

1 Michael Freund (SBN 99687)  
2 Michael Freund & Associates  
3 1919 Addison Street, Suite 105  
4 Berkeley, CA 94704  
5 Telephone: (510) 540-1992  
6 Email: freund1@aol.com

7 Attorney for Plaintiff Environmental Research Center, Inc.

8 Brent E. Johnson (SBN 133323)  
9 Holland & Hart LLP  
10 222 South Main Street, Suite 2200  
11 Salt Lake City, UT 84101  
12 Telephone: (801) 799-5800  
13 Email: bjohnson@hollandhart.com

14 Attorney for Defendant Kitu Life, Inc., individually and  
15 dba Super Coffee

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

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

21 **Plaintiff,**

22 **vs.**

23 **KITU LIFE, INC., individually and dba**  
24 **SUPER COFFEE; and DOES 1-100**

25 **Defendants.**

26 **CASE NO. RG20082587**

27 **STIPULATED CONSENT**  
28 **JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed: December 14, 2020

Trial Date: None set

1 **1. INTRODUCTION**

2 **1.1** On December 14, 2020, Plaintiff Environmental Research Center, Inc. (“ERC”),  
3 a non-profit corporation, as a private enforcer and in the public interest, initiated this action by  
4 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 Kitu Life, Inc., individually and dba Super Coffee (“Kitu Life”) and  
3 Does 1-100. In this action, ERC alleges that a number of products manufactured, distributed,  
4 or sold by Kitu Life contain lead, a chemical listed under Proposition 65 as a carcinogen and  
5 reproductive toxin, and expose consumers to this chemical at a level requiring a Proposition 65  
6 warning. These products (referred to hereinafter individually as a “Covered Product” or  
7 collectively as “Covered Products”) are: (1) Kitu Super Espresso Bold & Smooth  
8 Unsweetened Triple Shot, (2) Kitu Super Coffee Protein + MCT Oil Naturally Sweetened  
9 Vanilla, (3) Kitu Super Coffee Protein + MCT Oil Naturally Sweetened Hazelnut, (4) Kitu  
10 Super Coffee Protein + MCT Oil Unsweetened Original, (5) Kitu Super Coffee Protein + MCT  
11 Oil Naturally Sweetened Mocha, and (6) Kitu Super Cold Brew Bold & Smooth Unsweetened  
12 Black.

13       **1.2**     ERC and Kitu Life are hereinafter referred to individually as a “Party” or  
14 collectively as the “Parties.”

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

19       **1.4**     For purposes of this Consent Judgment, the Parties agree that Kitu Life is a  
20 business entity that has employed ten or more persons at all times relevant to this action, and  
21 qualifies as a “person in the course of doing business” within the meaning of Proposition 65. Kitu  
22 Life manufactures, distributes, and/or sells the Covered Products.

23       **1.5**     The Complaint is based on allegations contained in ERC’s Notice of Violation  
24 dated October 1, 2020, that was served on the California Attorney General, other public  
25 enforcers, and Kitu Life (“Notice”). A true and correct copy of the 60-Day Notice dated  
26 October 1, 2020 is attached hereto as **Exhibit A** and incorporated herein by reference. More  
27 than 60 days have passed since the Notice was served on the Attorney General, public  
28 enforcers, and Kitu Life and no designated governmental entity has filed a Complaint against

1 Kitu Life with regard to the Covered Products or the alleged violations.

2       **1.6**     ERC's Notice and Complaint allege that use of the Covered Products by  
3 California consumers exposes them to lead without first receiving clear and reasonable  
4 warnings from Kitu Life, which is in violation of California Health and Safety Code section  
5 25249.6. Kitu Life denies all material allegations contained in the Notice and Complaint.

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

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

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

18       **2.     JURISDICTION AND VENUE**

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

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

27       **3.1**     Beginning on the Effective Date, Kitu Life shall be permanently enjoined from  
28 manufacturing for sale in the State of California, "Distributing into the State of California," or

1 directly selling in the State of California, any Covered Product that exposes a person to a  
2 “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day unless it meets the  
3 warning requirements under Section 3.2. The injunctive requirements of this Section 3 shall  
4 not apply to Covered Products manufactured prior to, or in the stream of commerce as of, the  
5 Effective Date, which Covered Products would be expressly subject to the releases provided in  
6 Section 8.1, unless such Covered Products are still in the possession of or under the control of  
7 Kitu Life after the Effective Date.

8           **3.1.1** As used in this Consent Judgment, the term “Distributing (or  
9 Distributed) into the State of California” shall mean to directly ship a Covered Product into  
10 California for sale in California or to sell a Covered Product to a distributor that Kitu Life  
11 knows or has reason to know will sell the Covered Product in California.

12           **3.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure Level”  
13 shall be measured in micrograms, and shall be calculated using the following formula:  
14 micrograms of lead per gram of the Covered Product, multiplied by grams of product per serving  
15 of the product (using the largest serving size appearing on the product label), multiplied by  
16 servings of the product per day (using the largest number of recommended daily servings  
17 appearing on the label), which equals micrograms of lead exposure per day, excluding, pursuant  
18 to Section 3.1.3, amounts of allowances of lead in the ingredients listed in **Table 1** below. If the  
19 label contains no recommended daily servings, then the number of recommended daily servings  
20 shall be one.

21           **3.1.3** In calculating the Daily Lead Exposure Level for a Covered Product, Kitu  
22 Life shall be allowed to deduct the amount of lead which is deemed “naturally occurring” in any  
23 ingredient listed in **Table 1** that is contained in that Covered Product under the following  
24 conditions: For each year that Kitu Life claims entitlement to a “naturally occurring” allowance,  
25 Kitu Life shall provide ERC with the following information: (a) Kitu Life must produce to ERC  
26 a list of each ingredient in the Covered Product for which a “naturally occurring” allowance is  
27 claimed; (b) Kitu Life must provide ERC with documentation of laboratory testing that complies  
28 with Sections 3.4.3 and 3.4.4 and that shows the amount of lead, if any, contained in any



ingredient listed in **Table 1** that is contained in the Covered Product and for which Kitu Life intends to deduct “naturally occurring” lead; (c) If the laboratory testing reveals the presence of lead in any ingredient listed in **Table 1** that is contained in the Covered Product, Kitu Life shall be entitled to deduct up to the full amount of the allowance for that ingredient, as listed in **Table 1**, but not to exceed the total amount of lead actually contained in that ingredient in the Covered Product; and (d) If the Covered Product does not contain an ingredient listed in **Table 1**, Kitu Life shall not be entitled to a deduction for “naturally occurring” lead in the Covered Product for that ingredient. The information required by Sections 3.1.3 (a) and (b) shall be provided to ERC within thirty (30) days of the Effective Date or anniversary thereof for any year that Kitu Life shall claim entitlement to the “naturally occurring” allowance.

**TABLE 1**

INGREDIENT	ALLOWANCES OF AMOUNT OF LEAD
Calcium (Elemental)	Up to 0.8 micrograms/gram
Ferrous Fumarate	Up to 0.4 micrograms/gram
Zinc Oxide	Up to 8.0 micrograms/gram
Magnesium Oxide	Up to 0.4 micrograms/gram
Magnesium Carbonate	Up to 0.332 micrograms/gram
Magnesium Hydroxide	Up to 0.4 micrograms/gram
Zinc Gluconate	Up to 0.8 micrograms/gram
Potassium Chloride	Up to 1.1 micrograms/gram
Cocoa-powder	Up to 1.0 micrograms/gram

**3.2 Clear and Reasonable Warnings**

If Kitu Life is required to provide a warning pursuant to Section 3.1, one of the following warnings must be utilized (“Warning”):

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1            **OPTION 1**

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

4 Or

5            **OPTION 2**

6            **⚠ WARNING:** [Cancer and] Reproductive Harm – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

7            Kitu Life shall use the bracketed words “cancer and” in the Warning only if Kitu Life has  
8 reason to believe that the the “Daily Lead Exposure Level” is greater than 15 micrograms of lead  
9 as determined pursuant to the methodology set forth in Section 3.4 or if Kitu Life has reason to  
10 believe that another Proposition 65 chemical is present which may require a cancer warning. For  
11 Option 2, the Warning shall be immediately preceded on the left by a symbol consisting of a black  
12 exclamation point in a yellow equilateral triangle with a bold black outline unless the remainder of  
13 the package labeling is not printed with the color yellow, in which case the symbol may be printed  
14 in black and white.

15            The Warning shall be securely affixed to or printed upon the label of each Covered  
16 Product and it must be set off from other surrounding information. For Option 1, the Warning  
17 shall be enclosed in a box. In addition, for any Covered Product sold over the internet, the  
18 Warning, if required, shall appear either on the Covered Product’s primary display page or on  
19 the checkout page when a California delivery address is indicated for any purchase of any  
20 Covered Product. An asterisk or other identifying method must be utilized to identify which  
21 products on the checkout page are subject to the Warning if the Warning is displayed on the  
22 checkout page as described above. In no event shall any internet or website Warning be  
23 contained in or made through a link.

24            The Warning shall be at least the same size as the largest of any other health or safety  
25 warnings also appearing on the website or on the label and the word “**WARNING**” shall be in all  
26 capital letters and in bold print. No statements intended to or likely to have the effect of  
27 diminishing the impact of the Warning on the average lay person shall accompany the Warning.  
28 Further, no statements may accompany the Warning that state or imply that the source of the listed

1 chemical has an impact on or results in a less harmful effect of the listed chemical.

2 Kitu Life must display the above Warning with such conspicuousness, as compared with  
3 other words, statements or designs on the label, or on its website, if applicable, to render the  
4 Warning likely to be read and understood by an ordinary individual under customary conditions  
5 of purchase or use of the product.

6 For purposes of this Consent Judgment, the term “label” means a display of written,  
7 printed or graphic material that is printed on or affixed to a Covered Product or its immediate  
8 container or wrapper.

### 9 **3.3 Conforming Covered Products**

10 A Conforming Covered Product is a Covered Product for which the “Daily Lead Exposure  
11 Level” is no greater than 0.5 micrograms of lead per day as determined by the the exposure  
12 methodology set forth in Section 3.1.2 and the quality control methodology set forth in Section  
13 3.4, and that is not known by Kitu Life to contain other chemicals that violate Proposition 65’s  
14 safe harbor thresholds.

### 15 **3.4 Testing and Quality Control Methodology**

16 **3.4.1** Beginning within one year of the Effective Date, Kitu Life shall arrange  
17 for lead testing of the Covered Products at least once a year for a minimum of four (4)  
18 consecutive years by arranging for testing of three (3) randomly selected samples of each of  
19 the Covered Products, in the form intended for sale to the end-user, which Kitu Life intends to  
20 sell or is manufacturing for sale in California, directly selling to a consumer in California or  
21 “Distributing into the State of California.” If tests conducted pursuant to this Section  
22 demonstrate that no Warning is required for a Covered Product during each of four consecutive  
23 years, then the testing requirements of this Section will no longer be required as to that  
24 Covered Product. However, if during or after the four-year testing period, Kitu Life changes  
25 ingredient suppliers for any of the Covered Products and/or reformulates any of the Covered  
26 Products, Kitu Life shall test that Covered Product annually for at least three (3) consecutive  
27 years after such change is made.

28 **3.4.2** For purposes of measuring the “Daily Lead Exposure Level,” the highest

1 lead detection result of the three (3) randomly selected samples of the Covered Products will  
2 be controlling.

3           **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a  
4 laboratory method that complies with the performance and quality control factors appropriate  
5 for the method used, including limit of detection and limit of quantification, sensitivity,  
6 accuracy and precision that meets the following criteria: Inductively Coupled Plasma-Mass  
7 Spectrometry (“ICP-MS”) achieving a limit of quantification of less than or equal to 0.010  
8 mg/kg or any other testing methodology subsequently agreed to in writing by the Parties.

9           **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an  
10 independent third party laboratory certified by the California Environmental Laboratory  
11 Accreditation Program or an independent third-party laboratory that is registered with the  
12 United States Food & Drug Administration (“FDA”) or that uses methods that are in  
13 compliance with FDA regulations.

14           **3.4.5** Nothing in this Consent Judgment shall limit Kitu Life’s ability to  
15 conduct, or require that others conduct, additional testing of the Covered Products, including the  
16 raw materials used in their manufacture.

17           **3.4.6** Within thirty (30) days of ERC’s written request, which shall not be made  
18 more than once per year, Kitu Life shall deliver lab reports obtained pursuant to Section 3.4 to  
19 ERC. Kitu Life shall retain all test results and documentation for a period of five years from the  
20 date of each test.

#### 21 **4. SETTLEMENT PAYMENT**

22           **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,  
23 attorney’s fees, and costs, Kitu Life shall make a total payment of \$150,000.00 (“Total  
24 Settlement Amount”) to ERC in six equal installments (“Installment Payment(s)”). according  
25 to the following payment schedule (“Due Dates”):

- 26 • Installment Payment 1 -- \$25,000.00 within 5 days of the Effective Date
- 27 • Installment Payment 2 -- \$25,000.00 within 35 days of the Effective Date
- 28 • Installment Payment 3 -- \$25,000.00 within 65 days of the Effective Date

- 1 • Installment Payment 4 -- \$25,000.00 within 95 days of the Effective Date
- 2 • Installment Payment 5 -- \$25,000.00 within 125 days of the Effective Date
- 3 • Installment Payment 6 -- \$25,000.00 within 155 days of the Effective Date

4 Kitu Life shall make the Installment Payments by wire transfer to ERC's account, for  
5 which ERC will give Kitu Life the necessary account information as well as its form W-9.

6 ERC will be solely responsible for distributing to the other parties identified in this Section 4  
7 the payments identified herein. The Total Settlement Amount shall be apportioned as follows:

8 **4.2** \$73,500.00 shall be considered a civil penalty pursuant to California Health and  
9 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$55,125.00) of the civil penalty to  
10 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe  
11 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety  
12 Code section 25249.12(c). ERC will retain the remaining 25% (\$18,375.00) of the civil  
13 penalty.

14 **4.3** \$1,810.07 shall be distributed to ERC as reimbursement to ERC for reasonable  
15 costs incurred in bringing this action.

16 **4.4** \$54,871.42 shall be distributed to ERC as an Additional Settlement Payment  
17 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d)  
18 and 3204. ERC will utilize the ASP for activities that address the same public harm as  
19 allegedly caused by Defendant in this matter. These activities are detailed  
20 below and support ERC's overarching goal of reducing and/or eliminating hazardous and toxic  
21 chemicals in dietary supplement products in California. ERC's activities have had, and will  
22 continue to have, a direct and primary effect within the State of California because California  
23 consumers will be benefitted by the reduction and/or elimination of exposure to lead in dietary  
24 supplements and/or by providing clear and reasonable warnings to California consumers prior  
25 to ingestion of the products.

26 Based on a review of past years' actual budgets, ERC is providing the following list of  
27 activities ERC engages in to protect California consumers through Proposition 65 citizen  
28 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those

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

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

23 **4.5** \$15,600.00 shall be distributed to Michael Freund as reimbursement of ERC's  
24 attorney's fees, while \$4,218.51 shall be distributed to ERC for its in-house legal fees. Except  
25 as explicitly provided herein, each Party shall bear its own fees and costs.

26 **4.6** In the event that Kitu Life fails to remit, in full, any of the Installment Payments  
27 owed pursuant to Section 4.1 of this Consent Judgment on or before the applicable Due Date,  
28 Kitu Life shall be deemed to be in material breach of its obligations under this Consent



1 Judgment. ERC shall provide written notice of the delinquency to Kitu Life via electronic  
2 mail. If Kitu Life fails to deliver the delinquent Installment Payment within five (5) days from  
3 the written notice, the Total Settlement Payment, less any amounts previously paid pursuant to  
4 Section 4.1, shall be immediately due and owing and shall accrue interest at the statutory  
5 judgment interest rate provided in the California Code of Civil Procedure section 685.010.  
6 Additionally, Kitu Life agrees to pay ERC's reasonable attorney's fees and costs for any  
7 efforts to collect the payment(s) due under this Consent Judgment.

## 8 **5. MODIFICATION OF CONSENT JUDGMENT**

9 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by  
10 written stipulation of the Parties and upon entry by the Court of a modified consent judgment  
11 or (ii) by motion of either Party pursuant to Section 5.3 and upon entry by the Court of a  
12 modified consent judgment.

13 **5.2** If Kitu Life seeks to modify this Consent Judgment under Section 5.1, then Kitu  
14 Life must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to  
15 meet and confer regarding the proposed modification in the Notice of Intent, then ERC must  
16 provide written notice to Kitu Life within thirty (30) days of receiving the Notice of Intent. If  
17 ERC notifies Kitu Life in a timely manner of ERC's intent to meet and confer, then the Parties  
18 shall meet and confer in good faith as required in this Section. The Parties shall meet in person  
19 or via telephone within thirty (30) days of ERC's notification of its intent to meet and confer.  
20 Within thirty (30) days of such meeting, if ERC disputes the proposed modification, ERC shall  
21 provide to Kitu Life a written basis for its position. The Parties shall continue to meet and  
22 confer for an additional thirty (30) days in an effort to resolve any remaining disputes. Should  
23 it become necessary, the Parties may agree in writing to different deadlines for the meet-and-  
24 confer period.

25 **5.3** In the event that Kitu Life initiates or otherwise requests a modification under  
26 Section 5.1, and the meet and confer process leads to a joint motion or application for a  
27 modification of the Consent Judgment, Kitu Life shall reimburse ERC its costs and reasonable  
28 attorney's fees for the time spent in the meet-and-confer process and filing and arguing the

1 motion or application.

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

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

6 **6.2** If ERC alleges that any Covered Product fails to qualify as a Conforming  
7 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall  
8 inform Kitu Life in a reasonably prompt manner of its test results, including information  
9 sufficient to permit Kitu Life to identify the Covered Products at issue. Kitu Life shall, within  
10 thirty (30) days following such notice, provide ERC with testing information, from an  
11 independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,  
12 demonstrating Kitu Life's compliance with the Consent Judgment. The Parties shall first  
13 attempt to resolve the matter prior to ERC taking any further legal action.

14 **7. APPLICATION OF CONSENT JUDGMENT**

15 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their  
16 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,  
17 divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers,  
18 retailers, predecessors, successors, and assigns. This Consent Judgment shall have no  
19 application to any Covered Product that is distributed or sold exclusively outside the State of  
20 California and that is not used by California consumers.

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

22 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,  
23 on behalf of itself and in the public interest, and Kitu Life and its respective officers, directors,  
24 shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,  
25 franchisees, licensees, customers (not including private label customers of Kitu Life),  
26 distributors, wholesalers, retailers, and all other upstream and downstream entities in the  
27 distribution chain of any Covered Product, and the predecessors, successors, and assigns of any  
28 of them (collectively, "Released Parties"). ERC, on behalf of itself and in the public interest,

1 hereby fully releases and discharges the Released Parties from any and all claims, actions,  
2 causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses  
3 asserted, or that could have been asserted from the handling, use, or consumption of the  
4 Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations  
5 arising from the failure to provide Proposition 65 warnings on the Covered Products regarding  
6 lead up to and including the Effective Date.

7 **8.2** ERC on its own behalf only, and Kitu Life on its own behalf only, further  
8 waive and release any and all claims they may have against each other for all actions or  
9 statements made or undertaken in the course of seeking or opposing enforcement of  
10 Proposition 65 in connection with the Notice and Complaint up through and including the  
11 Effective Date, provided, however, that nothing in Section 8 shall affect or limit any Party's  
12 right to seek to enforce the terms of this Consent Judgment.

13 **8.3** It is possible that other claims not known to the Parties, arising out of the facts  
14 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be  
15 discovered. ERC on behalf of itself only, and Kitu Life on behalf of itself only, acknowledge  
16 that this Consent Judgment is expressly intended to cover and include all such claims up  
17 through and including the Effective Date, including all rights of action therefore. ERC and  
18 Kitu Life acknowledge that the claims released in Sections 8.1 and 8.2 above may include  
19 unknown claims, and nevertheless waive California Civil Code section 1542 as to any such  
20 unknown claims. California Civil Code section 1542 reads as follows:

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

25 ERC on behalf of itself only, and Kitu Life on behalf of itself only, acknowledge and  
26 understand the significance and consequences of this specific waiver of California Civil Code  
27 section 1542.

28 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to

1 constitute compliance with Proposition 65 by any of the Released Parties regarding alleged  
2 exposures to lead in the Covered Products as set forth in the Notice and Complaint.

3 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or  
4 environmental exposures arising under Proposition 65, nor shall it apply to any of Kitu Life's  
5 products other than the Covered Products.

6 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

10 **10. GOVERNING LAW**

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

13 **11. PROVISION OF NOTICE**

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

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

18 Chris Heptinstall, Executive Director, Environmental Research Center  
19 3111 Camino Del Rio North, Suite 400  
20 San Diego, CA 92108  
21 Ph: (619) 500-3090  
22 Email: [chris.heptinstall@erc501c3.org](mailto:chris.heptinstall@erc501c3.org)

23 With a copy to:  
24 Michael Freund  
25 Michael Freund & Associates  
26 1919 Addison Street, Suite 105  
27 Berkeley, CA 94704  
28 Ph: (510) 540-1992  
Email: [freund1@aol.com](mailto:freund1@aol.com)

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2 **FOR KITU LIFE, INC., individually and dba SUPER COFFEE:**

3 Jordan DeCicco  
4 Kitu Life, Inc.  
5 1732 First Ave #25614  
6 New York, NY 10128  
7 Email: jordan@kitulife.com

8 With a copy to:  
9 Brent E. Johnson  
10 Holland & Hart LLP  
11 222 South Main Street, Suite 2200  
12 Salt Lake City, UT 84101  
13 Ph: (801) 799-5807  
14 Email: bjohnson@hollandhart.com

11

12 **12. COURT APPROVAL**

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

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

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

21 **13. EXECUTION AND COUNTERPARTS**

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

25 **14. DRAFTING**

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

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

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

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

11 **16. ENFORCEMENT**

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

20 **17. ENTIRE AGREEMENT, AUTHORIZATION**

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

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



1 ///

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

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

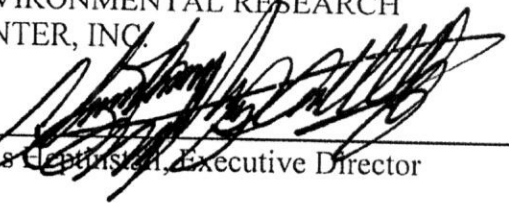
7 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
8 equitable settlement of all matters raised by the allegations of the Complaint that the matter has  
9 been diligently prosecuted, and that the public interest is served by such settlement; and

10 (2) Make the findings pursuant to California Health and Safety Code section  
11 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

12 **IT IS SO STIPULATED:**


13 Dated: 5/21, 2021

ENVIRONMENTAL RESEARCH  
CENTER, INC.

14  
15 By:   
16 Chris Depina, Executive Director

17 Dated: 5/23/2021, 2021

KITU LIFE, INC., individually and dba  
SUPER COFFEE

18  
19   
20 By: Jordan DeCicco  
21 Its: Founder

22 ///

23 ///

24 ///

25 ///

26 ///


27 ///

28 ///

1 APPROVED AS TO FORM


2  
3 Dated: 5/24/, 2021

MICHAEL FREUND ASSOCIATES

4  
5 By:   
6 Michael Freund  
7 Attorney for Environmental Research  
8 Center, Inc.

9  
10 Dated: 05 25 2021, 2021

HOLLAND HART LLP

11  
12 By:   
13 Brent E. Johnson  
14 Attorney for Kitu Life, Inc., individually  
15 and dba Super Coffee  
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**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: \_\_\_\_\_, 2021

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

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# EXHIBIT A

**Michael Freund & Associates**

1919 Addison Street, Suite 105

Berkeley, CA 94704

Voice: 510.540.1992 • Fax: 510.371.0885

Michael Freund, Esq.

October 1, 2020

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

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Environmental Research Center, Inc. ("ERC"), 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. (619) 500-3090. ERC's Executive Director is Chris Heptinstall. ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

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

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

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

**Kitu Life, Inc., individually and dba Super Coffee**

**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. Kitu Super Espresso Bold & Smooth Unsweetened Triple Shot - Lead**
- 2. Kitu Super Coffee Protein + MCT Oil Naturally Sweetened Vanilla - Lead**
- 3. Kitu Super Coffee Protein + MCT Oil Naturally Sweetened Hazelnut - Lead**
- 4. Kitu Super Coffee Protein + MCT Oil Unsweetened Original - Lead**
- 5. Kitu Super Coffee Protein + MCT Oil Naturally Sweetened Mocha - Lead**
- 6. Kitu Super Cold Brew Bold & Smooth Unsweetened Black - 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.

October 1, 2020

Page 2

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 October 1, 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.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violation to my attention at the law office address and telephone number indicated on the letterhead or at freund1@aol.com.**

Sincerely,



---

Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Kitu Life, Inc., individually and dba Super Coffee 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 Kitu Life, Inc., individually and dba Super Coffee**

I, Michael Freund, declare:

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

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed 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: October 1, 2020

---

Michael Freund

**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 October 1, 2020 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO  
Kitu Life, Inc., individually and  
dba Super Coffee  
1412 Broadway, Fl 21  
New York, NY 10018

Capitol Services, Inc.  
(Registered Agent for Kitu Life, Inc., individually  
and dba Super Coffee)  
1675 S State Street, Ste B  
Dover, DE 19901

Current President or CEO  
Kitu Life, Inc., individually and  
dba Super Coffee  
1732 1st Ave, #25614  
New York, NY 10128

On October 1, 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  
Oakland, CA 94612-0550

On October 1, 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** 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

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

October 1, 2020

Page 5

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

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

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  
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

Summer Stephan, District Attorney  
San Diego County  
330 West Broadway  
San Diego, CA 92101  
SanDiegoDAProp65@sdcda.org

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

Alethea Sargent, Assistant District Attorney  
White Collar Division  
San Francisco District Attorney's Office  
350 Rhode Island Street  
North Building, Suite 400N  
San Francisco, CA 94103  
alethea.sargent@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

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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

On October 1, 2020 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by First Class Mail.

Executed on October 1, 2020, in Fort Oglethorpe, Georgia.



---

Phyllis Dunwoody

Service List

District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Mateo County 400 County Ctr., 3rd Floor Redwood City, CA 94063
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, Shasta County 1355 West Street Redding, CA 96001
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Sierra County 100 Courthouse Square, 2 <sup>nd</sup> Floor Downieville, CA 95936
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533
District Attorney, El Dorado County 778 Pacific St Placerville, CA 95667	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Sutter County 463 2 <sup>nd</sup> Street Yuba City, CA 95991
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Bernardino County 303 West Third Street San Bernardino, CA 92415	San Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012		

## 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.