

ENDORSED  
FILED  
ALAMEDA COUNTY

JUL 7 2010

CLERK OF THE SUPERIOR COURT  
By [Signature] Deputy

1 MATTHEW C. MACLEAR (SBN 209228)  
2 ANTHONY M. BARNES (SBN 199048)  
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6 Attorneys for Plaintiff  
ENVIRONMENTAL RESEARCH CENTER, INC.

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8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ALAMEDA

11 ENVIRONMENTAL RESEARCH CENTER, )  
12 INC., a non-profit California corporation, )  
13 Plaintiff, )  
14 v. )  
15 APRICOT POWER, INC., a Nevada corporation, )  
16 and DOES 1 – 25, )  
17 Defendants. )

Case No. **RG16822787**  
**COMPLAINT FOR PERMANENT  
INJUNCTION, CIVIL PENALTIES AND  
OTHER RELIEF**  
Health & Safety Code §25249.5, *et seq.*

18  
19 Plaintiff Environmental Research Center, Inc. ("PLAINTIFF" or "ERC") brings this  
20 action in the interests of the general public and, on information and belief, hereby alleges:

21 **INTRODUCTION**

22 1. This action seeks to remedy the continuing failure of Defendants APRICOT POWER,  
23 INC. ("APRICOT POWER") and DOES 1-25 (hereinafter individually referred to as  
24 "DEFENDANT" or collectively as "DEFENDANTS") to warn consumers in California that they  
25 are being exposed to lead and cadmium, chemicals known to the State of California to cause  
26 cancer, birth defects, and other reproductive harm. According to the Safe Drinking Water and  
27 Toxics Enforcement Act of 1986, Health and Safety Code ("H&S Code") section 25249.5 (also  
28 known as and referred to hereinafter as "Proposition 65"), businesses must provide persons with

**BY FAX**

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF ALAMEDA

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

14 Plaintiff,

15 v.

16 APRICOT POWER, INC., a Nevada corporation,  
17 and DOES 1 – 25,

18 Defendants.

) Case No.

) **COMPLAINT FOR PERMANENT  
INJUNCTION, CIVIL PENALTIES AND  
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) Health & Safety Code §25249.5, *et seq.*

19 Plaintiff Environmental Research Center, Inc. (“PLAINTIFF” or “ERC”) brings this  
20 action in the interests of the general public and, on information and belief, hereby alleges:

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22 1. This action seeks to remedy the continuing failure of Defendants APRICOT POWER,  
23 INC. (“APRICOT POWER”) and DOES 1-25 (hereinafter individually referred to as  
24 “DEFENDANT” or collectively as “DEFENDANTS”) to warn consumers in California that they  
25 are being exposed to lead and cadmium, chemicals known to the State of California to cause  
26 cancer, birth defects, and other reproductive harm. According to the Safe Drinking Water and  
27 Toxics Enforcement Act of 1986, Health and Safety Code (“H&S Code”) section 25249.5 (also  
28 known as and referred to hereinafter as “Proposition 65”), businesses must provide persons with



1 a “clear and reasonable warning” before exposing individuals to chemicals known to the state to  
2 cause cancer or reproductive harm. DEFENDANTS manufacture, package, distribute, market,  
3 and/or sell in California certain products containing lead and/or cadmium (the “SUBJECT  
4 PRODUCTS”):

- 5 • Apricot Power Probiotic Shield - Lead
- 6 • Only Natural Inc. Yeast Therapy - Lead
- 7 • Apricot Power Ground SuperFood Mix Chocolate Brownie – Lead, Cadmium
- 8 • Apricot Power Green Phytofoods - Lead
- 9 • Apricot Power Chlorella - Lead
- 10 • Apricot Power Megazyme Forte 1018 mg - Lead
- 11 • Diamond Interest USA Ganoderma Chocolate Instant Chocolate Mixture with  
12 Ganoderma Powder - Lead, Cadmium
- 13 • Apricot Power Valerian Root 500 mg - Lead
- 14 • Apricot Power Coral Calcium - Cadmium

15 2. Lead and cadmium (hereinafter, the “LISTED CHEMICALS”) are chemicals known  
16 to the State of California to cause cancer, birth defects, and other reproductive harm.

17 3. The use and/or handling of the SUBJECT PRODUCTS causes exposures to the  
18 LISTED CHEMICALS at levels requiring a “clear and reasonable warning” under Proposition  
19 65. DEFENDANTS exposed consumers, users, and handlers to the LISTED CHEMICALS and  
20 have failed to provide the health hazard warnings required by Proposition 65.

21 4. DEFENDANTS’ continued manufacturing, packaging, distributing, marketing  
22 and/or sales of the SUBJECT PRODUCTS without the required health hazard warnings, causes,  
23 or threatens to cause, individuals to be involuntarily, unknowingly and unwittingly exposed to  
24 levels of the LISTED CHEMICALS that violate Proposition 65.

### 25 PARTIES

26 5. PLAINTIFF is a non-profit corporation organized under California law. ERC is  
27 dedicated to, among other causes, reducing the use and misuse of hazardous and toxic  
28 substances, consumer protection, worker safety, and corporate responsibility.



1           6. ERC is a person within the meaning of H&S Code §25249.11 and brings this  
2 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code §  
3 25249.7 (d) specifies that actions to enforce Proposition 65 may be brought by a person in the  
4 public interest, provided certain notice requirements and no other public prosecutor is diligently  
5 prosecuting an action for the same violation(s).

6           7. APRICOT POWER is now, and was at all times relevant herein, a corporation  
7 organized under the laws of Nevada and is doing business within the meaning of H&S Code  
8 §25249.11.

9           8. DEFENDANTS own, administer, direct, control and/or operate facilities and/or  
10 agents, distributors sellers, marketers or other retail operations who place its SUBJECT  
11 PRODUCTS into the stream of commerce in California (including but not limited to Alameda  
12 County) under the brand name Apricot Power and other brand names, which contain the LISTED  
13 CHEMICALS without first giving clear and reasonable warnings.

14           9. DEFENDANTS, separately and each of them, are or were, at all times relevant to the  
15 claims in this Complaint and continuing through the present, legally responsible for compliance  
16 with the provisions of Proposition 65. Whenever an allegation regarding any act of a  
17 DEFENDANT is made herein, such allegation shall be deemed to mean that DEFENDANT, or  
18 its agent, officer, director, manager, supervisor, or employee did, or so authorized, such acts while  
19 engaged in the affairs of DEFENDANT's business operations and/or while acting within the  
20 course and scope of their employment or while conducting business for DEFENDANT(S) for a  
21 commercial purpose.

22           10. In this Complaint, when reference is made to any act of a DEFENDANT, such  
23 allegation shall mean that the owners, officers, directors, agents, employees, contractors, or  
24 representatives of DEFENDANT acted or authorized such actions, and/or negligently failed and  
25 omitted to act or adequately and properly supervise, control or direct its employees and agents  
26 while engaged in the management, direction, operation or control of the affairs of the business  
27 organization. Whenever reference is made to any act of any DEFENDANT, such allegation shall  
28 be deemed to mean the act of each DEFENDANT acting individually, jointly, and severally as



1 defined by Civil Code Section 1430 *et seq.*

2 11. PLAINTIFF does not know the true names, capacities and liabilities of  
3 DEFENDANT's DOES Nos. 1-25, inclusive, and therefore sues them under fictitious names.  
4 PLAINTIFF will amend this Complaint to allege the true name and capacities of the DOE  
5 Defendants upon being ascertained. Each of these Defendants was in some way legally  
6 responsible for the acts, omissions, and/or violations alleged herein.

7 **JURISDICTION AND VENUE**

8 12. This Court has jurisdiction over this action pursuant to California Constitution Article  
9 VI, Section 10, which grants the Superior Court "original jurisdiction in all causes except those  
10 given by statute to other trial courts." The statute under which this action is brought does not  
11 specify any other court with jurisdiction.

12 13. This Court has jurisdiction over DEFENDANTS because they are business entities  
13 that do sufficient business, have sufficient minimum contacts in California or otherwise  
14 intentionally avail themselves of the California market, through the sale, marketing and use of  
15 their SUBJECT PRODUCTS in California, to render the exercise of jurisdiction over them by  
16 the California courts consistent with traditional notions of fair play and substantial justice.

17 14. Venue in this action is proper in the Alameda County Superior Court because the  
18 cause, or part thereof, arises in the County of Alameda since DEFENDANTS' products are  
19 marketed, offered for sale, sold, used, and/or consumed in this county.

20 **STATUTORY BACKGROUND**

21 15. The People of the State of California declared in Proposition 65 their right "[t]o be  
22 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive  
23 harm." (Section 1(b) of Initiative Measure, Proposition 65).

24 16. To effect this goal, Proposition 65 requires that individuals be provided with a "clear  
25 and reasonable warning" before being exposed to chemicals listed by the State of California as  
26 causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent part:

27 No person in the course of doing business shall knowingly and intentionally  
28 expose any individual to a chemical known to the state to cause cancer or  
reproductive toxicity without first giving clear and reasonable warning to such  
individual....



1 17. An exposure to a chemical in a consumer product is one "which results from a  
2 person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a  
3 consumer good, or any exposure that results from receiving a consumer service." (Cal. Code  
4 Regs., tit. 22, § 12601, subd. (b).)

5 18. Proposition 65 provides that any "person who violates or threatens to violate" the  
6 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7). The phrase  
7 "threaten to violate" is defined to mean creating "a condition in which there is a substantial  
8 probability that a violation will occur" (H&S Code §25249.11(e)). Violators are liable for civil  
9 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

#### 10 FACTUAL BACKGROUND

11 19. On February 27, 1987, the State of California officially listed lead as a chemical  
12 known to cause reproductive toxicity. Lead became subject to the warning requirement one year  
13 later and was therefore subject to the "clear and reasonable" warning requirements of Proposition  
14 65 beginning on February 27, 1988. (27 California Code of Regulations ("CCR") §25000, *et*  
15 *seq.*; H&S Code §25249.5, *et seq.*).

16 20. On October 1, 1992, the State of California officially listed lead and lead compounds  
17 as chemicals known to cause cancer. Lead and lead compounds became subject to the warning  
18 requirement one year later and were therefore subject to the "clear and reasonable" warning  
19 requirements of Proposition 65 beginning on October 1, 1993. (27 CCR § 25000, *et seq.*; H&S  
20 Code §25249.6, *et seq.*). Due to the high toxicity of lead, the maximum allowable dose level for  
21 lead is 0.5 µg/day (micrograms a day) for reproductive toxicity and the no significant risk level  
22 for carcinogens is 15µg/day (oral).

23 21. On May 1, 1997, the State of California officially listed the chemical cadmium as a  
24 chemical known to cause reproductive toxicity. Cadmium became subject to the warning  
25 requirement one year later and was therefore subject to the "clear and reasonable" warning  
26 requirements of Proposition 65 beginning on May 1, 1998. (27 CCR §25000, *et seq.*; H&S  
27 Code §25249.5, *et seq.*). Due to the high toxicity of cadmium, the maximum allowable dose  
28 level for cadmium is 4.1 µg/day (micrograms a day) for reproductive toxicity. (27 CCR §



1 25805(b.)

2 22. On October 1, 1987, the State of California officially listed the chemicals cadmium  
3 and cadmium compounds as chemicals known to cause cancer. Cadmium and cadmium  
4 compounds became subject to the warning requirement one year later and were therefore  
5 subject to the "clear and reasonable" warning requirements of Proposition 65 beginning on  
6 October 1, 1988 (27 CCR §25000, et seq.; H&S Code §25249.6 *et seq.*).

7 23. To test DEFENDANTS' SUBJECT PRODUCTS for lead and cadmium, PLAINTIFF  
8 hired a well-respected and accredited testing laboratory. The results of testing undertaken by  
9 PLAINTIFF of DEFENDANTS' SUBJECT PRODUCTS show that the SUBJECT PRODUCTS  
10 tested were in violation of the 0.5 µg/day and/or 15 µg/day "safe harbor" daily dose limits set  
11 forth for lead, and/or in violation of the 4.1 µg/day "safe harbor" daily dose limits for cadmium,  
12 in Proposition 65's regulations. Very significant is the fact that people are being exposed to lead  
13 and/or cadmium through ingestion as opposed to other not as harmful methods of exposure such  
14 as dermal exposure. Ingestion of lead and/or cadmium produces much higher exposure levels  
15 and health risks than does dermal exposure to these chemicals.

16 24. At all times relevant to this action, DEFENDANTS, therefore, have knowingly and  
17 intentionally exposed the users, consumers and/or handlers of the SUBJECT PRODUCTS to the  
18 LISTED CHEMICALS without first giving a clear and reasonable warning to such individuals.

19 25. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use  
20 in California since at least April 29, 2013. The SUBJECT PRODUCTS continue to be distributed  
21 and sold in California without the requisite warning information.

22 26. As a proximate result of acts by DEFENDANTS, as persons in the course of doing  
23 business within the meaning of Health & Safety Code §25249.11, individuals throughout the  
24 State of California, including in the County of Alameda have been exposed to the LISTED  
25 CHEMICALS without a clear and reasonable warning on the SUBJECT PRODUCTS. The  
26 individuals subject to the violative exposures include normal and foreseeable users of the  
27 SUBJECT PRODUCTS, as well as all other persons exposed to the SUBJECT PRODUCTS.

28 27. On April 29, 2016, ERC served each of the DEFENDANTS and each of the



1 appropriate public enforcement agencies with a document entitled "Notice of Violations of  
2 California Health & Safety Code Section 25249.5" that provided DEFENDANTS and the public  
3 enforcement agencies with notice that DEFENDANTS were in violation of Proposition 65 for  
4 failing to warn purchasers and individuals using the SUBJECT PRODUCTS that the use of the  
5 SUBJECT PRODUCTS exposes them to lead and/or cadmium, chemicals known to the State of  
6 California to cause cancer and/or reproductive toxicity ("Prop. 65 Notice"). A true and correct  
7 copy of the 60-Day Notice ("NOTICE") is attached hereto as Exhibit A and is hereby  
8 incorporated by reference, and is available on the Attorney General's website located at  
9 <http://oag.ca.gov/prop65>.

10 28. The NOTICE was issued pursuant to, and in compliance with, the requirements of  
11 H&S Code §25249.7(d) and the statute's implementing regulations regarding the notice of the  
12 violations to be given to certain public enforcement agencies and to the violator. The NOTICE  
13 included, *inter alia*, the following information: the name, address, and telephone number of the  
14 noticing individual; the name of the alleged violator; the statute violated; the approximate time  
15 period during which violations occurred; and descriptions of the violations including the  
16 chemicals involved, the routes of toxic exposure, and the specific product or type of product  
17 causing the violations.

18 29. APRICOT POWER was also provided copies of the document entitled "The Safe  
19 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is  
20 also known as Appendix A to Title 27 of CCR §25903, via Certified Mail.

21 30. The California Attorney General was provided a copy of the NOTICE and a Certificate  
22 of Merit by the attorney for the noticing party, stating that there is a reasonable and meritorious  
23 case for this action, and attaching factual information sufficient to establish a basis for the  
24 certificate, including the identity of the persons consulted with and relied on by the certifier, and  
25 the facts, studies, or other data reviewed by those persons, pursuant to H&S Code §25249.7(h)  
26 (2) via online submission.

27 31. After expiration of the sixty (60) day notice period, The appropriate public  
28 enforcement agencies failed to commence and diligently prosecute a cause of action under H&S



1 Code §25249.5, *et seq.* against DEFENDANTS based on the allegations herein.

2 **FIRST CAUSE OF ACTION**

3 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**  
4 **the SUBJECT PRODUCTS described in the April 29, 2016 Prop. 65 Notice of Violation)**  
5 **Against DEFENDANTS**

6 32. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 31,  
7 inclusive, as if specifically set forth herein.

8 33. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant  
9 to this action, and continuing through the present, have violated, or threaten to violate, H&S Code  
10 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals  
11 in California to chemicals known to the State of California to cause cancer or reproductive toxicity  
12 without first giving clear and reasonable warnings to such persons who use, consume or handle  
13 the SUBJECT PRODUCTS containing the LISTED CHEMICALS, pursuant to H&S Code §§  
14 25249.6 and 25249.11(f).

15 34. By the above-described acts, DEFENDANTS have violated, or threaten to violate,  
16 H&S Code § 25249.6 and are therefore subject to preliminary and permanent injunctions ordering  
17 DEFENDANTS to stop violating Proposition 65, to provide warnings to all present and future  
18 customers, and to provide warnings to DEFENDANTS' past customers who purchased or used  
19 the SUBJECT PRODUCTS without receiving a clear and reasonable warning.

20 35. An action for injunctive relief under Proposition 65 is specifically authorized by H&S  
21 Code §25249.7(a).

22 36. Continuing commission by DEFENDANTS of the acts alleged above will irreparably  
23 harm the citizens of the State of California, for which harm they have no plain, speedy, or  
24 adequate remedy at law.

25 37. In the absence of preliminary and then permanent injunctive relief, DEFENDANTS  
26 will continue to create a substantial risk of irreparable injury by continuing to cause consumers  
27 to be involuntarily, unknowingly and unwittingly exposed to the LISTED CHEMICALS through  
28 the use, consumption and/or handling of the SUBJECT PRODUCTS.



1 SECOND CAUSE OF ACTION

2 (Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the  
3 SUBJECT PRODUCTS described in the April 29, 2016, Prop. 65 Notice of Violation)  
4 Against DEFENDANTS

5 38. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 37,  
6 inclusive, as if specifically set forth herein.

7 39. By committing the acts alleged in this Complaint, DEFENDANTS at all times  
8 relevant to this action, and continuing through the present, have violated H&S Code §25249.6 by,  
9 in the course of doing business, knowingly and intentionally exposing individuals in California  
10 to chemicals known to the State of California to cause cancer or reproductive toxicity without  
11 first giving clear and reasonable warnings to such persons who use, consume or handle the  
12 SUBJECT PRODUCTS containing the LISTED CHEMICALS, pursuant to H&S Code §§  
13 25249.6 and 25249.11(f).

14 40. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code  
15 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure  
16 to the LISTED CHEMICALS from the SUBJECT PRODUCTS, in an amount in excess of \$1  
17 million.

18 THE NEED FOR INJUNCTIVE RELIEF

19 41. PLAINTIFF re-alleges and incorporates by this reference Paragraphs 1 through  
20 40, as if set forth below.

21 42. By committing the acts alleged in this Complaint, DEFENDANTS have caused  
22 or threaten to cause irreparable harm for which there is no plain, speedy or adequate remedy at  
23 law. In the absence of equitable relief, DEFENDANTS will continue to create a substantial risk  
24 of irreparable injury by continuing to cause consumers to be involuntarily and unwittingly  
25 exposed to the LISTED CHEMICALS through the use and/or handling of the SUBJECT  
26 PRODUCTS.

27 PRAYER FOR RELIEF

28 Wherefore, PLAINTIFF prays for the following relief:

A. A preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),



1 enjoining DEFENDANTS, their agents, employees, assigns and all persons acting in concert or  
2 participating with DEFENDANTS, from manufacturing, distributing, marketing or selling the  
3 SUBJECT PRODUCTS in California without first providing a clear and reasonable warning,  
4 within the meaning of Proposition 65, that the users and/or handlers of the SUBJECT  
5 PRODUCTS are exposed to the LISTED CHEMICALS;

6 B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling  
7 DEFENDANTS to identify and locate each individual who has purchased the SUBJECT  
8 PRODUCTS since June 5, 2012, and to provide a warning to such person that the use of the  
9 SUBJECT PRODUCTS will expose the user to chemicals known to cause cancer, birth defects,  
10 and other reproductive harm;

11 C. An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),  
12 against DEFENDANTS in the amount of \$2,500 per day for each violation of Proposition 65, in  
13 an amount in excess of \$1 million, according to proof;

14 D. An award to PLAINTIFF of its reasonable attorney's fees and costs of suit  
15 pursuant to California Code of Civil Procedure §§ 1032 *et. seq* and 1021.5, as PLAINTIFF shall  
16 specify in further applications to the Court; and,

17 E. Such other and further relief as may be just and proper.  
18

19 DATED: February , 2016

AQUA TERRA AERIS LAW GROUP

21 

22 Matthew C. Maclear  
23 Anthony M. Barnes  
24 Attorneys for Plaintiff  
25 Environmental Research Center, Inc.  
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**EXHIBIT A**





Matthew M. Maclear  
[mcm@atalawgroup.com](mailto:mcm@atalawgroup.com)  
415.568.5200

April 29, 2016

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

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

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

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

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

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

**Apricot Power, Inc.**

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

- 1. Apricot Power Probiotic Shield - Lead**
- 2. Only Natural Inc. Yeast Therapy - Lead**





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

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3. **Apricot Power Ground SuperFood Mix Chocolate Brownie – Lead, Cadmium**
4. **Apricot Power Green Phytofoods - Lead**
5. **Apricot Power Chlorella - Lead**
6. **Apricot Power Megazyme Forte 1018 mg - Lead**
7. **Diamond Interest USA Ganoderma Chocolate Instant Chocolate Mixture with Ganoderma Powder – Lead, Cadmium**
8. **Apricot Power Valerian Root 500 mg - Lead**
9. **Apricot Power Coral Calcium - Cadmium**

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.

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 purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least April 29, 2013, 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 Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified





Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 29, 2016  
Page 3

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.**

Sincerely,

A handwritten signature in dark ink, appearing to read "Matthew Maclear", is written over a horizontal line.

Matthew Maclear  
AQUA TERRA AERIS LAW GROUP

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Apricot Power, Inc. and its Registered Agent for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)





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

April 29, 2016

Page 4

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Apricot Power, Inc.**

I, Matthew Maclear, declare:

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

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed 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 Violator will be able to establish any of the affirmative defenses set forth in the statute.

5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: April 29, 2016

Matthew Maclear





Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 29, 2016  
Page 5

**CERTIFICATE OF SERVICE**

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, over the age of 18 years of age, and am not a party to the within entitled action. 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 April 29, 2016, 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 the party 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  
Apricot Power, Inc.  
720 South Main Street  
Lakeport, CA 95453

Incorp Services, Inc.  
(Apricot Power, Inc.'s Registered  
Agent for Service of Process)  
3773 Howard Hughes Parkway, Suite 500S  
Las Vegas, NV 89169

On April 29, 2016, 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 April 29, 2016, 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 the party listed below:

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

Dije Ndreu, Deputy District Attorney  
Monterey County  
1200 Aguajito Road  
Monterey, CA 93940  
Prop65DA@co.monterey.ca.us

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

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





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

April 29, 2016

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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

Gregory Alker, Assistant District Attorney  
San Francisco County  
732 Brannan Street  
San Francisco, CA 94103  
gregory.alker@sfgov.org

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

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

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


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

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

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

On April 29, 2016, 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 Priority Mail.

Executed on April 29, 2016, in Fort Oglethorpe, Georgia.

  
Phyllis Dunwoody





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

April 29, 2016

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Service List

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Los Angeles County 210 West Temple Street, Suite 18000 Los Angeles, CA 90012	District Attorney, San Joaquin County 222 E. Weber Ave. Rm. 202 Stockton, CA 95202	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Mateo County 400 County Ctr., 3rd Floor Redwood City, CA 94063	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102
District Attorney, Amador County 708 Court Street Jackson, CA 95642	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101	San Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060	
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Sierra County PO Box 437 Downieville, CA 95936	
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Sutter County 446 Second Street Yuba City, CA 95991	
District Attorney, Humboldt County 825 5th Street 4 <sup>th</sup> Floor Eureka, CA 95501	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093	
District Attorney, Inyo County 230 W. Line Street Bishop, CA 93514	District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92415-0004	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901	
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012	
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453			



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**EXHIBIT B**



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27 CCR Appendix A  
**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

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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's implementing regulations (see citations below) for further information.

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

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Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. The statute is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

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*WHAT DOES PROPOSITION 65 REQUIRE?*

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**The "Governor's List."** Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. This means that 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 female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at: [http://www.oehha.ca.gov/prop65/prop65\\_list/Newlist.html](http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html).

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

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**Clear and reasonable warnings.** A business is required to warn a person before "knowingly and intentionally" exposing that person to a LISTED CHEMICALS unless an exemption applies; for example, when exposures are sufficiently low (see below). 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. Some



1 exposures are exempt from the warning requirement under certain circumstances discussed  
2 below.

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

7 **DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?**

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

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

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

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

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

28 **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 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 a Food.** Certain exposures to chemicals that  
occur in foods naturally (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



1 requirements of the law. If the chemical is a contaminant<sup>2</sup> it must be reduced to the lowest level  
2 feasible. Regulations explaining this exemption can be found in Section 25501.

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

#### 9 ***HOW IS PROPOSITION 65 ENFORCED?***

10 Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney  
11 General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private  
12 parties acting in the public interest, but only after providing notice of the alleged violation to the  
13 Attorney General, the appropriate district attorney and city attorney, and the business accused of  
14 the violation. The notice must provide adequate information to allow the recipient to assess the  
15 nature of the alleged violation. The notice must comply with the information and procedural  
16 requirements specified in Section 25903 of the regulations and in Title 11, sections 3100-3103. A  
17 private party may not pursue an independent enforcement action under Proposition 65 if one of  
18 the governmental officials noted above initiates an action within sixty days of the notice.  
19 A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500  
20 per day for each violation. In addition, the business may be ordered by a court of law to stop  
21 committing the violation.

#### 18 ***FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS. . .***

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

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

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

24 Note: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5  
25 25249.6, 25249.9, 25249.10 and 25249.11, Health and Safety Code.

#### 25 **HISTORY**

- 26 1. New Appendix A filed 4-22-97; operative 4-22-97 pursuant to Government Code section  
27 11343.4(d) (Register 97, No. 17).
- 28 2. Amendment filed 1-7-2003; operative 2-6-2003 (Register 2003, No. 2).
3. Change without regulatory effect renumbering title 22, section 12903 and Appendix A to title  
27 27, section 25903 and Appendix A, including amendment of appendix, filed 6-18-2008 pursuant  
28 to section 100, title 1, California Code of Regulations (Register 2008, No. 25).
4. Amendment filed 11-19-2012; operative 12-19-2012 (Register 2012, No. 47).



1 This database is current through 10/17/14 Register 2014, No. 42  
2 27 CCR Appendix A, 27 CA ADC Appendix A

3 END OF  
4 DOCUMENT

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6 **Documents In Sequence**

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