementing regulations for failure to provide Proposition 65 warnings of exposure to lead
16 from the handling, use, or consumption of the Covered Products and fully resolves all claims
17 that have been or could have been asserted in this action up to and including the Effective Date
18 for failure to provide Proposition 65 warnings for the Covered Products. ERC, on behalf of
19 itself and in the public interest, hereby discharges BPI and its respective officers, directors,
20 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,
21 franchisees, licensees, customers (not including private label customers of BPI), 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"), from any and all claims, actions, causes of action, suits,
25 demands, liabilities, damages, penalties, fees, costs and expenses asserted, or that could have
26 been asserted, as to any alleged violation of Proposition 65 arising from the failure to provide
27 Proposition 65 warnings on the Covered Products regarding lead.

28 **8.2** The Parties further waive and release any and all claims they may have against

1 each other for all actions or statements made or undertaken in the course of seeking or opposing
2 enforcement of Proposition 65 in connection with the Notice or Complaint up through
3 and including the Effective Date, provided, however, that nothing in Section 8 shall affect or
4 limit any Party's right to seek to enforce the terms of this Consent Judgment.

5 **8.3** It is possible that other claims not known to the Parties arising out of the facts
6 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be
7 discovered. The Parties acknowledge that this Consent Judgment is expressly intended to cover
8 and include all such claims up through the Effective Date, including all rights of action
9 therefore. The Parties acknowledge that the claims released in Sections 8.1 and 8.2 above may
10 include unknown claims, and nevertheless waive California Civil Code section 1542 as to any
11 such unknown claims. California Civil Code section 1542 reads as follows:

12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
13 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
14 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
15 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
16 OR HER SETTLEMENT WITH THE DEBTOR.

17 The Parties acknowledge and understand the significance and consequences of this specific
18 waiver of California Civil Code section 1542.

19 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
20 constitute compliance with Proposition 65 by any Released Party regarding alleged exposures
21 to lead in the Covered Products as set forth in the Notice and the Complaint.

22 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
23 environmental exposures arising under Proposition 65, nor shall it apply to any of BPI's
24 products other than the Covered Products.

25 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

28 **10. GOVERNING LAW**

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

1 **11. PROVISION OF NOTICE**

2 All notices required to be given to either Party to this Consent Judgment by the other shall
3 be in writing and sent to the following agents listed below by: (a) first-class, registered, or certified
4 mail; (b) overnight courier; or (c) personal delivery. Courtesy copies via email may also be sent.
5

6 **FOR ENVIRONMENTAL RESEARCH CENTER:**

7 Chris Heptinstall, Executive Director, Environmental Research Center
8 3111 Camino Del Rio North, Suite 400
9 San Diego, CA 92108
10 Tel: (619) 500-3090
11 Email: chris_erc501c3@yahoo.com
12

13 With a copy to:

14 Michael Freund SBN 99687
15 Ryan Hoffman SBN 283297
16 Michael Freund & Associates
17 1919 Addison Street, Suite 105
18 Berkeley, CA 94704
19 Telephone: (510) 540-1992
20 Facsimile: (510) 540-5543
21

22 **FOR BPI SPORTS, LLC**

23 Derek Ettinger, Chief Executive Officer, BPI Sports, LLC
24 3149 S.W. 42nd Street, Suite 200
25 Hollywood, FL 33312
26 Tel: (954) 926-0900
27 Email: derek@bpisports.net
28

28 With a copy to:

1 Daniel S. Silverman
2 Venable LLP
3 2049 Century Park East, Suite 2100
4 Los Angeles, CA 90067
5 Tel: (310) 229-0373
6 Fax: (310) 229-9901
7
8

9 **12. COURT APPROVAL**

10 **12.1** If this Stipulated Consent Judgment is not approved by the Court, it shall be void
11 and have no force or effect.

12 **12.2** Following Court Approval of the Consent Judgment, ERC shall comply with
13 California Health and Safety Code section 25249.7(f) and with Title II of the California Code
14 Regulations, Section 3003.

15 **13. EXECUTION AND COUNTERPARTS**

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

19 **14. DRAFTING**

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

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

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

1 filed, however, the prevailing party may seek to recover costs and reasonable attorney's fees. As
2 used in the preceding sentence, the term "prevailing party" means a party who is successful in
3 obtaining relief more favorable to it than the relief that the other party was amenable to providing
4 during the Parties' good faith attempt to resolve the dispute that is the subject of such enforcement
5 action.

6 **16. ENTIRE AGREEMENT, AUTHORIZATION**

7 **16.1** This Consent Judgment contains the sole and entire agreement and understanding
8 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
9 negotiations, commitments and understandings related hereto. No representations, oral or
10 otherwise, express or implied, other than those contained herein have been made by any Party.
11 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to
12 exist or to bind any Party.

13 **16.2** Each signatory to this Consent Judgment certifies that he or she is fully
14 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as
15 explicitly provided herein, each Party shall bear its own fees and costs.

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

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

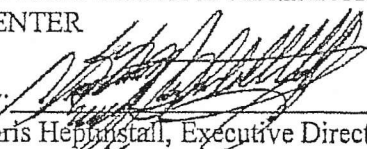
21 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
22 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has
23 been diligently prosecuted, and that the public interest is served by such settlement; and

24 (2) Make the findings pursuant to California Health and Safety Code section
25 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

26 **IT IS SO STIPULATED:**
27
28

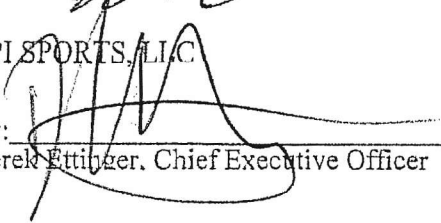
1 Dated: 9/5, 2014

ENVIRONMENTAL RESEARCH
CENTER

By: 
Chris Heppinstall, Executive Director

4 Dated: 9/8, 2014


BPI SPORTS, LLC

By: 
Derek Ettlinger, Chief Executive Officer

7 APPROVED AS TO FORM:


9 Dated: 9/9, 2014

ENVIRONMENTAL RESEARCH
CENTER

By: 
Michael Freund SBN 99687
Ryan Hoffman SBN 283297
Michael Freund & Associates

14 Dated: 9/9, 2014

VENABLE LLP

By: 
Daniel S. Silverman SBN 137864
Attorneys for BPI Sports, LLC

20 **JUDGMENT**

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

25 Dated: _____, 2014

Judge of the Superior Court

Michael Freund & Associates

1919 Addison Street, Suite 105
Berkeley, CA 94704
Voice: 510.540.1992 • Fax: 510.540.5543

Michael Freund, Esq.
Ryan Hoffman, Esq.

OF COUNSEL:
Denise Ferkich Hoffman, Esq.

January 31, 2014

**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 (“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:

BPI Sports, LLC

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:

- **Image Sports Vein Watermelon – Lead**
- **Image Sports Racing Fruit Punch – Lead**
- **BPI Sports A-HD Fruit Punch – Lead**
- **BPI Sports Stim-Elite Blue Raspberry – Lead**
- **BPI Sports 1.MR Lemon Lime - Lead**
- **Image Sports 4D Pump Red Lemonade – Lead**
- **Image Sports 4D Pump Arctic Ice – Lead**
- **BPI Sports 1.M.R Orange – Lead**
- **Image Sports Racing Raspberry Lemonade – Lead**
- **BPI Sports A-HD Blue Raspberry – Lead**
- **BPI Sports A-HD Watermelon – Lead**
- **BPI Sports Stim-Elite Watermelon - Lead**

Exhibit A

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 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 January 31, 2011, 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 Violation to my attention at the law office address and telephone number indicated on the letterhead or at rrhoffma@gmail.com.**

Sincerely,



Ryan Hoffman

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to BPI Sports, 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 BPI Sports, LLC

I, Ryan Hoffman, 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 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: January 31, 2014



Ryan Hoffman

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 January 31, 2014, 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 the party 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
BPI Sports, LLC
3149 SW 42nd Street
Suite 200
Fort Lauderdale, FL 33312

Cary A. Lubetsky, Esq.
(BPI Sports, LLC's Registered
Agent for Service of Process)
c/o Krinzman, Huss, & Lubetsky
800 Brickell Avenue
Suite 1501
Miami, FL 33131

Current President or CEO
BPI Sports, LLC
3149 SW 42nd Street
Suite 200
Hollywood, FL 33312

On January 31, 2014, 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 January 31, 2014, 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 Priority Mail.

Executed on January 31, 2014, in Fort Oglethorpe, Georgia.



Tiffany Capenhart

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

January 31, 2014

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 nd 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, San Mateo County 400 County Ctr., 3 rd 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 3 rd 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 th 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 5 th Street 4 th 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 th 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 nd 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 27001.¹ 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

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>.

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.

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 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 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.

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 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.

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.