

1 TANYA A. GULESSERIAN (CBN 198640)
2 CHRISTINA M. CARO (CBN 250797)
3 ADAMS BROADWELL JOSEPH & CARDOZO
4 601 Gateway Blvd., Suite 1000
5 South San Francisco, CA 94080-7037
6 Telephone: (650) 589-1660
7 Fax No.: (650) 589-5062
8 Email: tgulesserian@adamsbroadwell.com
9 ccaro@adamsbroadwell.com

10 Attorneys for Plaintiff
11 ENVIRONMENTAL RESEARCH CENTER, INC.

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

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

16 Plaintiff,

17 v.

18 NUTRI-DYN MIDWEST, INC., a Minnesota
19 corporation,

20 Defendant.

CASE NO.

21 **STIPULATED CONSENT
JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed: July 18, 2018
Trial Date: None set

22 **1. INTRODUCTION**

23 1.1 On July 18, 2018, Plaintiff Environmental Research Center, Inc. ("ERC"), a non-
24 profit corporation, as a private enforcer and in the public interest, initiated this action by filing a
25 Complaint for Injunctive Relief and Civil Penalties (the "Complaint") pursuant to the provisions
26 of California Health and Safety Code section 25249.5 *et seq.* ("Proposition 65"), against NUTRI-
27 DYN MIDWEST, INC. ("NUTRI-DYN").

28 1.2 In this action, ERC alleges that a number of products manufactured, distributed,

1 or sold by NUTRI-DYN contain lead, a chemical listed under Proposition 65 as a carcinogen and
2 reproductive toxin, and expose consumers to this chemical at a level requiring a Proposition 65
3 warning. These products (referred to hereinafter individually as a "Covered Product" or
4 collectively as "Covered Products") are: (1) DNA Dynamic Nutritional Associates Inc.
5 Muconell, (2) D+ Dynamic Paleo Protein Pure Beef Protein Isolate Chocolate, (3) D+ Dynamic
6 Paleo Protein Pure Beef Protein Isolate French Vanilla, (4) D+ Dynamic Intestinal Cleanse
7 Orange, (5) NutriDyn Ultimate Fat Burner, (6) NutriDyn Fruits & Greens Berry, (7) NutriDyn
8 Fruits & Greens Green Tea Melon, (8) NutriDyn Fruits & Greens Pink Lemonade, (9) NutriDyn
9 Fruits & Greens Strawberry Kiwi, (10) NutriDyn Fruits & Greens Chocolate, (11) Dynamic
10 Fruits & Greens Mint, (12) Dynamic Fruits & Greens Grape, (13) Dynamic Fruits & Greens
11 Espresso, (14) Dynamic Fruits & Greens Chocolate Peppermint, (15) D+ Dynamic Health Drink
12 Strawberry Cream, (16) D+ Dynamic Health Drink Chocolate, (17) D+ Dynamic Slender Drink
13 Strawberry Kiwi, (18) D+ Dynamic Slender Drink Pink Lemonade, (19) D+ Dynamic Recharge
14 Drink Lemon Lime, (20) D+ Dynamic Performance Drink Orange Cream, (21) NutriDyn Kids
15 Fruits & Greens Fruit Punch, and (22) NutriDyn Herbal Eze.

16 1.3 ERC and NUTRI-DYN are hereinafter referred to individually as a "Party" or
17 collectively as the "Parties."

18 1.4 ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
19 causes, helping safeguard the public from health hazards by reducing the use and misuse of
20 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
21 and encouraging corporate responsibility.

22 1.5 For purposes of this Stipulated Consent Judgment ("Consent Judgment"), the
23 Parties agree that NUTRI-DYN is a business entity that has employed ten or more persons at all
24 times relevant to this action, and qualifies as a "person in the course of doing business" within the
25 meaning of Proposition 65. NUTRI-DYN manufactures, distributes, and/or sells the Covered
26 Products.

27 1.6 The Complaint is based on allegations contained in ERC's Notice of Violation
28 dated May 8, 2018 that was served on the California Attorney General, other public enforcers,

1 and NUTRI-DYN ("Notice"). A true and correct copy of the 60-Day Notice dated May 8, 2018
2 is attached hereto as Exhibit A and is incorporated herein by reference.

3 1.7 More than 60 days will have passed since the Notice was served on the Attorney
4 General, public enforcers, and NUTRI-DYN and no designated governmental entity has filed a
5 complaint against NUTRI-DYN with regard to the Covered Products or the alleged violations.

6 1.8 ERC's Notice and Complaint allege that use of the Covered Products exposes
7 persons in California to lead without first providing clear and reasonable warnings in violation
8 of California Health and Safety Code section 25249.6. NUTRI-DYN denies all material
9 allegations contained in the Notice and Complaint.

10 1.9 The Parties have entered into this Consent Judgment in order to settle,
11 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.
12 Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute or
13 be construed as an admission by any of the Parties or by any of their respective officers,
14 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees,
15 licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact, issue of law, or
16 violation of law.

17 1.10 Except as expressly set forth herein, nothing in this Consent Judgment shall
18 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
19 current or future legal proceeding unrelated to these proceedings.

20 1.11 The Effective Date of this Consent Judgment is the date on which it is entered as
21 a Judgment by this Court.

22 2. JURISDICTION AND VENUE

23 For purposes of this Consent Judgment and any further court action that may become
24 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
25 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
26 over NUTRI-DYN as to the acts alleged in the Complaint, that venue is proper in Alameda
27 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
28 resolution of all claims up through and including the Effective Date which were or could have

1 been asserted in this action based on the facts alleged in the Notice and Complaint.

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

3 **3.1** Beginning on the Effective Date, NUTRI-DYN shall be permanently enjoined
4 from manufacturing for sale in the State of California, "Distributing into the State of
5 California," or directly selling in the State of California, any Covered Products which expose a
6 person to a "Daily Lead Exposure Level" of more than 0.5 micrograms of lead per day unless it
7 meets the warning requirements under Section 3.2.

8 **3.1.1** As used in this Consent Judgment, the term "Distributing into the State
9 of California" shall mean to directly ship a Covered Product into California for sale in
10 California or to sell a Covered Product to a distributor that NUTRI-DYN knows or has reason
11 to know will sell the Covered Product in California.

12 **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure
13 Level" shall be measured in micrograms, and shall be calculated using the following formula:
14 micrograms of lead per gram of product, multiplied by grams of product per serving of the
15 product (using the largest serving size appearing on the product label), multiplied by servings
16 of the product per day (using the largest number of recommended daily servings appearing on
17 the label), which equals micrograms of lead exposure per day. If the label contains no
18 recommended daily servings, then the number of recommended daily servings shall be one.

19 **3.2 Clear and Reasonable Warnings**

20 If NUTRI-DYN is required to provide a warning pursuant to Section 3.1, the following
21 warning must be utilized ("Warning"):

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

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

28 ///

1 The Warning shall be securely affixed to or printed upon the container or label of each
2 Covered Product. If the Warning is provided on the label, it must be set off from other
3 surrounding information and enclosed in a box. In addition, for any Covered Product sold over
4 the internet, the Warning shall appear on the checkout page when a California delivery address is
5 indicated for any purchase of any Covered Product. An asterisk or other identifying method
6 must be utilized to identify which products on the checkout page are subject to the Warning. In
7 no event shall any internet or website Warning be contained in or made through a link.

8 The Warning shall be at least the same size as the largest of any other health or safety
9 warnings also appearing on its website or on the label or container of NUTRI-DYN's product
10 packaging and the word "WARNING" shall be in all capital letters and in bold print. No
11 statements intended to or likely to have the effect of diminishing the impact of, or reducing the
12 clarity of, the Warning on the average lay person shall accompany the Warning. Further, no
13 statements may accompany the Warning that state or imply that the source of the listed chemical
14 has an impact on or results in a less harmful effect of the listed chemical.

15 NUTRI-DYN must display the above Warning with such conspicuousness, as compared
16 with other words, statements or designs on the label or container, or on its website, if applicable, to
17 render the Warning likely to be read and understood by an ordinary individual under customary
18 conditions of purchase or use of the product.

19 3.3 Reformulated Covered Products

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

23 3.4 Testing and Quality Control Methodology

24 3.4.1 Beginning within one year of the Effective Date, NUTRI-DYN shall
25 arrange for lead testing of the Covered Products at least once a year for a minimum of five
26 consecutive years by arranging for testing of five randomly selected samples of each of the
27 Covered Products, in the form intended for sale to the end-user, which NUTRI-DYN intends to
28 sell or is manufacturing for sale in California, directly selling to a consumer in California or

1 "Distributing into the State of California." If tests conducted pursuant to this Section
2 demonstrate that no Warning is required for a Covered Product during each of five consecutive
3 years, then the testing requirements of this Section will no longer be required as to that Covered
4 Product. However, if during or after the five-year testing period, NUTRI-DYN changes
5 ingredient suppliers for any of the Covered Products and/or reformulates any of the Covered
6 Products, NUTRI-DYN shall test that Covered Product annually for at least four (4)
7 consecutive years after such change is made.

8 3.4.2 For purposes of measuring the "Daily Lead Exposure Level," the highest
9 lead detection result of the five (5) randomly selected samples of the Covered Products will be
10 controlling.

11 3.4.3 All testing pursuant to this Consent Judgment shall be performed using a
12 laboratory method that complies with the performance and quality control factors appropriate
13 for the method used, including limit of detection, qualification, accuracy, and precision that
14 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")
15 achieving a limit of quantification of less than or equal to 0.010 mg/kg.

16 3.4.4 All testing pursuant to this Consent Judgment shall be performed by an
17 independent third party laboratory certified by the California Environmental Laboratory
18 Accreditation Program or an independent third-party laboratory that is registered with the
19 United States Food & Drug Administration.

20 3.4.5 Nothing in this Consent Judgment shall limit NUTRI-DYN's ability to
21 conduct, or require that others conduct, additional testing of the Covered Products, including
22 the raw materials used in their manufacture.

23 3.4.6 Within thirty (30) days of ERC's written request, NUTRI-DYN shall
24 deliver lab reports obtained pursuant to Section 3.4 to ERC. NUTRI-DYN shall retain all test
25 results and documentation for a period of five years from the date of each test. NUTRI-DYN is
26 not required to test the Covered Products if Warnings are on the products.

1 **4. SETTLEMENT PAYMENT**

2 **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,
3 attorney's fees, and costs, NUTRI-DYN shall make a total payment of \$70,000.00 ("Total
4 Settlement Amount") to ERC. The Total Settlement Amount shall be made in monthly
5 payments as follows ("Due Dates")

6 \$35,000.00 within 5 days of the Effective Date

7 \$35,000.00 within 35 days of the Effective Date

8 NUTRI-DYN shall make this payment by wire transfer to ERC's account, for which
9 ERC will give NUTRI-DYN the necessary account information. The Total Settlement
10 Amount shall be apportioned as follows:

11 **4.2** \$24,731.81 shall be considered a civil penalty pursuant to California Health and
12 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$18,548.85) of the civil penalty to
13 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
14 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
15 Code section 25249.12(c). ERC will retain the remaining 25% (\$6,182.96) of the civil penalty.

16 **4.3** \$2,276.31 shall be distributed to ERC as reimbursement to ERC for reasonable
17 costs incurred in bringing this action.

18 **4.4** \$18,548.84 shall be distributed to ERC as an Additional Settlement Payment
19 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d) and
20 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly
21 caused by NUTRI-DYN in this matter. These activities are detailed below and support ERC's
22 overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary
23 supplement products in California. ERC's activities have had, and will continue to have, a direct
24 and primary effect within the State of California because California consumers will be benefitted
25 by the reduction and/or elimination of exposure to lead in dietary supplements and/or by
26 providing clear and reasonable warnings to California consumers prior to ingestion of the
27 products.

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

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

26 4.5 \$8,490.00 shall be distributed to Adams Broadwell Joseph & Cardozo as
27 reimbursement of ERC's attorney's fees, while \$15,953.04 shall be distributed to ERC for its
28

1 in-house legal fees. Except as explicitly provided herein, each Party shall bear its own fees and
2 costs.

3 4.6 In the event that NUTRI-DYN fails to remit the Total Settlement Amount owed
4 under Section 4 of this Consent Judgment on or before the Due Date, NUTRI-DYN shall be
5 deemed to be in material breach of its obligations under this Consent Judgment. ERC shall
6 provide written notice of the delinquency to NUTRI-DYN via electronic mail. If NUTRI-DYN
7 fails to deliver the Total Settlement Amount within five (5) days from the written notice, the
8 Total Settlement Amount shall accrue interest at the statutory judgment interest rate provided in
9 the California Code of Civil Procedure section 685.010. Additionally, NUTRI-DYN agrees to
10 pay ERC's reasonable attorney's fees and costs for any efforts to collect the payment due under
11 this Consent Judgment.

12 5. MODIFICATION OF CONSENT JUDGMENT

13 5.1 This Consent Judgment may be modified only as to injunctive terms (i) by
14 written stipulation of the Parties and upon entry by the Court of a modified consent judgment or
15 (ii) by motion of either Party pursuant to Section 5.3 or 5.4 and upon entry by the Court of a
16 modified consent judgment.

17 5.2 If NUTRI-DYN seeks to modify this Consent Judgment under Section 5.1, then
18 NUTRI-DYN must provide written notice to ERC of its intent ("Notice of Intent"). If ERC
19 seeks to meet and confer regarding the proposed modification in the Notice of Intent, then ERC
20 must provide written notice to NUTRI-DYN within thirty (30) days of receiving the Notice of
21 Intent. If ERC notifies NUTRI-DYN in a timely manner of ERC's intent to meet and confer,
22 then the Parties shall meet and confer in good faith as required in this Section. The Parties
23 shall meet in person or via telephone within thirty (30) days of ERC's notification of its intent
24 to meet and confer. Within thirty (30) days of such meeting, if ERC disputes the proposed
25 modification, ERC shall provide to NUTRI-DYN a written basis for its position. The Parties
26 shall continue to meet and confer for an additional thirty (30) days in an effort to resolve any
27 remaining disputes. Should it become necessary, the Parties may agree in writing to different
28 deadlines for the meet-and-confer period.

1 5.3 In the event that NUTRI-DYN initiates or otherwise requests a modification
2 under Section 5.1, and the meet and confer process leads to a joint motion or application for a
3 modification of the Consent Judgment, NUTRI-DYN shall reimburse ERC its costs and
4 reasonable attorney's fees for the time spent in the meet-and-confer process and filing and
5 arguing the motion or application.

6 5.4 Where the meet-and-confer process does not lead to a joint motion or
7 application in support of a modification of the Consent Judgment, then either Party may seek
8 judicial relief on its own. In any such contested court proceeding, ERC may seek costs and any
9 attorney's fees incurred in opposing the motion pursuant to California Code of Civil Procedure
10 section 1021.5.

11 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
12 **JUDGMENT**

13 6.1 This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
14 this Consent Judgment.

15 6.2 If ERC alleges that any Covered Product fails to qualify as a Reformulated
16 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
17 inform NUTRI-DYN in a reasonably prompt manner of its test results, including information
18 sufficient to permit NUTRI-DYN to identify the Covered Products at issue. NUTRI-DYN
19 shall, within thirty (30) days following such notice, provide ERC with testing information, from
20 an independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,
21 demonstrating NUTRI-DYN's compliance with the Consent Judgment. The Parties shall first
22 attempt to resolve the matter prior to ERC taking any further legal action.

23 **7. APPLICATION OF CONSENT JUDGMENT**

24 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their
25 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
26 divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers,
27 retailers, predecessors, successors, and assigns. This Consent Judgment shall have no
28 application to any Covered Product which is distributed or sold exclusively outside the State of

1 California and which is not used by California consumers.

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

3 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,
4 on behalf of itself and in the public interest, and NUTRI-DYN and its respective officers,
5 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,
6 franchisees, licensees, customers (not including private label customers of NUTRI-DYN),
7 distributors, wholesalers, retailers, and all other upstream and downstream entities in the
8 distribution chain of any Covered Product, and the predecessors, successors, and assigns of any
9 of them (collectively, "Released Parties"). ERC, on behalf of itself and in the public interest,
10 hereby fully releases and discharges the Released Parties from any and all claims, actions,
11 causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses
12 asserted, or that could have been asserted from the handling, use, or consumption of the
13 Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations
14 arising from the failure to provide Proposition 65 warnings on the Covered Products regarding
15 lead up to and including the Effective Date.

16 **8.2** ERC on its own behalf only, and NUTRI-DYN on its own behalf only,
17 further waive and release any and all claims they may have against each other for all actions or
18 statements made or undertaken in the course of seeking or opposing enforcement of Proposition
19 65 in connection with the Notice and Complaint up through and including the Effective Date,
20 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to
21 enforce the terms of this Consent Judgment.

22 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
23 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
24 discovered. ERC on behalf of itself only, and NUTRI-DYN on behalf of itself only,
25 acknowledge that this Consent Judgment is expressly intended to cover and include all such
26 claims up through and including the Effective Date, including all rights of action therefore.
27 ERC and NUTRI-DYN acknowledge that the claims released in Sections 8.1 and 8.2 above
28 may include unknown claims, and nevertheless waive California Civil Code section 1542 as to

1 any such unknown claims. California Civil Code section 1542 reads as follows:

2 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
3 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
4 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
5 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
6 OR HER SETTLEMENT WITH THE DEBTOR.

7 ERC on behalf of itself only, and NUTRI-DYN on behalf of itself only, acknowledge and
8 understand the significance and consequences of this specific waiver of California Civil Code
9 section 1542.

10 ///

11 8.4 Compliance with the terms of this Consent Judgment shall be deemed to
12 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
13 in the Covered Products as set forth in the Notice and Complaint.

14 8.5 Nothing in this Consent Judgment is intended to apply to any occupational or
15 environmental exposures arising under Proposition 65, nor shall it apply to any of NUTRI-
16 DYN's products other than the Covered Products.

17 9. SEVERABILITY OF UNENFORCEABLE PROVISIONS

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

20 10. GOVERNING LAW

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

23 11. PROVISION OF NOTICE

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

27 FOR ENVIRONMENTAL RESEARCH CENTER, INC.:

28 Chris Heptinstall, Executive Director, Environmental Research Center
3111 Camino Del Rio North, Suite 400
San Diego, CA 92108
Ph: (619) 500-3090

1 Email: chris_erc501c3@yahoo.com

2 With a copy to:

3 TANYA A. GULESSERIAN

4 CHRISTINA M. CARO

ADAMS BROADWELL JOSEPH & CARDOZO

5 601 Gateway Blvd., Suite 1000

South San Francisco, CA 94080-7037

6 Telephone: (650) 589-1660

7 Fax No.: (650) 589-5062

Email: tgulesserian@adamsbroadwell.com

8 ccaro@adamsbroadwell.com

9 NUTRI-DYN MIDWEST, INC.

10 *[PROVIDE NAME AND ADDRESS]*

11
12 **12. COURT APPROVAL**

13 12.1 Upon execution of this Consent Judgment by the Parties, ERC shall notice a
14 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
15 Consent Judgment.

16 12.2 If the California Attorney General objects to any term in this Consent Judgment,
17 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
18 prior to the hearing on the motion.

19 12.3 If this Stipulated Consent Judgment is not approved by the Court, it shall be
20 void and have no force or effect.

21 **13. EXECUTION AND COUNTERPARTS**

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

25 **14. DRAFTING**

26 The terms of this Consent Judgment have been reviewed by the respective counsel for each
27 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and
28 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and

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

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

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

11 **16. ENFORCEMENT**

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

20 **17. ENTIRE AGREEMENT, AUTHORIZATION**

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

27 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
28 authorized by the Party he or she represents to stipulate to this Consent Judgment.

1 18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF
2 CONSENT JUDGMENT

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

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

9 (2) Make the findings pursuant to California Health and Safety Code section
10 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

11
12 IT IS SO STIPULATED:

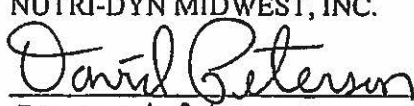
13 Dated: 6/15/, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

14
15 By: 
16 Christopher H. Smith, Executive Director

17
18 Dated: 6/13, 2018

NUTRI-DYN MIDWEST, INC.

19 
20 By: David Peterson
21 Its: President
22
23
24
25
26
27
28

1 APPROVED AS TO FORM:

2 Dated: June 15, 2018

ADAMS BROADWELL JOSEPH &
CARDOZO

By:

Christina M. Caro
Christina M. Caro
Attorney for Plaintiff Environmental
Research Center, Inc.

EXHIBIT A

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

ccaro@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

MILA A. BUCKNER
DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
RACHAEL E. KOSS
COLLIN S. MCCARTHY
LINDA T. SOBCZYNSKI

May 8, 2018

VIA CERTIFIED MAIL

David Peterson or Current CEO
Nutri-Dyn Midwest, Inc.
5414 Highway 12
Maple Plain, MN 55359

David Peterson or Current CEO
Nutri-Dyn Midwest, Inc.
Post Office Box 219
Maple Plain, MN 55359

VIA ONLINE SUBMISSION

Office of the California Attorney General

VIA ELECTRONIC MAIL

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

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

Dije Ndreu, Deputy District Attorney
Monterey County
1200 Aguajito Road
Monterey, CA 93940
Prop65DA@co.monterey.ca.us

VIA ELECTRONIC MAIL

Allison Haley, District Attorney
Napa County
1127 First Street, Suite C
Napa, CA 94559
CEPD@countyofnapa.org

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

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

Kathryn L. Turner, Chief Deputy City Attorney
San Diego City Attorney
1200 Third Avenue
San Diego, CA 92101
CityAttyCrimProp65@sandiego.gov

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

Tori Verber Salazar, District Attorney
San Joaquin County
222 E. Weber Avenue, Room 202
Stockton, CA 95202
DAConsumer.Environmental@sjcda.org

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*
May 8, 2018
Page 2

VIA ELECTRONIC MAIL

Eric J. Dobroth, Deputy District Attorney
San Luis Obispo County
County Government Center Annex, 4th Floor
San Luis Obispo, CA 93408
edobroth@co.slo.ca.us

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

Yen Dang, Supervising Deputy District Attorney
Santa Clara County
70 W Hedding St
San Jose, CA 95110
EPU@da.sccgov.org

Jeffrey S. Rosell, District Attorney
Santa Cruz County
701 Ocean Street
Santa Cruz, CA 95060
Prop65DA@santacruzcounty.us

VIA ELECTRONIC MAIL

Stephan R. Passalacqua, District Attorney
Sonoma County
600 Administration Dr
Sonoma, CA 95403
jbarnes@sonoma-county.org

Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

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

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

VIA FIRST CLASS MAIL

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

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

Dear Addressees:

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

ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

The name of the Company covered by this notice that violated Proposition 65 (hereinafter the “Violator”) is:

Nutri-Dyn Midwest, Inc.

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

- 1. DNA Dynamic Nutritional Associates Inc. Muconell - Lead**
- 2. D+ Dynamic Paleo Protein Pure Beef Protein Isolate Chocolate - Lead**
- 3. D+ Dynamic Paleo Protein Pure Beef Protein Isolate French Vanilla - Lead**
- 4. D+ Dynamic Intestinal Cleanse Orange - Lead**
- 5. NutriDyn Ultimate Fat Burner - Lead**
- 6. NutriDyn Fruits & Greens Berry - Lead**
- 7. NutriDyn Fruits & Greens Green Tea Melon - Lead**
- 8. NutriDyn Fruits & Greens Pink Lemonade - Lead**
- 9. NutriDyn Fruits & Greens Strawberry Kiwi - Lead**
- 10. NutriDyn Fruits & Greens Chocolate – Lead**
- 11. Dynamic Fruits & Greens Mint - Lead**
- 12. Dynamic Fruits & Greens Grape – Lead**
- 13. Dynamic Fruits & Greens Espresso - Lead**
- 14. Dynamic Fruits & Greens Chocolate Peppermint - Lead**
- 15. D+ Dynamic Health Drink Strawberry Cream - Lead**
- 16. D+ Dynamic Health Drink Chocolate - Lead**
- 17. D+ Dynamic Slender Drink Strawberry Kiwi - Lead**
- 18. D+ Dynamic Slender Drink Pink Lemonade - Lead**
- 19. D+ Dynamic Recharge Drink Lemon Lime - Lead**
- 20. D+ Dynamic Performance Drink Orange Cream - Lead**
- 21. NutriDyn Kids Fruits & Greens Fruit Punch - Lead**
- 22. NutriDyn Herbal Eze - Lead**

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

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

The Violator has manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemical, lead. The consumer exposures that are the subject of this notice result from the recommended use of these products by consumers. The primary route of exposure to lead has been

May 8, 2018

Page 4

through ingestion. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to lead. The method of warning should be a warning that appears on the product's label. The Violator violated Proposition 65 because it failed to provide an appropriate warning to persons ingesting these products that they are being exposed to lead. Each of these ongoing violations has occurred on every day since May 8, 2015, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users.

Pursuant to Section 25249.7(d) of the statute, ERC intends to file a citizen enforcement action sixty days after effective service of this notice unless the Violator agrees in an enforceable written instrument to: (1) reformulate the listed products so as to eliminate further exposures to the identified chemical; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Consistent with the public interest goals of Proposition 65 and my client's objectives in pursuing this notice, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemical and expensive and time-consuming litigation.

ERC's Executive Director is Chris Heptinstall, and is located at 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. 619-500-3090. ERC has retained me in connection with this matter. We suggest that communications regarding this Notice of Violations should be directed to my attention at the above listed law office address and telephone number.

Sincerely,



Christina M. Caro

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Nutri-Dyn Midwest, 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, Inc.'s Notice of Proposition 65 Violations by
Nutri-Dyn Midwest, Inc.**

I, Christina Caro, declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am an attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the notice.
4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.
5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: May 8, 2018



Christina M. Caro

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States and over the age of 18 years of age. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On May 8, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, 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 each of the parties listed below and depositing it in a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

David Peterson or Current CEO
Nutri-Dyn Midwest, Inc.
5414 Highway 12
Maple Plain, MN 55359

David Peterson or Current CEO
Nutri-Dyn Midwest, Inc.
Post Office Box 219
Maple Plain, MN 55359

On May 8, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General’s website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

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

On May 8, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

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

Dije Ndreu, Deputy District Attorney
Monterey County
1200 Aguajito Road
Monterey, CA 93940
Prop65DA@co.monterey.ca.us

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

Allison Haley, District Attorney
Napa County
1127 First Street, Suite C
Napa, CA 94559
CEPD@countyofnapa.org

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

May 8, 2018

Page 7

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

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

Kathryn L. Turner, Chief Deputy City Attorney
San Diego City Attorney
1200 Third Avenue
San Diego, CA 92101
CityAttyCrimProp65@sandiego.gov

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

Tori Verber Salazar, District Attorney
San Joaquin County
222 E. Weber Avenue, Room 202
Stockton, CA 95202
DAConsumer.Environmental@sjcda.org

Eric J. Dobroth, Deputy District Attorney
San Luis Obispo County
County Government Center Annex, 4th Floor
San Luis Obispo, CA 93408
edobroth@co.slo.ca.us

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

Yen Dang, Supervising Deputy District Attorney
Santa Clara County
70 W Hedding St
San Jose, CA 95110
EPU@da.sccgov.org

Jeffrey S. Rosell, District Attorney
Santa Cruz County
701 Ocean Street
Santa Cruz, CA 95060
Prop65DA@santacruzcounty.us

Stephan R. Passalacqua, District Attorney
Sonoma County
600 Administration Dr
Sonoma, CA 95403
jbarnes@sonoma-county.org

Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

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

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

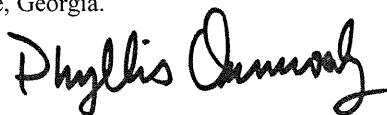
Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

May 8, 2018

Page 8

On May 8, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATIONS, 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 First Class Mail.

Executed on May 8, 2018, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink, reading "Phyllis Dunwoody". The signature is fluid and cursive, with the first name "Phyllis" being more prominent and the last name "Dunwoody" written in a more compact, cursive style.

Phyllis Dunwoody

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

May 8, 2018

Page 9

Service List

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

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

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

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

District Attorney, Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

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

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

District Attorney, El Dorado County
515 Main Street
Placerville, CA 95667

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

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

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

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

District Attorney, Inyo County
P.O. Drawer D
Independence, CA 93526

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

San Francisco, City Attorney
City Hall, Room 234
1 Dr Carlton B Goodlett PL
San Francisco, CA 94102

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

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

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

WHAT DOES PROPOSITION 65 REQUIRE?

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>.

The “Proposition 65 List.” Under Proposition 65, the lead agency (OEHHA) publishes a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. Chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at: http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

Only those chemicals that are on the list are regulated under Proposition 65. Businesses that produce, use, release or otherwise engage in activities involving listed chemicals must comply with the following:

Clear and reasonable warnings. A business is required to warn a person before “knowingly and intentionally” exposing that person to a listed chemical unless an exemption applies. The warning given must be “clear and reasonable.” This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Some discharges are exempt from this requirement under certain circumstances discussed below.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. You should consult the current version of the statute and regulations (<http://www.oehha.ca.gov/prop65/law/index.html>) to determine all applicable exemptions, the most common of which are the following:

Grace Period. Proposition 65 warning requirements do not apply until 12 months after the chemical has been listed. The Proposition 65 discharge prohibition does not apply to a discharge or release of a chemical that takes place less than 20 months after the listing of the chemical.

Governmental agencies and public water utilities. All agencies of the federal, state or local government, as well as entities operating public water systems, are exempt.

Businesses with nine or fewer employees. Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. This includes all employees, not just those present in California.

Exposures that pose no significant risk of cancer. For chemicals that are listed under Proposition 65 as known to the State to cause cancer, a warning is not required if the business causing the exposure can demonstrate that the exposure occurs at a level that poses “no significant risk.” This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific “No Significant Risk Levels” (NSRLs) for many listed carcinogens. Exposures below these levels are exempt from the warning requirement. See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of NSRLs, and Section 25701 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business causing the exposure can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the “no observable effect level” divided by 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures to Naturally Occurring Chemicals in Food. Certain exposures to chemicals that naturally occur in foods (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant² it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

Discharges that do not result in a “significant amount” of the listed chemical entering any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a “significant amount” of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any detectable amount, except an amount that would meet the “no significant risk” level for

² See Section 25501(a)(4).

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.

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of Title 27 and sections 3100-3103 of Title 11. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an enforcement action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court to stop committing the violation.

A private party may not file an enforcement action based on certain exposures if the alleged violator meets specific conditions. For the following types of exposures, the Act provides an opportunity for the business to correct the alleged violation:

- An exposure to alcoholic beverages that are consumed on the alleged violator's premises to the extent onsite consumption is permitted by law;
- An exposure to a Proposition 65 listed chemical in a food or beverage prepared and sold on the alleged violator's premises that is primarily intended for immediate consumption on- or off-premises. This only applies if the chemical was not intentionally added to the food, and was formed by cooking or similar preparation of food or beverage components necessary to render the food or beverage palatable or to avoid microbiological contamination;
- An exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises;
- An exposure to listed chemicals in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking non-commercial vehicles.

If a private party alleges that a violation occurred based on one of the exposures described above, the private party must first provide the alleged violator a notice of special compliance procedure and proof of compliance form.

A copy of the notice of special compliance procedure and proof of compliance form is included in Appendix B and can be downloaded from OEHHA's website at:
<http://oehha.ca.gov/prop65/law/p65law72003.html>.

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

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

Revised: May 2017

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11, Health and Safety Code.

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

ORDER AND JUDGMENT

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

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____, 2018

Judge of the Superior Court