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

10 **ENVIRONMENTAL RESEARCH**
11 **CENTER, INC., a California non-profit**
12 **corporation**

13 **Plaintiff,**

14 **vs.**

15 **WILDERNESS ATHLETE, LLC and**
16 **DOES 1-100**

17 **Defendants.**

CASE NO. RG19046157

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: December 9, 2019

Trial Date: None set

18
19 **1. INTRODUCTION**

20 **1.1** On December 9, 2019, Plaintiff Environmental Research Center, Inc. (“ERC”),
21 a non-profit corporation, as a private enforcer and in the public interest, initiated this action by
22 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)
23 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
24 (“Proposition 65”), against Wilderness Athlete, LLC (“Wilderness Athlete”) and Does 1-100.
25 In this action, ERC alleges that a number of products manufactured, distributed, or sold by
26 Wilderness Athlete contain lead, a chemical listed under Proposition 65 as a carcinogen and
27 reproductive toxin, and expose consumers to this chemical at a level requiring a Proposition 65
28 warning. These products (referred to hereinafter individually as a “Covered Product” or

1 collectively as “Covered Products”) are: (1) Wilderness Athlete High Performance Meal
2 Replacement and Recovery Shake Strawberry, (2) Wilderness Athlete Lean Life Weight Loss
3 Formula, (3) Wilderness Athlete Elite Brute Strength Superior Post-Workout Recovery
4 Chocolate, (4) Wilderness Athlete Green Infusion, (5) Wilderness Athlete High Performance
5 Meal Replacement Shake Chocolate, (6) Wilderness Athlete High Performance Meal
6 Replacement Shake Vanilla, (7) Wilderness Athlete Paleo(ish) Beef Protein Vanilla Almond,
7 (8) Wilderness Athlete Paleo(ish) Beef Protein Carnivore Cocoa, (9) Wilderness Athlete
8 Energy & Focus Brain & Body Fuel Mango Bango, and (10) Wilderness Athlete Paleo(ish)
9 Hydrate & Recover Complete Electrolyte Fuel Arizona Sunrise Pineapple Passion Fruit.

10 **1.2** ERC and Wilderness Athlete are hereinafter referred to individually as a “Party”
11 or collectively as the “Parties.”

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

16 **1.4** For purposes of this Consent Judgment only, the Parties agree that Wilderness
17 Athlete is a business entity that has employed ten or more persons at certain times that may be
18 relevant to this action, and qualifies as a “person in the course of doing business” within the
19 meaning of Proposition 65. Wilderness Athlete manufactures, distributes, and/or sells the Covered
20 Products.

21 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
22 dated September 27, 2019 that was served on the California Attorney General, other public
23 enforcers, and Wilderness Athlete (“Notice”). A true and correct copy of the 60-Day Notice
24 dated September 27, 2019 is attached hereto as **Exhibit A** and is incorporated herein by
25 reference. More than 60 days have passed since the Notice was served on the Attorney
26 General, public enforcers, and Wilderness Athlete and no designated governmental entity has
27 filed a Complaint against Wilderness Athlete with regard to the Covered Products or the alleged
28 violations.

1 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products exposes
2 persons in California to lead without first providing clear and reasonable warnings in violation
3 of California Health and Safety Code section 25249.6. Wilderness Athlete denies all material
4 allegations contained in the Notice and Complaint.

5 **1.7** The Parties have entered into this Consent Judgment in order to settle,
6 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.
7 Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute
8 or be construed as an admission by any of the Parties or by any of their respective officers,
9 directors, members, shareholders, employees, agents, parent companies, subsidiaries, divisions,
10 franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact,
11 issue of law, or violation of law.

12 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
13 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in
14 any current or future legal proceeding unrelated to these proceedings.

15 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered
16 as a Judgment by this Court.

17 **2. JURISDICTION AND VENUE**

18 For purposes of this Consent Judgment and any further court action that may become
19 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
20 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
21 over Wilderness Athlete as to the acts alleged in the Complaint, that venue is proper in Alameda
22 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
23 resolution of all claims up through and including the Effective Date which were or could have
24 been asserted in this action based on the facts alleged in the Notice and Complaint.

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

26 **3.1** Beginning on the Effective Date, Wilderness Athlete shall be permanently
27 enjoined from manufacturing for sale in the State of California, “Distributing into the State of
28 California,” or directly selling in the State of California, any Covered Product which exposes a

1 person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day unless it
2 meets the warning requirements under Section 3.2.

3 **3.1.1** As used in this Consent Judgment, the term “Distributing into the State
4 of California” shall mean to directly ship a Covered Product into California for sale in
5 California or to sell a Covered Product to a distributor that Wilderness Athlete knows will sell
6 the Covered Product in California.

7 **3.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure
8 Level” shall be measured in micrograms, and shall be calculated using the following formula:
9 micrograms of lead per gram of product, multiplied by grams of product per serving of the
10 product (using the largest serving size appearing on the product label), multiplied by servings
11 of the product per day (using the largest number of recommended daily servings appearing on
12 the label), which equals micrograms of lead exposure per day. If the label contains no
13 recommended daily servings, then the number of recommended daily servings shall be one.

14 **3.2 Clear and Reasonable Warnings**

15 If Wilderness Athlete is required to provide a warning pursuant to Section 3.1, the
16 following warning must be utilized (“Warning”):

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

20 Wilderness Athlete shall use the phrase “cancer and” in the Warning if the “Daily Lead
21 Exposure Level” is greater than 15 micrograms of lead as determined pursuant to the testing
22 methodology set forth in Section 3.4 or if another Proposition 65 chemical is present at a level
23 requiring a cancer warning. The Parties acknowledge that the above Warning is the Safe Harbor
24 Warning Language for foods and dietary supplements currently set forth in Title 27, California
25 Code of Regulations, section 25607.2. In the event that the warning language in section 25607.2
26 is amended or modified in the future, Wilderness Athlete may use the Safe Harbor Warning
27 Language in section 25607.2 as amended or modified so long as it remains applicable to the
28 Covered Products.

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 enclosed in a box that
3 contains no other information. In addition, for any Covered Product sold over the internet, the
4 Warning shall appear on the checkout page when a California delivery address is indicated for
5 any purchase of any Covered Product. An asterisk or other identifying method must be utilized
6 to identify which products on the checkout page are subject to the Warning. In no event shall
7 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 the website or on the label or container of Wilderness Athlete's
10 product 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 the Warning on the
12 average lay person shall accompany the Warning. Further, no statements may accompany the
13 Warning that state or imply that the source of the listed chemical minimizes or limits the harmful
14 effect of the listed chemical.

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

19 **3.3 Conforming Covered Products**

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

23 **3.4 Testing Methodology**

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

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

8 **3.4.2** For purposes of measuring the “Daily Lead Exposure Level,” the
9 average of the testing results of the three randomly selected samples of the Covered Products
10 will be 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 or any other testing
16 method subsequently agreed to in writing by the Parties.

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

21 **3.4.5** Nothing in this Consent Judgment shall limit Wilderness Athlete’s
22 ability to conduct, or require that others conduct, additional testing of the Covered Products,
23 including the raw materials used in their manufacture.

24 **3.4.6** Wilderness Athlete shall retain all test results and documentation for a
25 period of five years from the date of each test and shall deliver such test results and
26 documentation to ERC within thirty (30) days of ERC’s written request. ERC’s right to obtain
27 any particular lab report under this subsection shall expire two years after the date such lab report
28 is conducted.

1 **3.4.7** The testing requirements of Section 3.4.1 do not apply to any Covered
2 Product for which Wilderness Athlete has provided the Warning in compliance with Section
3 3.2 continuously and uninterrupted after the Effective Date; however, in the event Wilderness
4 Athlete ceases to provide the Warning in compliance with Section 3.2, Wilderness Athlete
5 shall be required to comply with the testing requirements of this section beginning immediately
6 after the date the Warning ceases to be provided or one year after the Effective Date,
7 whichever date is later, unless Wilderness Athlete can show to the satisfaction of ERC that the
8 cessation in providing the Warning was a temporary error that was resolved when discovered.

9 **4. SETTLEMENT PAYMENT**

10 **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,
11 attorney’s fees, and costs, Wilderness Athlete shall make a total payment of \$40,000.00 (“Total
12 Settlement Amount”) to ERC in two periodic payments (the “Periodic Payments”) according to
13 the following payment schedule (“Due Dates”):

- 14 • Payment 1 -- \$20,000.00 within 5 business days of the Effective Date
- 15 • Payment 2 -- \$20,000.00 within 35 days of the Effective Date

16 Wilderness Athlete shall make these Periodic Payments by wire transfer to ERC’s
17 account, for which ERC will give Wilderness Athlete the necessary account information. The
18 Total Settlement Amount shall be apportioned as follows:

19 **4.2** \$17,000.00 shall be considered a civil penalty pursuant to California Health and
20 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$12,750.00) of the civil penalty to
21 the Office of Environmental Health Hazard Assessment (“OEHHA”) for deposit in the Safe
22 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
23 Code section 25249.12(c). ERC will retain the remaining 25% (\$4,250.00) of the civil penalty.

24 **4.3** \$4,118.86 shall be distributed to ERC as reimbursement to ERC for reasonable
25 costs incurred in bringing this action.

26 **4.4** \$12,077.16 shall be distributed to ERC as an Additional Settlement Payment
27 (“ASP”), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d)
28 and 3204. ERC will utilize the ASP for activities that address the same public harm as

1 allegedly caused by Defendant in this matter. These activities are detailed below and support
2 ERC's overarching goal of reducing and/or eliminating hazardous and toxic chemicals in
3 dietary supplement products in California. ERC's activities have had, and will continue to
4 have, a direct and primary effect within the State of California because California consumers
5 will be benefitted by the reduction and/or elimination of exposure to lead in dietary
6 supplements and/or by providing clear and reasonable warnings to California consumers prior
7 to ingestion of the products.

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

28 ERC shall be fully accountable in that it will maintain adequate records to document

1 and will be able to demonstrate how the ASP funds will be spent and can assure that the funds
2 are being spent only for the proper, designated purposes described in this Consent Judgment.
3 ERC shall provide the Attorney General, within thirty days of any request, copies of
4 documentation demonstrating how such funds have been spent.

5 **4.5** \$6,803.98 shall be distributed to ERC for its in-house legal fees. Except as
6 explicitly provided herein, each Party shall bear its own fees and costs.

7 **4.6** In the event that Wilderness Athlete fails to remit the Periodic Payments owed
8 under Section 4.1 of this Consent Judgment on or before the applicable Due Date, Wilderness
9 Athlete shall be deemed to be in material breach of its obligations under this Consent Judgment.
10 ERC shall provide written notice of the delinquency to Wilderness Athlete via electronic mail. If
11 Wilderness Athlete fails to deliver the delinquent payments within five (5) business days from
12 the written notice, the Total Settlement Amount, less any amounts previously paid pursuant to
13 Section 4.1, shall be immediately due and owing and shall accrue interest at the statutory
14 judgment interest rate provided in the California Code of Civil Procedure section 685.010.
15 Additionally, Wilderness Athlete agrees to pay ERC's reasonable attorney's fees and costs for
16 any efforts to collect the payment due under this Consent Judgment.

17 **5. MODIFICATION OF CONSENT JUDGMENT**

18 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by
19 written stipulation of the Parties and upon entry by the Court of a modified consent judgment
20 or (ii) by motion of either Party pursuant to Section 5.3 and upon entry by the Court of a
21 modified consent judgment.

22 **5.2** If Wilderness Athlete seeks to modify this Consent Judgment under Section 5.1,
23 then Wilderness Athlete must provide written notice to ERC of its intent ("Notice of Intent").
24 If ERC seeks to meet and confer regarding the proposed modification in the Notice of Intent,
25 then ERC must provide written notice to Wilderness Athlete within thirty (30) days of receiving
26 the Notice of Intent. If ERC notifies Wilderness Athlete in a timely manner of ERC's intent to
27 meet and confer, then the Parties shall meet and confer in good faith as required in this Section.
28 The Parties shall meet in person or via telephone within thirty (30) days of ERC's notification

1 of its intent to meet and confer. Within thirty (30) days of such meeting, if ERC disputes the
2 proposed modification, ERC shall provide to Wilderness Athlete a written basis for its position.
3 The Parties shall continue to meet and confer for an additional thirty (30) days in an effort to
4 resolve any remaining disputes. Should it become necessary, the Parties may agree in writing
5 to different deadlines for the meet-and-confer period. ERC further agrees that if Wilderness
6 Athlete seeks to modify the Consent Judgment to allow for warning methods and language that
7 are authorized under the Proposition 65 statute and regulations and applicable to the Covered
8 Products, ERC will not unreasonably withhold its agreement to such modifications.

9 **5.3** In the event that Wilderness Athlete initiates or otherwise requests a
10 modification under Section 5.1, and the meet and confer process leads to a joint motion or
11 application for a modification of the Consent Judgment, Wilderness Athlete shall reimburse
12 ERC its costs and reasonable attorney's fees for the time spent in the meet-and-confer process
13 and filing and arguing the motion or application. If the modifications to the Consent Judgment
14 are minor changes to the injunctive provisions (Sections 3.1-3.4), such as allowing Wilderness
15 Athlete to warn using the methods and language that are authorized under any amendments to
16 the Proposition 65 statute and regulations applicable to the Covered Products, ERC will have
17 no right to recover its costs and reasonable attorney's fees.

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
21 terminate this Consent Judgment.

22 **6.2** If ERC alleges that any Covered Product fails to qualify as a Conforming
23 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
24 inform Wilderness Athlete in a reasonably prompt manner of its test results, including
25 information sufficient to permit Wilderness Athlete to identify the Covered Products at issue.
26 Wilderness Athlete shall, within thirty (30) days following such notice, provide ERC with
27 testing information, from an independent third-party laboratory meeting the requirements of
28 Sections 3.4.3 and 3.4.4, demonstrating Wilderness Athlete's compliance with the Consent

1 Judgment. The Parties shall first attempt to resolve the matter prior to ERC taking any further
2 legal action.

3 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

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

24 **8.2** ERC on its own behalf only, and Wilderness Athlete on its own behalf only,
25 further waive and release any and all claims they may have against each other for all actions or
26 statements made or undertaken in the course of seeking or opposing enforcement of
27 Proposition 65 in connection with the Notice and Complaint up through and including the
28 Effective Date, provided, however, that nothing in Section 8 shall affect or limit any Party's

1 right to seek to enforce the terms of this Consent Judgment.

2 **8.3** It is possible that other claims not known to the Parties and that one Party may
3 have against the other, will develop or be discovered. ERC on behalf of itself only, and
4 Wilderness Athlete on behalf of itself only, acknowledge that this Consent Judgment is
5 expressly intended to cover and include all such claims up through and including the Effective
6 Date, including all rights of action therefore. ERC and Wilderness Athlete acknowledge that
7 the claims released in Sections 8.1 and 8.2 above may include unknown claims, and
8 nevertheless waive California Civil Code section 1542 as to any such unknown claims.
9 California Civil Code section 1542 reads as follows:

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

14 ERC on behalf of itself only, and Wilderness Athlete on behalf of itself only, acknowledge and
15 understand the significance and consequences of this specific waiver of California Civil Code
16 section 1542.

17 **8.4** Wilderness Athlete's compliance with the terms of this Consent Judgment shall
18 be deemed to constitute compliance with Proposition 65 by any Released Party regarding
19 alleged exposures to lead in the Covered Products as set forth in the Notice and Complaint.

20 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
21 environmental exposures arising under Proposition 65. This Consent Judgment shall not apply
22 to any of Wilderness Athlete's products other than the Covered Products, except as set forth
23 above in Sections 8.2 and 8.3.

24 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

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1 **10. GOVERNING LAW**

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

4 **11. PROVISION OF NOTICE**

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

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

9 Chris Heptinstall, Executive Director,
10 Environmental Research Center
11 3111 Camino Del Rio North, Suite 400
12 San Diego, CA 92108
13 Ph: (619) 500-3090
14 Email: chris.heptinstall@erc501c3.org

15 With a copy to:
16 Charles W. Poss
17 Environmental Research Center, Inc.
18 3111 Camino Del Rio North, Suite 400
19 San Diego, CA 92108
20 Ph: (619) 500-3090
21 Fax: (706) 858-0326
22 Email: charles.poss@erc501c3.org

23 **FOR WILDERNESS ATHLETE, LLC:**

24 Courtney Denham, CEO
25 Wilderness Athlete LLC
26 16851 E Parkview Ave Suite 101
27 Fountain Hills, AZ 85268
28 courtney@wildernessathlete.com

29 **12. COURT APPROVAL**

30 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
31 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
32 Consent Judgment.

33 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
34 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible

1 prior to the hearing on the motion.

2 **12.3** If this Consent Judgment is not approved by the Court, it shall be void and have
3 no force or effect.

4 **13. EXECUTION AND COUNTERPARTS**

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

8 **14. DRAFTING**

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

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

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

22 **16. ENFORCEMENT**

23 ERC may, by motion or order to show cause before the Superior Court of Alameda
24 County, enforce the terms and conditions contained in this Consent Judgment. In any action
25 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,
26 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.
27 To the extent the failure to comply with the Consent Judgment constitutes a violation of
28 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent

1 Judgment, but may seek in another action whatever fines, costs, penalties, or remedies as are
2 provided by law for failure to comply with Proposition 65 or other laws.

3 **17. ENTIRE AGREEMENT, AUTHORIZATION**

4 **17.1** This Consent Judgment contains the sole and entire agreement and
5 understanding of the Parties with respect to the entire subject matter herein, and any and all
6 prior discussions, negotiations, commitments, and understandings related hereto. No
7 representations, oral or otherwise, express or implied, other than those contained herein have
8 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
9 herein, shall be deemed to exist or to bind any Party.

10 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
11 authorized by the Party he or she represents to stipulate to this Consent Judgment.

12 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
13 **CONSENT JUDGMENT**

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

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

20 (2) Make the findings pursuant to California Health and Safety Code section
21 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

22 **IT IS SO STIPULATED:**

23 Dated: 12/18/, 2019

24 ENVIRONMENTAL RESEARCH
25 CENTER, INC.

26 By: 
27 Chris Heptinstall, Executive Director

1 Dated: Dec. 18th, 2019

WILDERNESS ATHLETE, LLC



By: Courtney Denham
Its: CEO

5 **APPROVED AS TO FORM:**

7 Dated: December 18, 2019

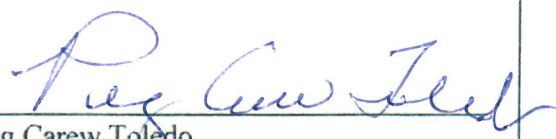
ENVIRONMENTAL RESEARCH
CENTER, INC.

By: 

Charles W. Poss
In-House Counsel

12 Dated: December 18, 2019

ARNOLD & PORTER KAYE SCHOLER
LLP

By: 

Peg Carew Toledo
Attorneys for Defendant Wilderness
Athlete, LLC

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: _____, 2020

Judge of the Superior Court

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EXHIBIT A



Environmental Research Center

3111 Camino Del Rio North, Suite 400
San Diego, CA 92108
619-500-3090

September 27, 2019

NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 *ET SEQ.* (PROPOSITION 65)

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I am the Executive Director of Environmental Research Center, Inc. (“ERC”). ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

ERC has identified violations of California’s Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”), which is codified at California Health & Safety Code §25249.5 *et seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with these products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d) of the statute, ERC intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

General Information about Proposition 65. A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is attached with the copy of this letter served to the alleged Violator identified below.

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

Wilderness Athlete, LLC

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

- 1. Wilderness Athlete High Performance Meal Replacement and Recovery Shake Strawberry - Lead**

2. **Wilderness Athlete Lean Life Weight Loss Formula - Lead**
3. **Wilderness Athlete Elite Brute Strength Superior Post-Workout Recovery Chocolate - Lead**
4. **Wilderness Athlete Green Infusion - Lead**
5. **Wilderness Athlete High Performance Meal Replacement Shake Chocolate - Lead**
6. **Wilderness Athlete High Performance Meal Replacement Shake Vanilla - Lead**
7. **Wilderness Athlete Paleo(ish) Beef Protein Vanilla Almond - Lead**
8. **Wilderness Athlete Paleo(ish) Beef Protein Carnivore Cocoa - Lead**
9. **Wilderness Athlete Energy & Focus Brain & Body Fuel Mango Bango - Lead**
10. **Wilderness Athlete Paleo(ish) Hydrate & Recover Complete Electrolyte Fuel Arizona Sunrise Pineapple Passion Fruit - Lead**

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

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

Route of Exposure. The consumer exposures that are the subject of this notice result from the recommended use of these products. Consequently, the route of exposure to this chemical has been and continues to be through ingestion.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least September 27, 2016, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until this known toxic chemical is either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemical. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons ingesting these products with appropriate warnings that they are being exposed to this chemical.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time-consuming litigation.

September 27, 2019

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Please direct all questions concerning this notice to ERC at the above listed address and telephone number.

Sincerely,



Chris Heptinstall
Executive Director
Environmental Research Center

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Wilderness Athlete, LLC and its Registered Agent for Service of Process only)

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

CERTIFICATE OF MERIT

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

I, Chris Heptinstall, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.

2. I am the Executive Director 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: September 27, 2019

Chris Heptinstall

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 September 27, 2019, 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:

Current President or CEO
Wilderness Athlete, LLC
16851 E Parkview Ave, Ste 101
Scottsdale, AZ 85268

Current President or CEO
Wilderness Athlete, LLC
16610 E Laser Dr
Fountain Hills, AZ 85268

Current President or CEO
Wilderness Athlete, LLC
8711 E Pinnacle Peak Rd
Scottsdale, AZ 85255

Rebecca Howell
(Registered Agent for Wilderness Athlete, LLC)
20280 N 59th Ave, #115-642
Glendale, AZ 85308

On September 27, 2019, 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
Post Office Box 70550
Oakland, CA 94612-0550

On September 27, 2019, between 8:00 a.m. and 5:00 p.m. Eastern Time, verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

Nancy O’Malley, District Attorney
Alameda County
7677 Oakport Street, Suite 650
Oakland, CA 94621
CEPDProp65@acgov.org

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

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

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

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

September 27, 2019

Page 6

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

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

Mark Ankcorn, Deputy City Attorney
San Diego City Attorney
1200 Third Avenue
San Diego, CA 92101
CityAttyProp65@sandiego.gov

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

Valerie Lopez, Deputy City Attorney
San Francisco City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
Valerie.Lopez@sfcityatty.org

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

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

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

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

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

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

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

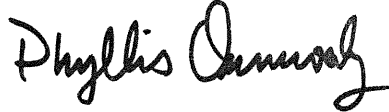
Gregory D. Totten, District Attorney
Ventura County
800 S Victoria Ave
Ventura, CA 93009
daspecialops@ventura.org

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

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*
September 27, 2019
Page 7

On September 27, 2019, 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 September 27, 2019, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink, reading "Phyllis Dunwoody". The signature is written in a cursive style with a large initial "P".

Phyllis Dunwoody

Service List

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

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

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

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

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

District Attorney, El Dorado
County
778 Pacific St.
Placerville, CA 95667

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

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

WHAT DOES PROPOSITION 65 REQUIRE?

The “Proposition 65 List.” Under Proposition 65, the lead agency (OEHHA) publishes a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. Chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as damage to

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

female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at: http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

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

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

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

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

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

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

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

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

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

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

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

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

² See Section 25501(a)(4).

HOW IS PROPOSITION 65 ENFORCED?

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

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

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

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

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

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

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

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

Revised: May 2017

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