

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

8 Jennifer Adams SBN 319347
9 Amin Talati Wasserman LLP
10 100 S. Wacker Drive, Suite 2000
11 Chicago, IL 60606
12 Telephone: (312) 327-3383
13 Email: jennifer@amintalati.com

14 Attorney for Defendants The Feed.com, Inc. and Kyoku Superfoods
15 LLC

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 **THE FEED.COM, INC.; KYOKU**
24 **SUPERFOODS LLC; and DOES 1-100**

25 **Defendants.**

26 **CASE NO. 23CV028038**

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

Health & Safety Code § 25249.5 *et seq.*

Action Filed: February 16, 2023

Trial Date: None set

1 **1. INTRODUCTION**

2 **1.1** On February 16, 2023, Plaintiff Environmental Research Center, Inc. (“ERC”),
3 a non-profit corporation, as a private enforcer and in the public interest, initiated this action by
4 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)
5 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*

1 (“Proposition 65”), against The Feed.com, Inc. and Kyoku Superfoods LLC (collectively “The
2 Feed”) and Does 1-100. In this action, ERC alleges that a number of products manufactured,
3 distributed, or sold by The Feed contain lead and/or cadmium and/or mercury, chemicals listed
4 under Proposition 65 as carcinogens and/or reproductive toxins, and expose consumers to these
5 chemicals at a level requiring a Proposition 65 warning. These products (referred to hereinafter
6 individually as a “Covered Product” or collectively as “Covered Products”) are: (1) Swiss RX
7 Total Recovery Chocolate Mint (lead, cadmium, mercury), (2) Kyoku Daily Superfood Shake
8 (lead, mercury), (3) Swiss RX Total Recovery Vanilla Chai (lead, cadmium), (4) Swiss RX
9 Total Recovery Strawberry (lead, cadmium, and mercury), and (5) Swiss RX Nitric Oxide
10 (lead).

11 **1.2** ERC and The Feed 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 The Feed 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. The
20 Feed manufactures, distributes, and/or sells the Covered Products.

21 **1.5** The Complaint is based on allegations contained in ERC’s Notices of Violation
22 dated September 29, 2022 and October 25, 2022 that were served on the California Attorney
23 General, other public enforcers, and The Feed (“Notices”). True and correct copies of the 60-
24 Day Notices dated September 29, 2022 and October 25, 2022 are attached hereto as **Exhibits**
25 **A** and **B** and each is incorporated herein by reference. More than 60 days have passed since
26 the Notices were served on the Attorney General, public enforcers, and The Feed and no
27 designated governmental entity has filed a Complaint against The Feed with regard to the
28 Covered Products or the alleged violations.

1 **1.6** ERC’s Notices and Complaint allege that use of the Covered Products by
2 California consumers exposes them to lead and/or cadmium and/or mercury without first
3 receiving clear and reasonable warnings from The Feed, which is in violation of California
4 Health and Safety Code section 25249.6. The Feed denies all material allegations contained in
5 the Notices and Complaint.

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

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

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

18 **2. JURISDICTION AND VENUE**

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

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

27 **3.1** Beginning on the Effective Date, The Feed shall be permanently enjoined from
28 manufacturing for sale in the State of California, “Distributing into the State of California,” or

1 directly selling in the State of California, any Covered Product that exposes a person to a
2 “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day and/or “Daily
3 Cadmium Exposure Level” of more than 4.1 micrograms of cadmium per day and/or “Daily
4 Mercury Exposure Level” of more than 0.3 micrograms of mercury per day unless it meets the
5 warning requirements under Section 3.2.

6 **3.1.1** As used in this Consent Judgment, the terms “Distributing into the State
7 of California” and “Distributed into the State of California” shall mean to directly ship a
8 Covered Product into California for sale in California or to sell a Covered Product to a
9 distributor that The Feed knows will sell the Covered Product in California.

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

17 **3.1.3** In calculating the Daily Lead Exposure Level for a Covered Product, The
18 Feed shall be allowed to deduct the amount of lead which is deemed “naturally occurring” in any
19 ingredient listed in **Table 1** that is contained in that Covered Product under the following
20 conditions: For the first three (3) years that The Feed claims entitlement to a “naturally
21 occurring” allowance, The Feed shall provide ERC with the following information: (a) The Feed
22 must produce to ERC a written list of each ingredient in the Covered Product, and the amount,
23 measured in grams, of each such ingredient contained therein, for which a “naturally occurring”
24 allowance is claimed; (b) The Feed must provide ERC with documentation of laboratory testing,
25 conducted during the year for which the “naturally occurring” allowance is claimed, that
26 complies with Sections 3.4.3 and 3.4.4 and that shows the amount of lead, if any, contained in
27 any ingredient listed in **Table 1** that is contained in the Covered Product and for which The Feed
28 intends to deduct “naturally occurring” lead; (c) If the laboratory testing reveals the presence of

1 lead in any ingredient listed in **Table 1** that is contained in the Covered Product, The Feed shall
 2 be entitled to deduct the amount of lead contained in each such ingredient, up to the full amount
 3 of the allowance for that ingredient as listed in **Table 1** but not to exceed the total amount of lead
 4 actually contained in that ingredient in the Covered Product; and (d) If the Covered Product does
 5 not contain an ingredient listed in **Table 1**, The Feed shall not be entitled to a deduction for
 6 “naturally occurring” lead in the Covered Product for that ingredient. The information required
 7 by Sections 3.1.3 (a) and (b) shall be provided to ERC within thirty (30) days of the first
 8 anniversary of the Effective Date, and annually within thirty (30) days of the anniversary of the
 9 Effective Date, for the first (3) three years that The Feed shall claim entitlement to the “naturally
 10 occurring” allowance. After the first (3) three years, ERC may request this information, no more
 11 than once per year thereafter, and The Feed shall provide the requested information to ERC
 12 within thirty (30) days of such request.

13 **TABLE 1**

INGREDIENT	ALLOWANCES OF AMOUNT OF LEAD
Cocoa Powder	Up to 1.0 microgram/gram
Chocolate Liquor	Up to 1.0 microgram/gram
Cocoa Butter	Up to 0.1 micrograms/gram
Calcium (elemental)	Up to 0.8 micrograms/gram
Ferrous Fumarate	Up to 0.4 micrograms/gram
Zinc Oxide	Up to 8.0 microgram/gram
Magnesium Oxide	Up to 0.4 micrograms/gram
Magnesium Carbonate	Up to 0.332 micrograms/gram
Magnesium Hydroxide	Up to 0.4 micrograms/gram
Zinc Gluconate	Up to 0.8 micrograms/gram
Potassium Chloride	Up to 1.1 micrograms/gram

28 **3.1.4** For purposes of this Consent Judgment, the “Daily Cadmium Exposure

1 Level” shall be measured in micrograms, and shall be calculated using the following formula:
2 micrograms of cadmium per gram of product, multiplied by grams of product per serving of
3 the product (using the largest serving size appearing on the product label), multiplied by
4 servings of the product per day (using the largest number of recommended daily servings
5 appearing on the label), which equals micrograms of cadmium exposure per day. If the label
6 contains no recommended daily servings, then the number of recommended daily servings
7 shall be one.

8 **3.1.5** For purposes of this Consent Judgment, the “Daily Mercury Exposure
9 Level” shall be measured in micrograms, and shall be calculated using the following formula:
10 micrograms of mercury 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 mercury exposure per day. If the label contains no
14 recommended daily servings, then the number of recommended daily servings shall be one.

15 **3.1.6** So long as The Feed can provide documentation, if requested in writing by
16 ERC, Covered Products shipped, sold, or Distributed into the State of California by The Feed
17 prior to the Effective Date are not bound by the injunctive terms set forth in this Section 3,
18 including but not limited to the Daily Lead Exposure Level, Daily Cadmium Exposure Level,
19 Daily Mercury Exposure Level, and warning and testing requirements, and are instead permitted
20 to be sold as is to California Consumers and are expressly released by Section 8 of this Consent
21 Judgment.

22 **3.2 Clear and Reasonable Warnings**

23 If The Feed 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 [cadmium] [and] [mercury] which is [are] known to the State of California to cause [cancer
28 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 The Feed shall use the phrase “cancer and” in the Warning if The Feed has reason to
6 believe that the “Daily Lead Exposure Level” is greater than 15 micrograms of lead as determined
7 pursuant to the quality control methodology set forth in Section 3.4 or if The Feed has reason to
8 believe that another Proposition 65 chemical is present which may require a cancer warning. For
9 the Option 2 Warning, the entire Warning must be in a type size no smaller than the largest type
10 size used for other consumer information on the product. In no case shall the Warning appear in a
11 type size smaller than 6-point type. Further, for Option 2, a symbol consisting of a black
12 exclamation point in a yellow equilateral triangle with a bold black outline shall be placed to the
13 left of the text of the Warning, in a size no smaller than the height of the word “**WARNING.**”

14 Where the sign, label or shelf tag for the product is not printed using the color yellow, the symbol
15 may be printed in black and white. As identified in the brackets, the warning shall appropriately
16 reflect at least one chemical present in each of the Covered Products, but if there is a chemical
17 present at a level that requires a cancer warning, the chemical requiring use of the phrase “cancer
18 and” in the Warning shall always be identified.

19 The Warning shall be provided through one of the following methods: (1) a product-
20 specific warning provided on a posted sign, shelf tag, or shelf sign, for the consumer product at
21 each point of display of the product; or (2) a product-specific warning provided via any
22 electronic device or process that automatically provides the warning to the purchaser prior to or
23 during the purchase of the consumer product, without requiring the purchaser to seek out the
24 warning; or (3) a warning on the label that is securely affixed to or printed upon the label and
25 complies with this Section 3.2. If the Warning is printed upon the label of the Covered
26 Product, it must be set off from other surrounding information and enclosed in a box. In
27 addition, for any Covered Product sold over the internet, the Warning shall appear prior to
28 check-out on the primary product page, or as a pop-up when a California zip code is input into

1 the shipping instructions, or on the checkout page when a California delivery address is
2 indicated for any purchase of any Covered Product. Where a Warning subject to this section is
3 provided solely on the checkout page, an asterisk or other identifying method must be utilized
4 to identify which products on the checkout page are subject to the Warning. The Warning may
5 be provided with a conspicuous hyperlink stating “**WARNING**” in all capital and bold letters
6 so long as the hyperlink goes directly to a page prominently displaying the Warning without
7 content that detracts from the Warning. Given The Feed’s lack of control over third-party
8 websites, the online warning requirements expressed in this Section apply only to Covered
9 Products sold through The Feed’s website. However, if a Covered Product is being sold by an
10 online third-party seller, known to and authorized to sell such Covered Product by The Feed,
11 and The Feed cannot itself post the warning on the authorized online third-party seller’s
12 website because The Feed lacks control over such authorized online third-party seller’s
13 website, then The Feed must notify the authorized online third-party seller of its duty to
14 provide an internet warning as part of the condition of sale of the Covered Product. The Feed
15 may comply with this obligation to notify authorized online third-party sellers by complying
16 with 27 C.C.R. § 25600.2 (2023) and providing the information required by 27 C.C.R. §
17 25600.2 (2023) to any such authorized online third-party seller that is subject to California
18 Health and Safety Code § 25249.6. In all cases, a warning is not prominently displayed if the
19 purchaser must search for it in the general content of the website.

20 With respect to any downstream reseller customers of The Feed who are subject to
21 Proposition 65, The Feed may give written notice, including labels, labeling, shelf signs, or
22 tags bearing the Warning, and all other necessary warning materials, to the authorized agent of
23 such downstream reseller customers. Such written notice shall instruct the downstream reseller
24 customers that the labels, labeling, shelf signs, or tags bearing the Warning must be displayed
25 on or in proximity to the Covered Products with such conspicuousness, as compared with other
26 words, statements or designs as to render the Warning likely to be seen, read, and understood
27 by an ordinary individual prior to sale.

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

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

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

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

13 If subsequently enacted changes to Proposition 65 or its implementing regulations require
14 the use of additional or different information on any warning specifically applicable to the
15 Covered Products (the “New Safe Harbor Warning”), the Parties agree that the New Safe Harbor
16 Warning may be utilized in place of or in addition to, as applicable, the warnings set forth in this
17 Section.

18 **3.3 Conforming Covered Products**

19 A Conforming Covered Product is a Covered Product for which the “Daily Lead Exposure
20 Level” is no greater than 0.5 micrograms of lead per day and/or the “Daily Cadmium Exposure
21 Level” is no greater than 4.1 micrograms of cadmium per day and/or the “Daily Mercury
22 Exposure Level” is no greater than 0.3 micrograms of mercury per day as determined by the
23 exposure methodology set forth in Section 3.1.2 and the quality control methodology described in
24 Section 3.4, and that is not known by The Feed to contain other chemicals that violate Proposition
25 65’s safe harbor thresholds.

26 **3.4 Testing and Quality Control Methodology**

27 **3.4.1** Beginning within one year of the Effective Date, The Feed shall arrange
28 for lead, cadmium, and mercury testing of the Covered Products at least once a year for a

1 minimum of three (3) consecutive years by arranging for testing of three (3) randomly selected
2 samples of each of the Covered Products, in the form intended for sale to the end-user, which
3 The Feed intends to sell or is manufacturing for sale in California, directly selling to a
4 consumer in California or “Distributing into the State of California.” If tests conducted
5 pursuant to this Section demonstrate that no Warning is required for a Covered Product during
6 each of three (3) consecutive years, then the testing requirements of this Section will no longer
7 be required as to that Covered Product. However, if during or after the three-year testing
8 period, The Feed changes ingredient suppliers for any of the Covered Products and/or
9 reformulates any of the Covered Products, The Feed shall test that Covered Product annually
10 for at least three (3) consecutive years after such change is made.

11 **3.4.2** For purposes of measuring the “Daily Lead Exposure Level” and/or the
12 “Daily Cadmium Exposure Level” and/or the “Daily Mercury Exposure Level,” the highest
13 lead and/or cadmium and/or mercury detection result of the three (3) randomly selected
14 samples of the Covered Products will be controlling.

15 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a
16 laboratory method that complies with the performance and quality control factors appropriate
17 for the method used, including limit of detection and limit of quantification, sensitivity,
18 accuracy and precision that meets the following criteria: Inductively Coupled Plasma-Mass
19 Spectrometry (“ICP-MS”) achieving a limit of quantification of less than or equal to 0.005
20 mg/kg.

21 **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an
22 independent third party laboratory certified by the California Environmental Laboratory
23 Accreditation Program or an independent third-party laboratory that is registered with the
24 United States Food & Drug Administration.

25 **3.4.5** Nothing in this Consent Judgment shall limit The Feed’s ability to
26 conduct, or require that others conduct, additional testing of the Covered Products, including
27 the raw materials used in their manufacture.

28 **3.4.6** Within thirty (30) days of ERC’s written request, which request shall not

1 be made more than once per year, The Feed shall deliver lab reports obtained pursuant to
2 Section 3.4 to ERC. The Feed shall retain all test results and documentation for a period of
3 three years from the date of each test.

4 **3.4.7** The testing and reporting requirements of Section 3.4 do not apply to any
5 Covered Product for which The Feed is providing a Warning, continuously and without
6 interruption from the Effective Date, pursuant to Section 3.2 of this Consent Judgment. In the
7 event a Warning is provided after the Effective Date but The Feed thereafter ceases to provide
8 the Warning, the testing and reporting requirements of Section 3.4 of this Consent Judgment
9 shall apply beginning within one year after the date the Warning ceases to be provided, unless
10 The Feed can show to the satisfaction of ERC that the cessation in providing the Warning was a
11 temporary error that was resolved when discovered.

12 **4. SETTLEMENT PAYMENT**

13 **4.1** In full satisfaction of all potential civil penalties, additional settlement
14 payments, attorney's fees, and costs, The Feed shall make a total payment of \$55,500.00
15 ("Total Settlement Amount") to ERC within 5 days of the Effective Date ("Due Date"). The
16 Feed shall make this payment by wire transfer to ERC's account, for which ERC will give The
17 Feed the necessary account information. The Total Settlement Amount shall be apportioned as
18 follows:

19 **4.2** \$8,000.00 shall be considered a civil penalty pursuant to California Health and
20 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$6,000.00) of the civil penalty to the
21 Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
22 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
23 Code section 25249.12(c). ERC will retain the remaining 25% (\$2,000.00) of the civil penalty.

24 **4.3** \$3,696.77 shall be distributed to ERC as reimbursement to ERC for reasonable
25 costs incurred in bringing this action.

26 **4.4** \$17,600.00 shall be distributed to Michael Freund & Associates as
27 reimbursement of ERC's attorney fees, while \$26,203.23 shall be distributed to ERC for its in-
28 house legal fees. Except as explicitly provided herein, each Party shall bear its own fees and

1 costs.

2 **4.5** In the event that The Feed fails to remit the Total Settlement Amount owed
3 under Section 4 of this Consent Judgment on or before the Due Date, The Feed shall be
4 deemed to be in material breach of its obligations under this Consent Judgment. ERC shall
5 provide written notice of the delinquency to The Feed via electronic mail. If The Feed fails to
6 deliver the Total Settlement Amount within five (5) days from the written notice, the Total
7 Settlement Amount shall accrue interest at the statutory judgment interest rate provided in the
8 California Code of Civil Procedure section 685.010. Additionally, The Feed agrees to pay
9 ERC's reasonable attorney's fees and costs for any efforts to collect the payment due under
10 this Consent Judgment.

11 **5. MODIFICATION OF CONSENT JUDGMENT**

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

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

28 **5.3** In the event that The Feed initiates or otherwise requests a modification under

1 Section 5.1, and the meet and confer process leads to a joint motion or application for a
2 modification of the Consent Judgment, The Feed shall reimburse ERC its costs and reasonable
3 attorney's fees for the time spent in the meet-and-confer process and filing and arguing the
4 motion or application. ERC shall not be reimbursed for costs or attorney's fees for a
5 ministerial motion (such as a change in name or contact information) or if ERC does not
6 expend more than two (2) hours of attorney time on the joint motion.

7 **5.4** In the event that Proposition 65 is repealed or preempted as to food products,
8 then The Feed shall have no further obligation pursuant to this Consent Judgment with respect
9 to the Covered Products, to the extent that the Covered Products are so affected.

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

12 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or
13 terminate this Consent Judgment.

14 **6.2** If ERC alleges that any Covered Product fails to qualify as a Conforming
15 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
16 inform The Feed in a reasonably prompt manner of its test results, including information
17 sufficient to permit The Feed to identify the Covered Products at issue. The Feed shall, within
18 thirty (30) days following such notice, provide ERC with testing information, from an
19 independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,
20 demonstrating The Feed's compliance with the Consent Judgment. The Parties shall first
21 attempt to resolve the matter prior to ERC taking any further legal action.

22 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

2 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC, on
3 behalf of itself and in the public interest, and The Feed and its respective officers, directors,
4 shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,
5 franchisees, licensees, customers (not including private label customers of The Feed),
6 distributors, wholesalers, retailers, and all other upstream and downstream entities in the
7 distribution chain of any Covered Product, and the predecessors, successors, and assigns of any
8 of them (collectively, “Released Parties”).

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

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

25 **8.4** It is possible that other claims not known to the Parties, arising out of the facts
26 alleged in the Notices and Complaint, and relating to the Covered Products, will develop or be
27 discovered. ERC on behalf of itself only, and The Feed 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 The
2 Feed acknowledge that the claims released in Sections 8.2 and 8.3 above may include unknown
3 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
4 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 The Feed 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 of the Released Parties regarding alleged
16 exposures to lead and/or cadmium and/or mercury in the Covered Products as set forth in the
17 Notices and Complaint.

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

21 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

25 **10. GOVERNING LAW**

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

28 **11. PROVISION OF NOTICE**

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

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

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

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

8 With a copy to:
9 Michael Freund
10 Michael Freund & Associates
11 1919 Addison Street, Suite 105
12 Berkeley, CA 94704
13 Telephone: (510) 540-1992
14 Email: freund1@aol.com

15 **FOR THE FEED.COM, INC.; KYOKU SUPERFOODS LLC**

16 Heidi Huntington
17 224 Commerce Street, Ste. A1
18 Broomfield, CO 80020
19 Attention: CEO
20 Email: Heidi@thefeed.com

21 With a copy to:
22 Matthew Pace
23 Rimôn Law P.C.
24 100 Park Avenue 16th Floor
25 New York, NY 10017
26 Telephone: (212) 363-0270
27 Email: matthew.pace@rimonlaw.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.

12.3 If this Stipulated Consent Judgment is not approved by the Court, it shall be

1 void and have no force or effect.

2 **13. EXECUTION AND COUNTERPARTS**

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

6 **14. DRAFTING**

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

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

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

20 **16. ENFORCEMENT**

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

1 **17. ENTIRE AGREEMENT, AUTHORIZATION**

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

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

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

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

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

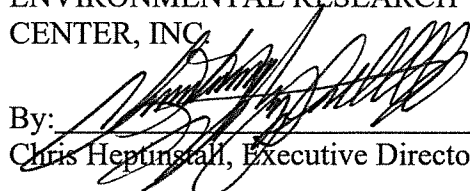
18 (2) Make the findings pursuant to California Health and Safety Code section
19 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

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

22 **IT IS SO STIPULATED:**

23
24 Dated: 5/15/, 2023

ENVIRONMENTAL RESEARCH
CENTER, INC.

25
26 By: 
27 Chris Heptinstall, Executive Director

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Dated: May 15, 2023

THE FEED.COM, INC.



By: Matt Johnson
Its: CEO

Dated: May 15, 2023

KYOKU SUPERFOODS LLC



By: Matt Johnson
Its: CEO

APPROVED AS TO FORM:

Dated: May 16, 2023

MICHAEL FREUND & ASSOCIATES



By: Michael Freund
Attorney for Plaintiff Environmental
Research Center, Inc.

Dated: May 15, 2023

AMIN TALATI WASSERMAN LLP



By: Jennifer Adams
Attorney for Defendants The Feed.com,
Inc. and Kyoku Superfoods LLC

ORDER AND JUDGMENT

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

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____, 2023 _____
Judge of the Superior Court

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EXHIBIT A

Michael Freund & Associates

1919 Addison Street, Suite 105
Berkeley, CA 94704
Voice: 510.540.1992 • Fax: 510.371.0885

Michael Freund, Esq.

September 29, 2022

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

Dear Alleged Violators and the Appropriate Public Enforcement Agencies:

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

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

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

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

The Feed.com, Inc.
Kyoku Superfoods LLC

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. Swiss RX Total Recovery Chocolate Mint – Lead, Mercury, Cadmium**
- 2. Kyoku Daily Superfood Shake – Lead, Mercury**

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.

Cadmium was officially listed as a chemical known to cause developmental toxicity and male reproductive toxicity on May 1, 1997, while cadmium and cadmium compounds were listed as chemicals known to the State of California to cause cancer on October 1, 1987.

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 September 29, 2019, 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 Violators 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.

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

Sincerely,

A handwritten signature in cursive script that reads "Michael Freund".

Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to The Feed.com, Inc.; Kyoku Superfoods LLC; 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 The Feed.com, Inc.;
Kyoku Superfoods LLC**

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that 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 an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed 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: September 29, 2022



Michael Freund

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States and over the age of 18 years of age. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On September 29, 2022 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; “THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY”** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO
The Feed.com, Inc.& Kyoku Superfoods LLC
224 Commerce St, Ste A1
Broomfield, CO 80020

Incorporating Services, Ltd.
(Registered Agent for The Feed.com, Inc.&
Kyoku Superfoods LLC)
3500 S Dupont Hwy
Dover, DE 19901

Matthew Johnson
(Registered Agent for The Feed.com, Inc.)
224 Commerce St, Ste A1
Broomfield, CO 80020

On September 29, 2022 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General’s website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

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

On September 29, 2022 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

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

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

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

September 29, 2022

Page 6

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

Lisa A. Smittcamp, District Attorney
Fresno County
2100 Tulare Street
Fresno, CA 93721
consumerprotection@fresnocountyca.gov

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

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

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

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

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

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

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

Todd Spitzer, District Attorney
Orange County
300 N Flower St
Santa Ana, CA 92703
Prop65notice@da.ocgov.com

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

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

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

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

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

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

Alexandra Grayner, Assistant District Attorney
San Francisco District Attorney's Office
350 Rhode Island Street
San Francisco, CA 94103
Alexandra.grayner@sfgov.org

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

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

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

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

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

Nora V. Frimann, City Attorney
San Jose City Attorney
200 E. Santa Clara Street, 16th Floor
San Jose, CA 96113
Proposition65notices@sanjoseca.gov

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

Jill Ravitch, District Attorney
Sonoma County
600 Administration Dr
Sonoma, CA 95403
Jeannie.Barnes@sonoma-county.org

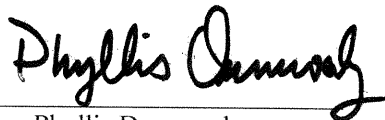
Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

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 September 29, 2022, between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by First Class Mail.

Executed on September 29, 2022, 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
310 6th St
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, 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, 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

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.

EXHIBIT B

Michael Freund & Associates

1919 Addison Street, Suite 105
Berkeley, CA 94704
Voice: 510.540.1992 • Fax: 510.371.0885

Michael Freund, Esq.

October 25, 2022

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

Dear Alleged Violators and the Appropriate Public Enforcement Agencies:

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

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

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

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

The Feed.com, Inc.
Kyoku Superfoods LLC

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. Swiss RX Total Recovery Vanilla Chai- Lead, Cadmium**
- 2. Swiss RX Total Recovery Strawberry – Lead, Cadmium, Mercury**
- 3. Swiss RX Nitric Oxide - 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.

Cadmium was officially listed as a chemical known to cause developmental toxicity and male reproductive toxicity on May 1, 1997, while cadmium and cadmium compounds were listed as chemicals known to the State of California to cause cancer on October 1, 1987.

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 October 25, 2019, 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 Violators 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.

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

Sincerely,



Michael Freund

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to The Feed.com, Inc.; Kyoku Superfoods LLC; 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 The Feed.com, Inc.;
Kyoku Superfoods LLC**

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that 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 an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed 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: October 25, 2022

Michael Freund

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States and over the age of 18 years of age. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On October 25, 2022 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; “THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY”** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO
The Feed.com, Inc.& Kyoku Superfoods LLC
224 Commerce St, Ste A1
Broomfield, CO 80020

Incorporating Services, Ltd.
(Registered Agent for The Feed.com, Inc.&
Kyoku Superfoods LLC)
3500 S Dupont Hwy
Dover, DE 19901

Matthew Johnson
(Registered Agent for The Feed.com, Inc.)
224 Commerce St, Ste A1
Broomfield, CO 80020

On October 25, 2022 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General’s website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

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

On October 25, 2022 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:

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

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

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

October 25, 2022

Page 6

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

Lisa A. Smittcamp, District Attorney
Fresno County
2100 Tulare Street
Fresno, CA 93721
consumerprotection@fresnocountyca.gov

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

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

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

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

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

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

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

Todd Spitzer, District Attorney
Orange County
300 N Flower St
Santa Ana, CA 92703
Prop65notice@da.ocgov.com

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

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

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

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

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

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

Alexandra Grayner, Assistant District Attorney
San Francisco District Attorney's Office
350 Rhode Island Street
San Francisco, CA 94103
Alexandra.grayner@sfgov.org

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

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

October 25, 2022

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

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

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

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

Nora V. Frimann, City Attorney
San Jose City Attorney
200 E. Santa Clara Street, 16th Floor
San Jose, CA 96113
Proposition65notices@sanjoseca.gov

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

Jill Ravitch, District Attorney
Sonoma County
600 Administration Dr
Sonoma, CA 95403
Jeannie.Barnes@sonoma-county.org

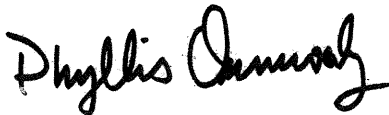
Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

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 October 25, 2022, between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by First Class Mail.

Executed on October 25, 2022, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

Service List

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

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

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

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

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

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

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

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

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

District Attorney, Colusa
County
310 6th St
Colusa, CA 95932

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

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

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

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

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

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

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

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

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

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

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

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

District Attorney, San Mateo
County
400 County Ctr., 3rd Floor
Redwood City, CA 94063

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

District Attorney, Shasta
County
1355 West Street
Redding, CA 96001

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

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

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

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

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

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

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

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

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