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15 Corporation, Morinda, Inc., Morinda Holdings, Inc., and Morinda
16 USA, Inc.

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

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

22 **Plaintiff,**

23 **vs.**

24 **NEWAGE, INC. f/k/a NEW AGE**
25 **BEVERAGES CORPORATION;**
26 **MORINDA, INC.; MORINDA**
27 **HOLDINGS, INC.; MORINDA USA, INC.;**
28 **and DOES 1-100**

Defendants.

CASE NO. 21CV001373

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: November 1, 2021

Trial Date: None set

1. INTRODUCTION

1.1 On November 1, 2021, Plaintiff Environmental Research Center, Inc. (“ERC”), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by

1 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)
2 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
3 (“Proposition 65”), against NewAge, Inc. f/k/a New Age Beverages Corporation, Morinda,
4 Inc., Morinda Holdings, Inc., and Morinda USA, Inc. (collectively “NewAge”) and Does 1-
5 100. In this action, ERC alleges that a number of products manufactured, distributed, or sold
6 by NewAge contain lead and/or mercury, chemicals listed under Proposition 65 as carcinogens
7 and reproductive toxins, and expose consumers to these chemicals at a level requiring a
8 Proposition 65 warning. These products (referred to hereinafter individually as a “Covered
9 Product” or collectively as “Covered Products”) are: (1) TE•ORA Shape Smoothie Mixed
10 Berry (lead, mercury) and (2) TE•MANA Shape Marvelous Mango Smoothie (lead).

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

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

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

21 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
22 dated July 8, 2021 that was served on the California Attorney General, other public enforcers,
23 and NewAge (“Notice”). A true and correct copy of the 60-Day Notice dated July 8, 2021 is
24 attached hereto as *Exhibit A* and each is incorporated herein by reference. More than 60 days
25 have passed since the Notice was served on the Attorney General, public enforcers, and
26 NewAge and no designated governmental entity has filed a Complaint against NewAge with
27 regard to the Covered Products or the alleged violations.

28 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products by

1 California consumers exposes them to lead and/or mercury without first receiving clear and
2 reasonable warnings from NewAge, which is in violation of California Health and Safety Code
3 section 25249.6. NewAge denies all material allegations contained in the Notice and
4 Complaint.

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

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

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

17 **2. JURISDICTION AND VENUE**

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

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

26 **3.1** Beginning on the Effective Date, NewAge shall be permanently enjoined from
27 manufacturing for sale in the State of California, “[d]istributing into the State of California,” or
28 directly selling in the State of California, any Covered Product that exposes a person to a

1 “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day and/or “Daily
2 Mercury Exposure Level” of more than 0.3 micrograms of mercury per day unless it meets the
3 warning requirements under Section 3.2.

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

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

15 **3.1.3** For purposes of this Consent Judgment, the “Daily Mercury Exposure
16 Level” shall be measured in micrograms, and shall be calculated using the following formula:
17 micrograms of mercury per gram of product, multiplied by grams of product per serving of the
18 product (using the largest serving size appearing on the product label), multiplied by servings
19 of the product per day (using the largest number of recommended daily servings appearing on
20 the label), which equals micrograms of mercury exposure per day. If the label contains no
21 recommended daily servings, then the number of recommended daily servings shall be one.

22 **3.2 Clear and Reasonable Warnings**

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

25 **OPTION 1:**

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

Or

1 **OPTION 2:**

2  **WARNING:** Cancer & Reproductive Harm - www.P65Warnings.ca.gov/food

3

4 NewAge shall use the phrase “cancer and” in the Warning if NewAge has reason to

5 believe that the “Daily Lead Exposure Level” is greater than 15 micrograms of lead as determined

6 pursuant to the quality control methodology set forth in Section 3.4 or if NewAge has reason to

7 believe that another Proposition 65 chemical is present which may require a cancer warning. As

8 identified in the brackets, the warning shall appropriately reflect whether there is lead or mercury

9 present in each of the Covered Products. For the Option 2 Warning, the entire Warning must be

10 in a type size no smaller than the largest type size used for other consumer information on the

11 product. In no case shall the Warning appear in a type size smaller than 6-point type. Further, for

12 Option 2, a symbol consisting of a black exclamation point in a yellow equilateral triangle with a

13 bold black outline shall be placed to the left of the text of the Warning, in a size no smaller than

14 the height of the word “**WARNING.**” Where the sign, label or shelf tag for the product is not

15 printed using the color yellow, the symbol may be printed in black and white..

16 The Warning shall be securely affixed to or printed on the label of each Covered

17 Product and it must be set off from other surrounding information and enclosed in a box. In

18 addition, for any Covered Product sold over the internet, the Warning shall be provided to the

19 customer prior to completing purchase when a California delivery address is indicated for any

20 purchase of any Covered Product so long as the Warning is prominently displayed such that the

21 customer does not have to search for it in the general content of the website, and such warning

22 shall provide sufficient information for the consumer to identify which product(s) are subject to

23 the Warning. In no event shall any internet or website Warning be contained in or made

24 through a link.

25 The Warning shall be at least the same size as the largest of any other health or safety

26 warnings also appearing on the website or on the label and the word “**WARNING**” shall be in all

27 capital letters and in bold print. No statements intended to or likely to have the effect of

28 diminishing the impact of the Warning on the average lay person shall accompany the Warning.

1 Further no statements may accompany the Warning that state or imply that the source of the listed
2 chemical has an impact on or results in a less harmful effect of the listed chemical.

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

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

10 **3.3 Conforming Covered Products**

11 A Conforming Covered Product is a Covered Product for which the “Daily Lead Exposure
12 Level” is no greater than 0.5 micrograms of lead per day and/or the “Daily Mercury Exposure
13 Level” is no greater than 0.3 micrograms of mercury per day as determined by the exposure
14 methodology set forth in Section 3.1.2 and the quality control methodology described in Section
15 3.4, and that is not known by NewAge to contain other chemicals that violate Proposition 65’s
16 safe harbor thresholds.

17 **3.4 Testing and Quality Control Methodology**

18 **3.4.1** Beginning within one year of the Effective Date, NewAge shall arrange
19 for lead and mercury testing of the Covered Products at least once a year for a minimum of
20 three consecutive years by arranging for testing of three (3) randomly selected samples of each
21 of the Covered Products, in the form intended for sale to the end-user, which NewAge intends
22 to sell or is manufacturing for sale in California, directly selling to a consumer in California or
23 “Distributing into the State of California.” If tests conducted pursuant to this Section
24 demonstrate that no Warning is required for a Covered Product during each of three
25 consecutive years, then the testing requirements of this Section will no longer be required as to
26 that Covered Product. However, if during or after the three-year testing period, NewAge
27 changes ingredient suppliers for any of the Covered Products and/or reformulates any of the
28 Covered Products, NewAge shall test that Covered Product annually for at least two (2)

1 consecutive years after such change is made.

2 **3.4.2** For purposes of measuring the “Daily Lead Exposure Level” and/or the
3 “Daily Mercury Exposure Level,” the highest lead and/or mercury detection result of the three
4 (3) randomly selected samples of the Covered Products will be controlling.

5 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a
6 laboratory method that complies with the performance and quality control factors appropriate
7 for the method used, including limit of detection and limit of quantification, sensitivity,
8 accuracy and precision that meets the following criteria: Inductively Coupled Plasma-Mass
9 Spectrometry (“ICP-MS”) achieving a limit of quantification of less than or equal to 0.005
10 mg/kg.

11 **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an
12 independent third party laboratory certified by the California Environmental Laboratory
13 Accreditation Program or an independent third-party laboratory that is registered with the
14 United States Food & Drug Administration.

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

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

22 **3.4.7** The testing requirements of Section 3.4 do not apply to any Covered
23 Product for which NewAge is providing a Warning, continuously and without interruption from
24 the Effective Date, pursuant to Section 3.2 of this Agreement. In the event a Warning is provided
25 after the Effective Date but NewAge thereafter ceases to provide the Warning, the testing and
26 reporting requirements of Section 3.4 of this Agreement shall apply beginning within one year
27 after the date the Warning ceases to be provided, unless NewAge can show to the satisfaction of
28 ERC that the cessation in providing the Warning was a temporary error that was resolved when

1 discovered.

2 **4. SETTLEMENT PAYMENT**

3 **4.1** In full satisfaction of all potential civil penalties, additional settlement
4 payments, attorney’s fees, and costs, NewAge shall make a total payment of \$25,000.00
5 (“Total Settlement Amount”) to ERC within ten days of NewAge’s receipt of ERC’s notice of
6 entry of the Court’s Order approving this Consent Judgment (“Due Date”). NewAge shall
7 make this payment by wire transfer to ERC’s account, for which ERC will give NewAge the
8 necessary account information. The Total Settlement Amount shall be apportioned as follows:

9 **4.2** \$6,650.00 shall be considered a civil penalty pursuant to California Health and
10 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$4,987.50) of the civil penalty to the
11 Office of Environmental Health Hazard Assessment (“OEHHA”) for deposit in the Safe
12 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
13 Code section 25249.12(c). ERC will retain the remaining 25% (\$1,662.50) of the civil penalty.

14 **4.3** \$3,344.15 shall be distributed to ERC as reimbursement to ERC for reasonable
15 costs incurred in bringing this action.

16 **4.4** \$4,951.27 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 Defendants in this matter. These activities are detailed below and support
20 ERC’s overarching goal of reducing and/or eliminating hazardous and toxic chemicals in
21 dietary supplement products in California. ERC’s activities have had, and will continue to
22 have, a direct and primary effect within the State of California because California consumers
23 will be benefitted by the reduction and/or elimination of exposure to lead and/or mercury in
24 dietary supplements and/or by providing clear and reasonable warnings to California
25 consumers prior 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 (up to 65-80%): obtaining, shipping, analyzing, and testing
2 dietary supplement products that may contain lead and/or mercury and are sold to California
3 consumers. This work includes continued monitoring and enforcement of past consent
4 judgments and settlements to ensure companies are in compliance with their obligations
5 thereunder, with a specific focus on those judgments and settlements concerning lead and/or
6 mercury. This work also includes investigation of new companies that ERC does not obtain
7 any recovery through settlement or judgment; (2) VOLUNTARY COMPLIANCE PROGRAM
8 (up to 10-20%): maintaining ERC's Voluntary Compliance Program by acquiring products
9 from companies, developing and maintaining a case file, testing products from these
10 companies, providing the test results and supporting documentation to the companies, and
11 offering guidance in warning or implementing a self-testing program for lead and/or mercury
12 in dietary supplement products; and (3) "GOT LEAD" PROGRAM (up to 5%): maintaining
13 ERC's "Got Lead?" Program which reduces the numbers of contaminated products that reach
14 California consumers by providing access to free testing for lead in dietary supplement
15 products (Products submitted to the program are screened for ingredients which are suspected
16 to be contaminated, and then may be purchased by ERC, catalogued, sent to a qualified
17 laboratory for testing, and the results shared with the consumer 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** \$10,054.58 shall be distributed to ERC for its in-house legal fees. Except as
24 explicitly provided herein, each Party shall bear its own fees and costs.

25 **4.6** In the event that NewAge fails to remit the Total Settlement Amount owed
26 under Section 4 of this Consent Judgment on or before the Due Date, NewAge shall be deemed
27 to be in material breach of its obligations under this Consent Judgment. ERC shall provide
28 written notice of the delinquency to NewAge via electronic mail. If NewAge fails to deliver

1 the Total Settlement Amount within five (5) days from the written notice, the Total Settlement
2 Amount shall accrue interest at the statutory judgment interest rate provided in the California
3 Code of Civil Procedure section 685.010. Additionally, NewAge agrees to pay ERC's
4 reasonable attorney's fees and costs for any efforts to collect the payment due under this
5 Consent Judgment.

6 **5. MODIFICATION OF CONSENT JUDGMENT**

7 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by
8 written stipulation of the Parties and upon entry by the Court of a modified consent judgment
9 or (ii) by motion of either Party pursuant to Section 5.3 and upon entry by the Court of a
10 modified consent judgment.

11 **5.2** If NewAge seeks to modify this Consent Judgment under Section 5.1, then
12 NewAge must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to
13 meet and confer regarding the proposed modification in the Notice of Intent, then ERC must
14 provide written notice to NewAge within thirty (30) days of receiving the Notice of Intent. If
15 ERC notifies NewAge in a timely manner of ERC's intent to meet and confer, then the Parties
16 shall meet and confer in good faith as required in this Section. The Parties shall meet in person
17 or via telephone within thirty (30) days of ERC's notification of its intent to meet and confer.
18 Within thirty (30) days of such meeting, if ERC disputes the proposed modification, ERC shall
19 provide to NewAge a written basis for its position. The Parties shall continue to meet and
20 confer for an additional thirty (30) days in an effort to resolve any remaining disputes. Should
21 it become necessary, the Parties may agree in writing to different deadlines for the meet-and-
22 confer period.

23 **5.3** In the event that NewAge initiates or otherwise requests a modification under
24 Section 5.1, and the meet and confer process leads to a joint motion or application for a
25 modification of the Consent Judgment, NewAge shall reimburse ERC its costs and reasonable
26 attorney's fees for the time spent in the meet-and-confer process and filing and arguing the
27 motion or application.

28 ///

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

3 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or
4 terminate this Consent Judgment.

5 **6.2** If ERC alleges that any Covered Product fails to qualify as a Conforming
6 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
7 inform NewAge in a reasonably prompt manner of its test results, including information
8 sufficient to permit NewAge to identify the Covered Products at issue. NewAge shall, within
9 thirty (30) days following such notice, provide ERC with testing idata from an independent
10 third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4 for at least the last
11 365 calendar days for any Covered Product(s) specifically at issue. If NewAge timely provides
12 the testing data and such testing demonstrates to the satisfaction of ERC that NewAge is in
13 compliance with the terms of this Consent Judgment, ERC shall not pursue any claim related to
14 the Covered Product(s) specifically at issue and for which NewAge provided such test results.
15 Should NewAge fail to provide such testing data, thethe Parties shall first attempt to resolve
16 the matter prior to ERC taking any further legal action. Should there be any other alleged
17 breach of the terms of this Consent Judgment, including but not limited to Section 10, the
18 Parties shall first attempt to resolve the matter prior to seeking appropriate injunctive or other
19 relief.

20 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

28 **8.1** This Consent Judgment is a full, final, and binding resolution between, on

1 the one hand, ERC, and its past and current officers, directors, shareholders, agents,
2 employees, representatives, attorneys, predecessors, successors, and/or assigns (collectively,
3 the “ERC Releasers”), and also in the public interest, and, on the other hand, NewAge and its
4 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
5 divisions, suppliers, franchisees, licensees, customers (not including private label customers of
6 NewAge), distributors, wholesalers, retailers, and all other upstream and downstream entities
7 in the distribution chain of any Covered Product, and the predecessors, successors, and assigns
8 of any of them (collectively, “Released Parties”).

9 **8.2** ERC, acting in the public interest, releases the Released Parties from any
10 and all claims for violations of Proposition 65 up through the Effective Date based on exposure
11 to lead and/or mercury from the Covered Products as set forth in the Notice of Violation.
12 ERC, on behalf of itself only, hereby fully releases and discharges the Released Parties from
13 any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties,
14 fees, costs, and expenses asserted, or that could have been asserted from the handling, use, or
15 consumption of the Covered Products, as to any alleged violation of Proposition 65 or its
16 implementing regulations arising from the failure to provide Proposition 65 warnings on the
17 Covered Products regarding lead and/or mercury up to and including the Effective Date.

18 **8.3** ERC, on behalf of the ERC Releasees only, and NewAge on its own behalf
19 and on behalf of the Released Parties only, further waive and release any and all claims they
20 may have against each other for all actions or statements made or undertaken in the course of
21 seeking or opposing enforcement of Proposition 65 in connection with the Notice and
22 Complaint up through and including the Effective Date, provided, however, that nothing in
23 Section 8 shall affect or limit any Party’s right to seek to enforce the terms of this Consent
24 Judgment.

25 **8.4** It is possible that other claims not known to the Parties, arising out of the facts
26 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
27 discovered. ERC on behalf of itself only, and NewAge on behalf of itself only, acknowledge
28 that this Consent Judgment is expressly intended to cover and include all such claims up

1 through and including the Effective Date, including all rights of action therefore. ERC and
2 NewAge acknowledge that the claims released in Sections 8.2 and 8.3 above may include
3 unknown claims, and nevertheless waive California Civil Code section 1542 as to any such
4 unknown claims. California Civil Code section 1542 reads as follows:

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

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

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

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

18 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

22 **10. GOVERNING LAW**

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

25 **11. PROVISION OF NOTICE**

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

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

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

7 With a copy to:

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

14 **NEWAGE, INC. f/k/a NEW AGE BEVERAGES CORPORATION; MORINDA, INC.;**
15 **MORINDA HOLDINGS, INC.; MORINDA USA, INC.**

16 Tyler Jones
17 Vice President of Legal
18 7158 S FLSmith Drive, Suite 250
19 Midvale, UT 84047
20 Email: Tyler_Jones@newage.com

21 With a copy to:

22 Bao M. Vu (SBN 277970)
23 Stoel Rives LLP
24 Three Embarcadero Center, Suite 1120
25 San Francisco, CA 94111
26 Ph: (415) 617-8900
27 Email: bao.vu@stoel.com

28 **12. COURT APPROVAL**

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

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

1 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
2 void and have no force or effect.

3 **13. EXECUTION AND COUNTERPARTS**

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

7 **14. DRAFTING**

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

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

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

21 **16. ENFORCEMENT**

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

1 provided by law for failure to comply with Proposition 65 or other laws.

2 **17. ENTIRE AGREEMENT, AUTHORIZATION**

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

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

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

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

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

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

21 **IT IS SO STIPULATED:**

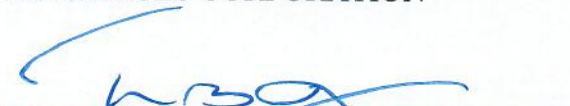
22
23 Dated: 4/20/, 2022

ENVIRONMENTAL RESEARCH
CENTER, INC.

24
25 By: 
26 Chris Heptinstall, Executive Director


1 Dated: 4/19, 2022

NEWAGE, INC. f/k/a NEW AGE
BEVERAGES CORPORATION

2
3
4 
By: Tyler B. Jones
Its: VP of Legal

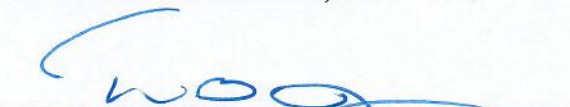
6 Dated: 4/19, 2022

MORINDA, INC.

8
9 
By: Tyler B. Jones
Its: Director


11 Dated: 4/19, 2022

MORINDA HOLDINGS, INC.

13
14 
By: Tyler B. Jones
Its: Director

16 Dated: 4/19, 2022

MORINDA USA, INC.

18
19 
By: Tyler B. Jones
Its: Director

1 **APPROVED AS TO FORM:**

2 Dated: April 20, 2022

ENVIRONMENTAL RESEARCH
CENTER, INC.

3
4 By: 

5 Charles W. Poss
6 In-House Counsel

7 Dated: April 20, 2022

STOEL RIVES LLP

8
9 By: 

10 Bao M. Vu
11 Attorney for Defendants NewAge, Inc.
12 f/k/a New Age Beverages Corporation,
13 Morinda, Inc., Morinda Holdings, Inc.,
14 and Morinda USA, Inc.
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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: _____, 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

July 8, 2021

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

Dear Alleged Violators 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 Violators 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 Violators 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 Violators identified below.

Alleged Violators. The names of the companies covered by this notice that violated Proposition 65 (hereinafter the “Violators”) are:

NewAge, Inc. f/k/a New Age Beverages Corporation
Morinda, Inc.
Morinda Holdings, Inc.
Morinda USA, Inc.

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

- 1. TE•ORA Shape Smoothie Mixed Berry – Lead, Mercury**
- 2. TE•MANA Shape Marvelous Mango Smoothie - Lead**

July 8, 2021

Page 2

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.

On July 1, 1990, the State of California officially listed mercury and mercury compounds as chemicals known to cause developmental toxicity and male and female reproductive toxicity.

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 these chemicals has been and continues to be through ingestion.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least July 8, 2018, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violators violated Proposition 65 because they failed to provide persons ingesting these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; (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 chemicals, 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 NewAge, Inc. f/k/a New Age Beverages Corporation, Morinda, Inc., Morinda Holdings, Inc. and Morinda USA, Inc. and their 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 NewAge, Inc. f/k/a New Age Beverages Corporation, Morinda, Inc., Morinda Holdings, Inc. and Morinda USA, Inc.

I, Chris Heptinstall, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged the parties 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 chemicals that are the subject of the notice.

4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiff’s case can be established and that the information did not prove that the alleged Violators 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: July 8, 2021

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 July 8, 2021, 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
NewAge, Inc. f/k/a New Age Beverages Corporation
737 E 1180 S
America Fork, UT 84003

The Corporation Trust Company
(Registered Agent for NewAge, Inc. f/k/a New Age Beverages Corporation)
1209 N. Orange St
Wilmington, DE 19801

Current President or CEO
NewAge, Inc. f/k/a New Age Beverages Corporation
2420 17th St, Ste 220
Denver, CO 80202

National Registered Agents, Inc.
(Registered Agent for NewAge, Inc. f/k/a New Age Beverages Corporation)
770 E Arapahoe Rd, Ste 220
Centennial, CO 80122

Current President or CEO
Morinda, Inc.
c/o Amber Knudsen
737 E 1180 S
America Fork, UT 84003

Cogency Global Inc.
(Registered Agent for Morinda, Inc.)
992 Davidson Dr, Ste B
Nashville, TN 37205

Current President or CEO
Morinda Holdings, Inc.
737 E 1180 S
America Fork, UT 84003

H. Michael Drake
(Registered Agent for Morinda Holdings, Inc.)
737 E 1180 S
American Fork, UT 84003

Current President or CEO
Morinda USA, Inc.
737 E 1180 S
America Fork, UT 84003

H. Michael Drake
(Registered Agent for Morinda USA, Inc.)
737 E 1180 S
American Fork, UT 84003

Davies Pearson PC
(Registered Agent for NewAge, Inc f/k/a New Age Beverages Corporation.)
920 Fawcett Ave
Tacoma, WA 98402

H. Michael Drake
(Registered Agent for Morinda, Inc)
737 E 1180 S
American Fork, UT 84003

On July 8, 2021, 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> :

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

July 8, 2021

Page 5

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, CA 94612-0550

On July 8, 2021, 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

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

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

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

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

Clifford H. Newell, District Attorney
Nevada County
201 Commercial St
Nevada City, CA 95959
DA.Prop65@co.nevada.ca.us

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

Morgan Briggs Gire, District Attorney
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10810 Justice Center Drive
Roseville, CA 95678
Prop65@placer.ca.gov

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

David Hollister, District Attorney
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520 Main St
Quincy, CA 95971
davidhollister@countyofplumas.com

Walter W. Wall, District Attorney
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P.O. Box 730
Mariposa, CA 95338
mcda@mariposacounty.org

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

Kimberly Lewis, District Attorney
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550 West Main St
Merced, CA 95340
Prop65@countyofmerced.com

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

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

July 8, 2021

Page 6

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
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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
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1112 Santa Barbara Street
Santa Barbara, CA 93101
DAProp65@co.santa-barbara.ca.us

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

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

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

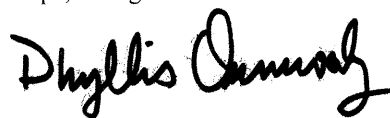
Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

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

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

On July 8, 2021, 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 July 8, 2021, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

Service List

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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, Orange
County
300 N Flower St
Santa Ana, CA 92703

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

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

District Attorney, San 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
Post Office Box 457
100 Courthouse Square, 2nd
Floor
Downieville, CA 95936

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

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

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

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

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

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

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

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

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

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

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

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

WHAT DOES PROPOSITION 65 REQUIRE?

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

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

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

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

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

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

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

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

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

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

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

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

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

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

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

² See Section 25501(a)(4).

HOW IS PROPOSITION 65 ENFORCED?

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

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

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

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

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

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

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

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

Revised: May 2017

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