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15 4Excelsior and Fresh Nutrition Inc.

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 **EXCELSIOR NUTRITION INC,**
24 **individually and dba 4EXCELSIOR;**
25 **FRESH NUTRITION INC.; and DOES 1-**
26 **100**

27 **Defendants.**

28 **CASE NO. 22CV007440**

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: February 23, 2022

Trial Date: None set

1. INTRODUCTION

1.1 On February 23, 2022, Plaintiff Environmental Research Center, Inc. (“ERC”), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”),

1 against Excelsior Nutrition Inc, individually and dba 4Excelsior (“Excelsior Nutrition”) and
2 Fresh Nutrition Inc. (“Fresh Nutrition”) and Does 1-100 (hereinafter individually referred to as
3 “Defendant” or collectively as “Defendants”). Subsequently, on November 22, 2022, a First
4 Amended Complaint was filed (the operative Complaint, hereinafter referred to as the
5 “Complaint”). In this action, ERC alleges that a number of products manufactured, distributed,
6 or sold by Excelsior Nutrition and Fresh Nutrition’s contain lead, a chemical listed under
7 Proposition 65 as a carcinogen and reproductive toxin, and expose consumers to this chemical
8 at a level requiring a Proposition 65 warning. These products (referred to hereinafter
9 individually as a “Covered Product” or collectively as “Covered Products”) are: (1) Fresh
10 Nutrition All Natural Green Lipped Mussels, (2) Fresh Nutrition Ceylon Cinnamon, (3) Fresh
11 Nutrition All Natural Turkey Tail Mushroom, (4) Fresh Nutrition All Natural Organic Ginger
12 Root, (5) Fresh Nutrition All Natural Echinacea, and (6) Fresh Nutrition All Natural Red
13 Reishi Mushroom.

14 **1.2** ERC and Excelsior Nutrition and Fresh Nutrition are hereinafter referred to
15 individually as a “Party” or collectively as the “Parties.”

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

20 **1.4** For purposes of this Consent Judgment, the Parties agree that Excelsior Nutrition
21 and Fresh Nutrition are business entities relevant to this action, and each Defendant qualifies as a
22 “person in the course of doing business” within the meaning of Proposition 65. Excelsior
23 Nutrition and Fresh Nutrition manufacture, distribute, and/or sell the Covered Products.

24 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
25 dated December 14, 2021 that was served on the California Attorney General, other public
26 enforcers, and Excelsior Nutrition and Fresh Nutrition (“Notice”). A true and correct copy of the
27 60-Day Notice dated December 14, 2021 is attached hereto as **Exhibit A** and is incorporated
28 herein by reference. More than 60 days have passed since the Notice was served on the

1 Attorney General, public enforcers, and Excelsior Nutrition and Fresh Nutrition and no
2 designated governmental entity has filed a Complaint against Excelsior Nutrition and Fresh
3 Nutrition with regard to the Covered Products or the alleged violations.

4 **1.6** ERC's Notice and Complaint allege that use of the Covered Products by
5 California consumers exposes them to lead without first receiving clear and reasonable
6 warnings from Excelsior Nutrition and Fresh Nutrition, which is in violation of California
7 Health and Safety Code section 25249.6. Excelsior Nutrition and Fresh Nutrition deny all
8 material allegations contained in the Notice and Complaint.

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

16 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
17 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in
18 any current or future legal proceeding unrelated to these proceedings.

19 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered
20 as a Judgment by this Court.

21 **2. JURISDICTION AND VENUE**

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

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

2 **3.1** Beginning on the Effective Date, Excelsior Nutrition and Fresh Nutrition shall
3 be permanently enjoined from manufacturing for sale in the State of California, “Distributing
4 into the State of California,” or directly selling in the State of California, any Covered Product
5 that exposes a person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead
6 per day unless it meets the warning requirements under Section 3.2. Excelsior Nutrition and
7 Fresh Nutrition shall only ship, distribute, sell or offer for sale in California, Covered Products
8 that are labeled with a clear and reasonable warning pursuant to Section 3.2. Excelsior
9 Nutrition and Fresh Nutrition shall have no obligation to label Covered Products that were
10 shipped or sold to third parties and are no longer in the possession of or under the control of
11 Excelsior Nutrition or Fresh Nutrition prior to the Effective Date.

12 **3.1.1** As used in this Consent Judgment, the term “Distributing into the State
13 of California” shall mean to directly ship a Covered Product into California for sale in
14 California or to sell a Covered Product to a distributor that Excelsior Nutrition and Fresh
15 Nutrition knows or has reason to know will sell the Covered Product in California.

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

23 **3.2 Clear and Reasonable Warnings**


24 If Excelsior Nutrition and Fresh Nutrition are required to provide a warning pursuant to
25 Section 3.1, one of the following warnings must be utilized (“Warning”):

26 **OPTION 1:**

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

1 OR:

2 **OPTION 2:**

3  **WARNING:** [Cancer and] Reproductive Harm – www.P65Warnings.ca.gov/food

4
5 Excelsior Nutrition and Fresh Nutrition shall use the phrase “cancer and” in the Warning
6 if Excelsior Nutrition and Fresh Nutrition have reason to believe that the “Daily Lead Exposure
7 Level” is greater than 15 micrograms of lead as determined pursuant to the quality control
8 methodology set forth in Section 3.4 or if Excelsior Nutrition and Fresh Nutrition have reason to
9 believe that another Proposition 65 chemical is present which may require a cancer warning. For
10 the Option 2 Warning, a symbol consisting of a black exclamation point in a yellow equilateral
11 triangle with a bold black outline shall be placed to the left of the text of the Warning, in a size no
12 smaller than the height of the word “**WARNING.**” Where the sign, label or shelf tag for the
13 product is not printed using the color yellow, the symbol may be printed in black and white.

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

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

27 Excelsior Nutrition and Fresh Nutrition must display the above Warning with such
28 conspicuousness, as compared with other words, statements or designs on the label, or on its

1 website, if applicable, to render the Warning likely to be read and understood by an ordinary
2 individual under customary conditions of purchase or use of the product.

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

6 **3.3 Conforming Covered Products**

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

12 **3.4 Testing and Quality Control Methodology**

13 **3.4.1** Beginning within one year of the Effective Date, Excelsior Nutrition and
14 Fresh Nutrition shall arrange for lead testing of the Covered Products at least once a year for a
15 minimum of three consecutive years by arranging for testing of three (3) randomly selected
16 samples of each of the Covered Products, in the form intended for sale to the end-user, which
17 Excelsior Nutrition and Fresh Nutrition intends to sell or is manufacturing for sale in
18 California, directly selling to a consumer in California or “Distributing into the State of
19 California.” If tests conducted pursuant to this Section demonstrate that no Warning is required
20 for a Covered Product during each of five consecutive years, then the testing requirements of
21 this Section will no longer be required as to that Covered Product. However, if during or after
22 the five-year testing period, Excelsior Nutrition and Fresh Nutrition change ingredient
23 suppliers for any of the Covered Products and/or reformulates any of the Covered Products,
24 Excelsior Nutrition and Fresh Nutrition shall test that Covered Product annually for at least
25 three (3) consecutive years after such change is made.

26 **3.4.2** For purposes of measuring the “Daily Lead Exposure Level,” the highest
27 lead detection result of the three (3) randomly selected samples of the Covered Products will
28 be controlling.

1 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a
2 laboratory method that complies with the performance and quality control factors appropriate
3 for the method used, including limit of detection and limit of quantification, sensitivity,
4 accuracy and precision that meets the following criteria: Inductively Coupled Plasma-Mass
5 Spectrometry (“ICP-MS”) achieving a limit of quantification of less than or equal to 0.005
6 mg/kg.

7 **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an
8 independent third party laboratory certified by the California Environmental Laboratory
9 Accreditation Program or an independent third-party laboratory that is registered with the
10 United States Food & Drug Administration.

11 **3.4.5** Nothing in this Consent Judgment shall limit Excelsior Nutrition and
12 Fresh Nutrition’s ability to conduct, or require that others conduct, additional testing of the
13 Covered Products, including the raw materials used in their manufacture.

14 **3.4.6** Within thirty (30) days of ERC’s written request, which shall not be
15 made more than once per year, Excelsior Nutrition and Fresh Nutrition shall deliver lab reports
16 obtained pursuant to Section 3.4 to ERC. Excelsior Nutrition and Fresh Nutrition shall retain
17 all test results and documentation for a period of three years from the date of each test.
18 Excelsior Nutrition’s and Fresh Nutrition’s obligation to provide lab reports to ERC pursuant
19 to this Section 3.4.6 shall cease after the third anniversary of the Effective Date.

20 **4. SETTLEMENT PAYMENT**

21 **4.1** In full satisfaction of all potential civil penalties, additional settlement
22 payments, attorney’s fees, and costs, Excelsior Nutrition and Fresh Nutrition shall make a total
23 payment of \$45,000.00 (“Total Settlement Amount”) to ERC within 5 days of the Effective
24 Date (“Due Date”). Excelsior Nutrition and Fresh Nutrition shall make this payment by wire
25 transfer to ERC’s account, for which ERC will give Excelsior Nutrition and Fresh Nutrition the
26 necessary account information. The Total Settlement Amount shall be apportioned as follows:

27 **4.2** \$4,000.00 shall be considered a civil penalty pursuant to California Health and
28 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$3,000.00) of the civil penalty to the

1 Office of Environmental Health Hazard Assessment (“OEHHA”) for deposit in the Safe
2 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
3 Code section 25249.12(c). ERC will retain the remaining 25% (\$1,000.00) of the civil penalty.

4 **4.3** \$7,718.89 shall be distributed to ERC as reimbursement to ERC for reasonable
5 costs incurred in bringing this action.

6 **4.4** \$33,281.11 shall be distributed to ERC for its in-house legal fees. Except as
7 explicitly provided herein, each Party shall bear its own fees and costs.

8 **4.5** In the event that Excelsior Nutrition and Fresh Nutrition fails to remit the Total
9 Settlement Amount owed under Section 4 of this Consent Judgment on or before the Due Date,
10 Excelsior Nutrition and Fresh Nutrition shall be deemed to be in material breach of its
11 obligations under this Consent Judgment. ERC shall provide written notice of the delinquency
12 to Excelsior Nutrition and Fresh Nutrition via electronic mail. If Excelsior Nutrition and Fresh
13 Nutrition fail to deliver the Total Settlement Amount within five (5) days from the written
14 notice, the Total Settlement Amount shall accrue interest at the statutory judgment interest rate
15 provided in the California Code of Civil Procedure section 685.010. Additionally, Excelsior
16 Nutrition and Fresh Nutrition agree to pay ERC’s reasonable attorney’s fees and costs for any
17 efforts to collect the payment due under this Consent Judgment.

18 **5. MODIFICATION OF CONSENT JUDGMENT**

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

23 **5.2** If Excelsior Nutrition and Fresh Nutrition seeks to modify this Consent Judgment
24 under Section 5.1, then Excelsior Nutrition and Fresh Nutrition must provide written notice to
25 ERC of its intent (“Notice of Intent”). If ERC seeks to meet and confer regarding the proposed
26 modification in the Notice of Intent, then ERC must provide written notice to Excelsior
27 Nutrition and Fresh Nutrition within thirty (30) days of receiving the Notice of Intent. If ERC
28 notifies Excelsior Nutrition and Fresh Nutrition in a timely manner of ERC’s intent to meet and

1 confer, then the Parties shall meet and confer in good faith as required in this Section. The
2 Parties shall meet in person or via telephone within thirty (30) days of ERC's notification of its
3 intent to meet and confer. Within thirty (30) days of such meeting, if ERC disputes the
4 proposed modification, ERC shall provide to Excelsior Nutrition and Fresh Nutrition a written
5 basis for its position. The Parties shall continue to meet and confer for an additional thirty (30)
6 days in an effort to resolve any remaining disputes. Should it become necessary, the Parties
7 may agree in writing to different deadlines for the meet-and-confer period.

8 **5.3** In the event that Excelsior Nutrition and Fresh Nutrition initiates or otherwise
9 requests a modification under Section 5.1, and the meet and confer process leads to a joint
10 motion or application for a modification of the Consent Judgment, Excelsior Nutrition and
11 Fresh Nutrition shall reimburse ERC its costs and reasonable attorney's fees for the time spent
12 in the meet-and-confer process and filing and arguing the motion or application.

13 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
14 **JUDGMENT**

15 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or
16 terminate this Consent Judgment.

17 **6.2** If ERC alleges that any Covered Product fails to qualify as a Conforming Covered
18 Product (for which ERC alleges that no Warning has been provided), then ERC shall inform
19 Excelsior Nutrition and Fresh Nutrition in a reasonably prompt manner of its test results,
20 including information sufficient to permit Excelsior Nutrition and Fresh Nutrition to identify the
21 Covered Products at issue. Excelsior Nutrition and Fresh Nutrition shall review the test results
22 and, within reasonable time, but not to exceed 45 days, provide a response to ERC explaining the
23 steps taken to address any potential non-compliance.

24 **6.3** In the event that Excelsior Nutrition and Fresh Nutrition discover any instances of
25 non-compliance with the Consent Judgment, they shall promptly notify ERC and take immediate
26 corrective actions. Excelsior Nutrition and Fresh Nutrition acknowledge their continuous
27 commitment to ensuring compliance with applicable laws and regulations. In case of any alleged
28 non-compliance asserted by ERC, the Parties must first engage in a good-faith meet and confer

1 process, as outlined in Section 6.4, to explore amicable resolution options before resorting to legal
2 remedies.

3 **6.4** If ERC alleges that Excelsior Nutrition and/or Fresh Nutrition are not complying
4 with the Consent Judgment, the Parties shall engage in a meet and confer process regarding the
5 alleged non-compliance. Within sixty (60) days after ERC informs Excelsior Nutrition and/or
6 Fresh Nutrition that they are not in compliance with the terms of the Consent Judgment, the
7 Parties shall meet and confer in good faith, either in person or via remote meeting or telephone.
8 Within thirty (30) days of such meeting, if Excelsior Nutrition and/or Fresh Nutrition have not
9 agreed to resolve the non-compliance, Excelsior Nutrition and Fresh Nutrition shall provide to
10 ERC a written basis for their/its position. The Parties shall continue to meet and confer for an
11 additional thirty (30) days in an effort to resolve any remaining disputes. Should it become
12 necessary, the Parties may agree in writing to different deadlines for the meet-and-confer period.
13 If, after completing the meet and confer process, the Parties have not resolved the dispute over
14 the alleged non-compliance, ERC may pursue a Motion or other action in Court to seek a
15 resolution of the non-compliance. The Parties shall have the option to pursue mediation or
16 alternative dispute resolution mechanisms before the matter proceeds to Court. In any proceeding
17 following the meet and confer process, whether in Court, mediation or alternative dispute
18 resolution, ERC shall have the right to seek recovery of its costs and reasonable attorney's fees
19 for the time spent in the meet-and-confer process and the subsequent proceeding.

20 **6.5** Excelsior Nutrition and Fresh Nutrition retain the right to challenge any test results
21 provided by ERC by obtaining additional testing from another independent third-party laboratory
22 meeting. The cost of such additional testing shall be borne by Excelsior Nutrition and Fresh
23 Nutrition, but they shall have the right to present the results as evidence in any subsequent legal
24 proceedings. Excelsior Nutrition and Fresh Nutrition shall have no obligation to label Covered
25 Products that were shipped or sold to third parties and are no longer in the possession of or under
26 the control of Excelsior Nutrition or Fresh Nutrition prior to the Effective Date.

27 **7. APPLICATION OF CONSENT JUDGMENT**

28 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their

1 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
2 divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers,
3 retailers, predecessors, successors, and assigns. This Consent Judgment shall have no
4 application to any Covered Product that is distributed or sold exclusively outside the State of
5 California and that is not used by California consumers.

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

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

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

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

1 **8.4** It is possible that other claims not known to the Parties, arising out of the facts
2 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
3 discovered. ERC on behalf of itself only, and Excelsior Nutrition and Fresh Nutrition on behalf
4 of itself only, acknowledge that this Consent Judgment is expressly intended to cover and
5 include all such claims up through and including the Effective Date, including all rights of
6 action therefore. ERC and Excelsior Nutrition and Fresh Nutrition acknowledge that the claims
7 released in Sections 8.2 and 8.3 above may include unknown claims, and nevertheless waive
8 California Civil Code section 1542 as to any such unknown claims. California Civil Code
9 section 1542 reads as follows:

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

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

17 **8.5** Compliance with the terms of this Consent Judgment shall be deemed to
18 constitute compliance with Proposition 65 by any of the Released Parties regarding alleged
19 exposures to lead in the Covered Products as set forth in the Notice and Complaint.

20 **8.6** Nothing in this Consent Judgment is intended to apply to any occupational or
21 environmental exposures arising under Proposition 65, nor shall it apply to any of Excelsior
22 Nutrition and Fresh Nutrition's products other than the Covered Products.

23 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

27 **10. GOVERNING LAW**

28 The terms and conditions of this Consent Judgment shall be governed by and construed in

1 accordance with the laws of the State of California.

2 **11. PROVISION OF NOTICE**

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

6 **FOR ENVIRONMENTAL RESEARCH CENTER, INC.:**
7 Chris Heptinstall, Executive Director, Environmental Research Center
8 3111 Camino Del Rio North, Suite 400
9 San Diego, CA 92108
Ph: (619) 500-3090
Email: chris.heptinstall@erc501c3.org

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

15 **FOR EXCELSIOR NUTRITION INC, individually and dba 4EXCELSIOR:**
16 Lin Yisheng
17 1206 N Miller Street, Ste D
18 Anaheim CA 92806
Email: Lin@4Excelsior.com

19 **FOR FRESH NUTRITION INC.:**
20 Junzhe Duane
21 155 N Riverview Drive
22 Anaheim CA 92808
23 Email: Info@Fresh-Nutrition.com

24 With a copy to:
25 Saba Sheida, Esq.
26 Milstein Jackson Fairchild & Wade, LLP
27 10990 Wilshire Blvd, 8th Floor
28 Los Angeles, CA 90024
Ph: (213) 377-5653
Email: ssheida@mjfwlaw.com

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1 **12. COURT APPROVAL**

2 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
3 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
4 Consent Judgment.

5 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
6 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
7 prior to the hearing on the motion.

8 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
9 void and have no force or effect.

10 **13. EXECUTION AND COUNTERPARTS**

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

14 **14. DRAFTING**

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

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

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

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1 **16. ENFORCEMENT**

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

10 **17. ENTIRE AGREEMENT, AUTHORIZATION**

11 **17.1** This Consent Judgment contains the sole and entire agreement and
12 understanding of the Parties with respect to the entire subject matter herein, including any and
13 all prior discussions, negotiations, commitments, and understandings related thereto. No
14 representations, oral or otherwise, express or implied, other than those contained herein have
15 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
16 herein, shall be deemed to exist or to bind any Party.

17 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
18 authorized by the Party he or she represents to stipulate to this Consent Judgment.

19 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
20 **CONSENT JUDGMENT**

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

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

27 (2) Make the findings pursuant to California Health and Safety Code section
28 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

(3) Retain jurisdiction, pursuant to Section 664.6 of the Code of Civil Procedure, after the Consent Judgment is entered in order to enforce, modify, or terminate this Consent Judgment.

///

IT IS SO STIPULATED:

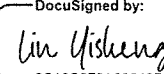
Dated: 8/25/, 2023

ENVIRONMENTAL RESEARCH
CENTER, INC.

By: 
Chris Heptinstall, Executive Director

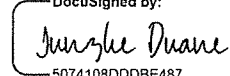
Dated: 8/25/2023, 2023

EXCELSIOR NUTRITION INC,
individually and dba 4EXCELSIOR:

DocuSigned by:

By: Lin Yisheng
Its: Principal

Dated: 8/25/2023, 2023

FRESH NUTRITION INC.:

DocuSigned by:

By: Junzhe Duane
Its: Principal

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1 **APPROVED AS TO FORM:**


2 Dated: August 25, 2023

ENVIRONMENTAL RESEARCH
CENTER, INC.

3
4 By: 
5 _____
6 Charles W. Poss
7 In-House Counsel

8 Dated: August 25, 2023

MILSTEIN JACKSON FAIRCHILD &
WADE, LLP

9
10 By: 
11 _____
12 Saba Sheida, Esq.
13 Attorney for Excelsior Nutrition Inc,
14 individually and dba 4Excelsior and Fresh
15 Nutrition Inc.

16 **ORDER AND JUDGMENT**

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

19 IT IS SO ORDERED, ADJUDGED AND DECREED.

20
21 Dated: _____, 2023

22 Judge of the Superior Court

EXHIBIT A



Environmental Research Center

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

December 14, 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:

**Excelsior Nutrition Inc, individually and dba 4Excelsior and dba Fresh Nutrition
Fresh Nutrition Inc.**

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

- 1. Fresh Nutrition All Natural Green Lipped Mussels - Lead**
- 2. Fresh Nutrition Ceylon Cinnamon - Lead**
- 3. Fresh Nutrition All Natural Turkey Tail Mushroom - Lead**
- 4. Fresh Nutrition All Natural Organic Ginger Root - Lead**
- 5. Fresh Nutrition All Natural Echinacea - Lead**

6. Fresh Nutrition All Natural Red Reishi Mushroom – Lead

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

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

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

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least December 14, 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 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 Violators violated Proposition 65 because they failed to provide persons ingesting these products with appropriate warnings that they are being exposed to this chemical.

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

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

Sincerely,



Chris Heptinstall
Executive Director
Environmental Research Center

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Excelsior Nutrition Inc, individually and dba 4Excelsior and dba Fresh Nutrition; Fresh Nutrition 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 Excelsior Nutrition Inc, individually and dba 4Excelsior and dba Fresh Nutrition; Fresh Nutrition 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 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 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: December 14, 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 December 14, 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
Excelsior Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition
1206 N Miller St, Ste D
Anaheim, CA 92806

Current President or CEO
Excelsior Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition
1601 Dove St
Newport Beach, CA 92660

Current President or CEO
Fresh Nutrition Inc.
155 N Riverview Dr
Anaheim, CA 92808

Benjamin Painter
(Registered Agent for Fresh Nutrition Inc.)
155 N Riverview Dr
Anaheim, CA 92808

Current President or CEO
Fresh Nutrition Inc.
23860 Nicole Way
Yorba Linda, CA 92887

Steven Jon Flipse
(Registered Agent for Excelsior
Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition)
1206 N Miller St, Ste D
Anaheim, CA 92806

Current President or CEO
Fresh Nutrition Inc.
5305 River Rd N, Ste B
Keizer, OR 97303

Ying Chen
(Registered Agent for Excelsior
Nutrition Inc, individually and dba
4Excelsior and dba Fresh Nutrition)
1 Chapin Rd, Unit 1
Pine Brook, NJ 07058

Current President or CEO
Fresh Nutrition Inc.
1601 Dove St
Newport Beach, CA 92660

Northwest Registered Agent LLC
(Registered Agent for Fresh Nutrition Inc.)
5305 River Rd N Ste B
Keizer, OR 97303

On December 14, 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> :

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

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

December 14, 2021

Page 5

On December 14, 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

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

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

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

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

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

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

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

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

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

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

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

Kimberly Lewis, District Attorney
Merced County
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Merced, CA 95340
Prop65@countyofmerced.com

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

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

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

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

December 14, 2021

Page 6

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@sfcityatt.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
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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
Santa Clara County
70 W Hedding St
San Jose, CA 95110
EPU@da.sccgov.org

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

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

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

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

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

On December 14, 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 December 14, 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.