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

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

**Plaintiff,**

**vs.**

**VITACOST.COM, INC. and DOES 1-100**

**Defendants.**

**CASE NO. RG20077050**

**STIPULATED CONSENT  
JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed: October 16, 2020

Trial Date: None set

**1. INTRODUCTION**

**1.1** On October 16, 2020, Plaintiff Environmental Research Center, Inc. (“ERC”), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)

1 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*  
2 (“Proposition 65”), against Vitacost.com, Inc. (“Vitacost.com”) and Does 1-100. In this action,  
3 ERC alleges that a number of products manufactured, distributed, or sold by Vitacost.com  
4 contain lead, a chemical listed under Proposition 65 as a carcinogen and reproductive toxin,  
5 and expose consumers to this chemical at a level requiring a Proposition 65 warning. These  
6 products (referred to hereinafter individually as a “Covered Product” or collectively as  
7 “Covered Products”) are: (1) Vital Earth Minerals Humic Minerals, (2) Vital Earth Minerals  
8 Mineral Blend Fulvic-Humic, and (3) Vital Earth Minerals Humic Mineral Caps.

9       **1.2**     ERC and Vitacost.com are hereinafter referred to individually as a “Party” or  
10 collectively as the “Parties.”

11       **1.3**     ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other  
12 causes, helping safeguard the public from health hazards by reducing the use and misuse of  
13 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,  
14 and encouraging corporate responsibility.

15       **1.4**     For purposes of this Consent Judgment, the Parties agree that Vitacost.com is a  
16 business entity that has employed ten or more persons at all times relevant to this action, and  
17 qualifies as a “person in the course of doing business” within the meaning of Proposition 65.  
18 Vitacost.com sells or has sold the Covered Products.

19       **1.5**     The Complaint is based on allegations contained in ERC’s Notice of Violation  
20 dated August 5, 2020 that was served on the California Attorney General, other public  
21 enforcers, and Vitacost.com (“Notice”). A true and correct copy of the 60-Day Notice dated  
22 August 5, 2020 is attached hereto as **Exhibit A** and incorporated herein by reference. More  
23 than 60 days have passed since the Notice was served on the Attorney General, public  
24 enforcers, and Vitacost.com and no designated governmental entity has filed a Complaint  
25 against Vitacost.com with regard to the Covered Products or the alleged violations.

26       **1.6**     ERC’s Notice and Complaint allege that use of the Covered Products by  
27 California consumers exposes them to lead without first receiving clear and reasonable  
28 warnings from Vitacost.com, which is in violation of California Health and Safety Code

1 section 25249.6. Vitacost.com denies all material allegations contained in the Notice and  
2 Complaint.

3       **1.7**     The Parties have entered into this Consent Judgment in order to settle,  
4 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.  
5 Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute  
6 or be construed as an admission by any of the Parties or by any of their respective officers,  
7 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,  
8 franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact,  
9 issue of law, or violation of law.

10       **1.8**     Except as expressly set forth herein, nothing in this Consent Judgment shall  
11 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in  
12 any current or future legal proceeding unrelated to these proceedings.

13       **1.9**     The Effective Date of this Consent Judgment is the date on which notice is  
14 provided to Vitacost.com that this Consent Judgment was entered as a Judgment by this Court.

15       **2.    JURISDICTION AND VENUE**

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

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

24       **3.1**     Beginning on the Effective Date, Vitacost.com shall be permanently enjoined  
25 from manufacturing for sale in the State of California, “Distributing into the State of  
26 California,” or directly selling in the State of California, any Covered Product that exposes a  
27 person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day unless it  
28 meets the warning requirements under Section 3.2.

1           **3.1.1** As used in this Consent Judgment, the term “Distributing into the State  
2 of California” shall mean to directly ship a Covered Product into California for sale in  
3 California or to sell a Covered Product to a distributor that Vitacost.com knows or has reason  
4 to know will sell the Covered Product in California.

5           **3.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure  
6 Level” shall be measured in micrograms, and shall be calculated using the following formula:  
7 micrograms of lead per gram of product, multiplied by grams of product per serving of the  
8 product (using the largest serving size appearing on the product label), multiplied by servings  
9 of the product per day (using the largest number of recommended daily servings appearing on  
10 the label), which equals micrograms of lead exposure per day. If the label contains no  
11 recommended daily servings, then the number of recommended daily servings shall be one.

### 12           **3.2 Clear and Reasonable Warnings**

13           If Vitacost.com is required to provide a warning pursuant to Section 3.1, the following  
14 warning must be utilized (“Warning”):

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

18           Vitacost.com shall use the phrase “cancer and” in the Warning if Vitacost.com has reason  
19 to believe that the the “Daily Lead Exposure Level” is greater than 15 micrograms of lead or if  
20 Vitacost.com has reason to believe that another Proposition 65 chemical is present which may  
21 require a cancer warning.

22           The Warning shall appear on the checkout page when a California delivery address is  
23 indicated for any purchase of any Covered Product, and be located either directly on the  
24 checkout page or through a clearly marked hyperlink located next to the product and which  
25 uses the word “WARNING”, in all capital and bold letters, so long as the hyperlink goes  
26 directly to a page prominently displaying the Warning without content that detracts from the  
27 Warning. An asterisk or other identifying method must be utilized to identify which products  
28 on the checkout page are subject to the Warning.

1 The Warning shall be at least the same size as the largest of any other health or safety  
2 warnings also appearing on the website or on the label and the word “**WARNING**” shall be in all  
3 capital letters and in bold print. No statements intended to or likely to have the effect of  
4 diminishing the impact of the Warning on the average lay person shall accompany the Warning.  
5 Further, no statements may accompany the Warning that state or imply that the source of the listed  
6 chemical has an impact on or results in a less harmful effect of the listed chemical.

7 Vitacost.com must display the above Warning with such conspicuousness, as compared  
8 with other words, statements or designs on its website to render the Warning likely to be read and  
9 understood by an ordinary individual under customary conditions of purchase or use of the  
10 product.

### 11 **3.3 Conforming Covered Products**

12 A Conforming Covered Product is a Covered Product for which the “Daily Lead Exposure  
13 Level” is no greater than 0.5 micrograms of lead per day as determined by the the exposure  
14 methodology set forth in Section 3.1.2 and that is not known by Vitacost.com to contain other  
15 chemicals that violate Proposition 65’s safe harbor thresholds.

## 16 **4. SETTLEMENT PAYMENT**

17 **4.1** In full satisfaction of all potential civil penalties, additional settlement  
18 payments, attorney’s fees, and costs, Vitacost.com shall make a total payment of \$5,000.00  
19 (“Total Settlement Amount”) to ERC within 14 days of the Effective Date (“Due Date”).  
20 Vitacost.com shall make this payment by wire transfer to ERC’s account, for which ERC will  
21 give Vitacost.com the necessary account information and after receiving ERC’s taxpayer  
22 information. The Total Settlement Amount shall be apportioned as follows:

23 **4.2** \$800.00 shall be considered a civil penalty pursuant to California Health and  
24 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$600.00) of the civil penalty to the  
25 Office of Environmental Health Hazard Assessment (“OEHHA”) for deposit in the Safe  
26 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety  
27 Code section 25249.12(c). ERC will retain the remaining 25% (\$200.00) of the civil penalty.

28 **4.3** \$914.95 shall be distributed to ERC as reimbursement to ERC for reasonable

1 costs incurred in bringing this action.

2       **4.4**     \$3,285.05 shall be distributed to ERC for its in-house legal fees. Except as  
3 explicitly provided herein, each Party shall bear its own fees and costs.

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

13     **5.    MODIFICATION OF CONSENT JUDGMENT**

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

18       **5.2**     If a Party seeks to modify this Consent Judgment under Section 5.1, then that  
19 Party must provide written notice to the other Party of its intent ("Notice of Intent"). If any  
20 non-moving Party seeks to meet and confer regarding the proposed modification in the Notice  
21 of Intent, then the non-moving Party must provide written notice to the moving Party within  
22 thirty (30) days of receiving the Notice of Intent. If the non-moving Party notifies the moving  
23 Party in a timely manner of its intent to meet and confer, then the Parties shall meet and confer  
24 in good faith as required in this Section. The Parties shall meet in person or via telephone  
25 within thirty (30) days of the non-moving Party's notification of its intent to meet and confer.  
26 Within thirty (30) days of such meeting, if the non-moving Party disputes the proposed  
27 modification, the non-moving Party shall provide to the moving Party a written basis for its  
28 position. The Parties shall continue to meet and confer for an additional thirty (30) days in an

1 effort to resolve any remaining disputes. Should it become necessary, the Parties may agree in  
2 writing to different deadlines for the meet-and-confer period.

3 **5.3** In the event that any Party initiates or otherwise requests a modification under  
4 Section 5.1 for reasons other than the revoking of Proposition 65 in total or revoking the  
5 application of Proposition 65 to lead in the Covered Products, and the meet and confer process  
6 leads to a joint motion or application for a modification of the Consent Judgment, the Party that  
7 initiated or requested the modification shall reimburse the other Party for its costs and  
8 reasonable attorney's fees for the time spent in the meet-and-confer process and filing and  
9 arguing the motion or application.

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

12 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or  
13 terminate this Consent Judgment. This Consent Judgment is enforceable solely by the Parties  
14 through the processes set out herein, and any alleged breach of the terms of this Consent  
15 Judgment must be brought in this Court.

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

24 **7. APPLICATION OF CONSENT JUDGMENT**

25 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their  
26 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,  
27 divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers,  
28 retailers, predecessors, successors, and assigns. This Consent Judgment shall have no application

1 to any Covered Product that is distributed or sold exclusively outside the State of California and  
2 that is not used by California consumers.

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

4 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,  
5 on behalf of itself and in the public interest, and Vitacost.com and its respective officers,  
6 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,  
7 franchisees, licensees, customers (not including private label customers of Vitacost.com),  
8 distributors, wholesalers, retailers, and all other downstream entities in the distribution chain of  
9 any Covered Product, and the predecessors, successors, and assigns of any of them  
10 (collectively, “Released Parties”).

11 **8.2** ERC, acting in the public interest, releases the Released Parties from any  
12 and all claims for violations of Proposition 65 up through the Effective Date based on exposure  
13 to lead from the Covered Products as set forth in the Notice of Violation. ERC, on behalf of  
14 itself only, hereby fully releases and discharges the Released Parties from any and all claims,  
15 actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and  
16 expenses asserted, or that could have been asserted from the handling, use, or consumption of  
17 the Covered Products, as to any alleged violation of Proposition 65 or its implementing  
18 regulations arising from the failure to provide Proposition 65 warnings on the Covered  
19 Products regarding lead up to and including the Effective Date

20 **8.3** ERC on its own behalf only, and Vitacost.com on its own behalf only,  
21 further waive and release any and all claims they may have against each other for all actions or  
22 statements made or undertaken in the course of seeking or opposing enforcement of  
23 Proposition 65 in connection with the Notice and Complaint up through and including the  
24 Effective Date, provided, however, that nothing in Section 8 shall affect or limit any Party’s  
25 right to seek to enforce the terms of this Consent Judgment.

26 **8.4** It is possible that other claims not known to the Parties, arising out of the facts  
27 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be  
28 discovered. ERC on behalf of itself only, and Vitacost.com on behalf of itself only,



1 acknowledge that this Consent Judgment is expressly intended to cover and include all such  
2 claims up through and including the Effective Date, including all rights of action therefore.  
3 ERC and Vitacost.com acknowledge that the claims released in Sections 8.2 and 8.3 above  
4 may include unknown claims, and nevertheless waive California Civil Code section 1542 as to  
5 any such unknown claims. California Civil Code section 1542 reads as follows:

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

10 ERC on behalf of itself only, and Vitacost.com on behalf of itself only, acknowledge and  
11 understand the significance and consequences of this specific waiver of California Civil Code  
12 section 1542.

13 **8.5** Compliance with the terms of this Consent Judgment shall be deemed to  
14 constitute compliance with Proposition 65 by any of the Released Parties regarding alleged  
15 exposures to lead in the Covered Products as set forth in the Notice and Complaint.

16 **8.6** Nothing in this Consent Judgment is intended to apply to any occupational or  
17 environmental exposures arising under Proposition 65, nor shall it apply to any of  
18 Vitacost.com's products other than the Covered Products.

19 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

23 **10. GOVERNING LAW**

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

26 **11. PROVISION OF NOTICE**

27 All notices required to be given to either Party to this Consent Judgment by the other shall  
28 be in writing and sent to the following agents listed below via first-class mail or via electronic

1 mail where required. Courtesy copies via email may also be sent.

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

3 Chris Heptinstall, Executive Director, Environmental Research Center  
4 3111 Camino Del Rio North, Suite 400  
5 San Diego, CA 92108  
6 Ph: (619) 500-3090  
7 Email: chris.heptinstall@erc501c3.org

8 With a copy to:  
9 Charles W. Poss  
10 Environmental Research Center, Inc.  
11 3111 Camino Del Rio North, Suite 400  
12 San Diego, CA 92108  
13 Ph: (619) 500-3090  
14 Email: charles.poss@erc501c3.org

15 **FOR VITACOST.COM, INC.:**

16 Thomas Jefferds  
17 The Kroger Co.  
18 4700 Exchange Court, Suite 200  
19 Boca Raton, FL 33431  
20 Email: thomas.jefferds@kroger.com

21 With a copy to:  
22 Gregory P. O'Hara  
23 Lauren M. Michals  
24 Nixon Peabody LLP  
25 One Embarcadero Center, 32nd Floor  
26 San Francisco, CA 94111  
27 Ph: (415) 984-8200  
28 Emails:  
29 gohara@nixonpeabody.com  
30 lmichals@nixonpeabody.com

31 **12. COURT APPROVAL**

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

35 **12.2** If the California Attorney General objects to any term in this Consent Judgment,

1 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible  
2 prior to the hearing on the motion.

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

5 **13. EXECUTION AND COUNTERPARTS**

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

9 **14. DRAFTING**

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

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

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

23 **16. ENFORCEMENT**

24 A Party may, by motion or order to show cause before the Superior Court of Alameda  
25 County, enforce the terms and conditions contained in this Consent Judgment. In any action  
26 brought to enforce this Consent Judgment, the Party may seek whatever fines, costs, penalties,  
27 or remedies as are provided by law for failure to comply with the Consent Judgment.

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1 **17. ENTIRE AGREEMENT, AUTHORIZATION**

2 **17.1** This Consent Judgment contains the sole and entire agreement and  
3 understanding of the Parties with respect to the entire subject matter herein, including any and  
4 all prior discussions, negotiations, commitments, and understandings related thereto. No  
5 representations, oral or otherwise, express or implied, other than those contained herein have  
6 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to  
7 herein, shall be deemed to exist or to bind any Party.

8 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully  
9 authorized by the Party he or she represents to stipulate to this Consent Judgment.

10 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
11 **CONSENT JUDGMENT**

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

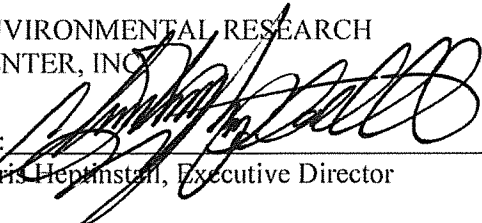
15 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
16 equitable settlement of all matters raised by the allegations of the Complaint that the matter has  
17 been diligently prosecuted, and that the public interest is served by such settlement; and

18 (2) Make the findings pursuant to California Health and Safety Code section  
19 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

20 **IT IS SO STIPULATED:**


21 Dated: 2/24, 2022

ENVIRONMENTAL RESEARCH  
CENTER, INC.

22  
23 By:   
Chris Heptinstal, Executive Director

24  
25 Dated: 2/18, 2022

VIFACOST.COM, INC.

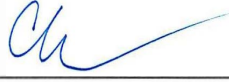
26  
27 By:   
Its: Assistant Secretary  
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**APPROVED AS TO FORM:**


Dated: February 24, 2022

ENVIRONMENTAL RESEARCH  
CENTER, INC.

By:   
\_\_\_\_\_  
Charles W. Poss  
In-House Counsel

Dated: Feb. 23, 2022

NIXON PEABODY LLP

By:   
\_\_\_\_\_  
Gregory P. O'Hara  
Lauren M. Michals  
Attorneys for Vitacost.com, Inc.

**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: \_\_\_\_\_, 2022 \_\_\_\_\_  
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

August 5, 2020

### 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:

**Vitacost.com, Inc.**

**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. Vital Earth Minerals Humic Minerals - Lead**
- 2. Vital Earth Minerals Mineral Blend Fulvic-Humic - Lead**
- 3. Vital Earth Minerals Humic Mineral Caps - 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 August 5, 2017, 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.

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 Vitacost.com, Inc. and its Registered Agents 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 Vitacost.com, Inc.**

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: August 5, 2020

---

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 August 5, 2020, 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  
Vitacost.com, Inc.  
5400 Broken Sound Blvd NW, Ste 500  
Boca Raton, FL 33487

Corporation Service Company  
(Registered Agent for Vitacost.com, Inc.)  
251 Little Falls Dr  
Wilmington, DE 19808

Current President or CEO  
Vitacost.com, Inc.  
1014 Vine St  
Cincinnati, OH 45202

Corporation Service Company  
(Registered Agent for Vitacost.com, Inc.)  
1201 Hays St  
Tallahassee, FL 32301

On August 5, 2020, 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 August 5, 2020, 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.*

August 5, 2020

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

Jeannine M. Pacioni, District Attorney  
Monterey County  
1200 Aguajito Road  
Monterey, CA 93940  
Prop65DA@co.monterey.ca.us

Gary Lieberstein, District Attorney  
Napa County  
931 Parkway Mall  
Napa, CA 94559  
CEPD@countyofnapa.org

Paul E. Zellerbach, District Attorney  
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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

Summer Stephan, District Attorney  
San Diego County  
330 West Broadway  
San Diego, CA 92101  
SanDiegoDAProp65@sdca.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, 7<sup>th</sup> 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, 4<sup>th</sup> 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  
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600 Administration Dr  
Sonoma, CA 95403  
jbarnes@sonoma-county.org

Phillip J. Cline, District Attorney  
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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

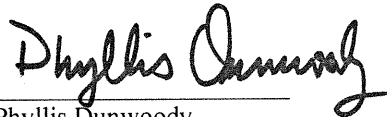
Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

August 5, 2020

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On August 5, 2020, 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 August 5, 2020, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink, appearing to read "Phyllis Dunwoody", written in a cursive style.

---

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 4<sup>th</sup> 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 Bernardino, CA 92415

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, 2<sup>nd</sup>  
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 2<sup>nd</sup> 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.<sup>1</sup> 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

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

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

Only those chemicals that are on the list are regulated under 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 contaminant<sup>2</sup> it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

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

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

## *HOW IS PROPOSITION 65 ENFORCED?*

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of 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](mailto: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.