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ENDORSED

2017 APR 20 P 2:19

CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPUTY

Attorneys for Plaintiff
Center for Advanced Public Awareness, Inc. ("CAPA")

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

17 CV 308869

**CENTER FOR ADVANCED PUBLIC
AWARENESS, INC.**, a California
nonprofit corporation,

Plaintiff,

vs.

NC3 SYSTEMS, INC., d.b.a. CALIVA,
a California corporation; and **DOES 1-25,**
inclusive,

Defendant.

No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 *et seq.*)

BY FAX

Plaintiff CENTER FOR ADVANCED PUBLIC AWARENESS, INC. ("PLAINTIFF" or
"CAPA") brings this action in the interest of the general public, and on information and belief,
hereby alleges:

INTRODUCTION

1. This action seeks to remedy the continuing failure of Defendants NC3 SYSTEMS INC.,
d.b.a. CALIVA ("CALIVA") and DOES 1-25 (hereinafter individually referred to as
"DEFENDANT" or collectively as "DEFENDANTS") to warn consumers (including patients) in
California that they are being exposed to marijuana smoke, a chemical known to the State of
California to cause cancer. According to the Safe Drinking Water and Toxic Enforcement Act of

1 1986, Health and Safety Code (“H&S Code”) section 25249.5 (also known as and referred to
2 hereinafter as “Proposition 65”), businesses must provide persons with a “clear and reasonable
3 warning” before exposing individuals to chemicals known to the State to cause cancer or
4 reproductive harm. Marijuana smoke is referred to hereinafter as the “LISTED CHEMICAL.”¹

5 2. DEFENDANTS manufacture, package, distribute, market, and/or sell in California
6 products containing marijuana intended for smoking, including, but not limited to, pre-rolled
7 products, unprocessed and processed marijuana intended to be heated, combusted, then inhaled,
8 and specifically, the flowers, leaves, and other organic parts of marijuana plants (“SUBJECT
9 PRODUCTS”), the consumption and use of which result in exposure to the LISTED CHEMICAL
10 that require a “clear and reasonable” warning under Proposition 65. DEFENDANTS exposed
11 consumers, users and patients to the LISTED CHEMICAL and have failed to provide the health
12 hazard warnings required under Proposition 65.

13 3. DEFENDANTS continue manufacturing, packaging, distributing, marketing and/or sales
14 of the SUBJECT PRODUCTS without the required health hazard warnings, which causes or
15 threatens to cause individuals to be involuntarily, unknowingly, and unwittingly exposed to the
16 LISTED CHEMICAL in violation of Proposition 65, and subjects DEFENDANTS to injunctive
17 relief for such conduct as well as civil penalties for each violation. (H&S Code § 25249.7(a) &
18 (b)(1).)

19 PARTIES

20 4. PLAINTIFF is a non-profit public benefit corporation organized under California law.
21 CAPA is dedicated to, among other causes, providing information to consumers regarding the
22 hazards of toxins in products; protecting public health and drinking water sources by preventing
23

24 ¹ Many of the chemical constituents that have been identified in marijuana smoke are carcinogens. The following 33
25 marijuana smoke constituents . . . are listed under Proposition 65 as causing cancer: acetaldehyde, acetamide,
26 acrylonitrile, 4-aminobiphenyl, arsenic, benz[a]anthracene, benzene, benzo[a]pyrene, benzo[b]fluoranthene,
27 benzo[j]fluoranthene, benzo[k]fluoranthene, benzofuran, 1,3-butadiene, cadmium, carbazole, catechol, chromium
28 (hexavalent compounds), chrysene, dibenz[a,h]anthracene, dibenz[a,i]pyrene, dibenzo[a,e]pyrene,
diethylnitrosamine, dimethylnitrosamine, formaldehyde, indeno[1,2,3,-c,d]pyrene, isoprene, lead, mercury, 5-
methylchrysene, naphthalene, nickel, pyridine, and quinoline. (Evidence on the Carcinogenicity of Marijuana Smoke,
Office of Environmental Health Hazard Assessment, Reproductive and Cancer Hazard Assessment Branch, March,
2009 at 5.)

1 pollution and toxics from being discharged, released or emitted into the environment; and
2 enforcing state and federal environmental laws and regulations through citizen suits.

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

8 6. CALIVA is now, and was at all times relevant herein, a corporation organized under the
9 laws of California and is doing business within the meaning of H&S Code section 25249.11 at
10 1695 S. 7th Street, San Jose, CA 95112.

11 7. DEFENDANTS manufacture, package, distribute, market, sell in and/or offer the
12 SUBJECT PRODUCTS for sale or use in the State of California or imply by their conduct that
13 they manufacture, distribute, and/or offer the SUBJECT PRODUCTS for sale or use in the State
14 of California (including but not limited to Santa Clara County), which contain the LISTED
15 CHEMICAL without first giving “clear and reasonable” warnings.

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

24 9. In this Complaint, when reference is made to any act of a DEFENDANT, such allegation
25 shall mean that the owners, officers, directors, agents, employees, contractors, or representatives
26 of a DEFENDANT acted or authorized such actions, and/or negligently failed and omitted to act
27 or adequately and properly supervise, control or direct its employees and agents while engaged in
28

1 the management, direction, operation or control of the affairs of the business organization.

2 Whenever reference is made to any act of any DEFENDANT, such allegation shall be deemed to
3 mean the act of each DEFENDANT acting individually, jointly, and severally as defined by Civil
4 Code section 1430 *et seq.*

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

10 **JURISDICTION AND VENUE**

11 11. Venue is proper in the Santa Clara County Superior Court, pursuant to Code of Civil
12 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
13 because one or more instances of wrongful conduct occurred, and continue to occur, in Santa
14 Clara County, and because DEFENDANTS conducted, and continue to conduct, business in this
15 County with respect to the SUBJECT PRODUCTS.

16 12. This Court has jurisdiction over this action pursuant to California Constitution Article VI,
17 section 10, which grants the Superior Court “original jurisdiction in all causes except those given
18 by statute to other trial courts.” The statute under which this action is brought does not specify
19 any other court with jurisdiction.

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

25 14. Venue in this action is proper in the Santa Clara County Superior Court because the cause,
26 or part thereof, arises in Santa Clara County since DEFENDANTS’ violations occurred (products
27 are marketed, offered for sale, sold, used, and/or consumed without clear and reasonable
28

1 warnings) in this County.

2 **STATUTORY BACKGROUND**

3 15. The people of the State of California declared in Proposition 65 their right “[t]o be
4 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
5 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

6 16. To effect this goal, Proposition 65 requires that individuals be provided with a “clear and
7 reasonable warning” before being exposed to substances listed by the State of California as
8 causing cancer or reproductive toxicity. H&S Code section 25249.6 states, in pertinent part:

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

13 17. An exposure to a chemical in a consumer product is one “which results from a person’s
14 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer
15 good, or any exposure that results from receiving a consumer service.” (27 CCR § 25602, para
16 (b).) H&S Code, section 25603(c) states that “a person in the course of doing business . . . shall
17 provide a warning to any person to whom the product is sold or transferred unless the product is
18 packaged or labeled with a clear and reasonable warning.”

19 18. Pursuant to H&S Code section 25603.1, the warning may be provided by using one or
20 more of the following methods singly or in combination:²

- 21 (a) A warning that appears on a product's label or other labeling.
- 22 (b) Identification of the product at the retail outlet in a manner which provides a
23 warning. Identification may be through shelf labeling, signs, menus, or a
24 combination thereof.
- 25 (c) The warnings provided pursuant to subparagraphs (a) and (b) shall be
26 prominently placed upon a product's label or other labeling or displayed at the
27 retail outlet with such conspicuousness, as compared with other words,
28 statements, designs, or devices in the label, labeling or display as to render it
likely to be read and understood by an ordinary individual under customary
conditions of purchase or use.
- (d) A system of signs, public advertising identifying the system and toll-free

² Alternatively, a person in the course of doing business may elect to comply with the warning requirements set out in the amended version of 27 CCR 25601 *et. seq.*, as amended on August 30, 2016, and operative on August 30, 2018.

1 information services, or any other system that provides clear and reasonable
2 warnings.

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

8 **FACTUAL BACKGROUND**

9 20. On December 12, 2007, the Office of Environmental Health Hazard Assessment
10 (OEHHA) announced the selection of marijuana smoke as a chemical for consideration for listing
11 by the Carcinogen Identification Committee (CIC) in the *California Regulatory Register*. The
12 CIC subsequently determined that marijuana smoke has been clearly shown, through
13 scientifically valid testing according to general accepted principles, to cause cancer.
14 Consequently, on June 19, 2009, marijuana smoke was added to the Proposition 65 list, pursuant
15 to California Code of Regulations, § 25305(a)(1) (formerly Title 22, California Code of
16 Regulations, § 12305(a)(1)). In summary, marijuana smoke was listed under Proposition 65 as
17 known to the State to cause cancer.

18 21. The consumer exposures that are the subject of this Complaint result from the combustion
19 and inhalation of the SUBJECT PRODUCTS resulting in exposure to the LISTED CHEMICAL,
20 to wit – marijuana smoke and its constituent carcinogens. Consequently, a primary route of
21 exposure to the LISTED CHEMICAL contained in marijuana smoke is through direct smoking of
22 the marijuana leaves, flowers, and stems or pre-rolled products. A secondary route of exposure to
23 the LISTED CHEMICAL contained in marijuana smoke is through exposure to second-hand
24 smoke generated by the smoking of the marijuana leaves, flowers, and stems or pre-rolled
25 products.

26 22. DEFENDANTS have manufactured, grown, processed, marketed, distributed, offered to
27 sell and/or sold the SUBJECT PRODUCTS for use and consumption by inhalation/smoking in
28 California since at least January 25, 2016. The SUBJECT PRODUCTS continue to be distributed

1 and sold in California without the requisite warning information.

2 23. At all times relevant to this action, DEFENDANTS, therefore, have knowingly and
3 intentionally exposed the users, consumers and/or patients to the SUBJECT PRODUCTS and the
4 LISTED CHEMICAL without first giving a clear and reasonable warning(s) to such individuals.

5 24. As a proximate result of acts by DEFENDANTS, as persons in the course of doing
6 business within the meaning of H&S Code section 25249.11, individuals throughout the State of
7 California, including in Santa Clara County, have been exposed to the LISTED CHEMICAL
8 without a clear and reasonable warning on the SUBJECT PRODUCTS. The individuals subject
9 to the violative exposures include normal and foreseeable users, consumers and patients of the
10 SUBJECT PRODUCTS, as well as all others exposed to the SUBJECT PRODUCTS.

11 25. On January 25, 2017, CAPA served CALIVA and each of the appropriate public
12 enforcement agencies with a document entitled “Notice of Violations of California Health &
13 Safety Code Section 25249.5” that provided CALIVA and the public enforcement agencies with
14 notice that CALIVA was in violation of Proposition 65 for failing to warn purchasers and
15 individuals using the SUBJECT PRODUCTS that the use of the SUBJECT PRODUCTS exposes
16 them to marijuana smoke, a chemical known to the State of California to cause cancer (“Prop. 65
17 Notice”). A true and correct copy of the 60-Day Notice (“NOTICE”) is attached hereto as
18 **Exhibit A** and is hereby incorporated by reference, and is available on the Attorney General’s
19 website located at <http://oag.ca.gov/prop65>.

20 26. The NOTICE was issued pursuant to, and in compliance with, the requirements of
21 H&S Code section 25249.7(d) and the statute’s implementing regulations regarding the notice of
22 the violations to be given to certain public enforcement agencies and to the violator. The
23 NOTICE included, *inter alia*, the following information: the name, address, and telephone
24 number of the noticing individual; the name of the alleged violator; the statute violated; the
25 approximate time period during which violations occurred; and descriptions of the violations
26 including the chemicals involved, the routes of toxic exposure, and the specific product or type of
27 product causing the violations.

1 27. CALIVA was also provided copies of the document entitled “The Safe Drinking Water
2 and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is also known as
3 Appendix A to Title 27 of CCR section 25903, via Certified Mail.

4 28. The California Attorney General was provided a copy of the NOTICE and a Certificate of
5 Merit by the attorney for the noticing party, stating that there is a reasonable and meritorious case
6 for this action, and attaching factual information sufficient to establish a basis for the certificate,
7 including the identity of the persons consulted with and relied on by the certifier, and the facts or
8 other data reviewed by those persons, pursuant to H&S Code section 25249.7(h) (2) via online
9 submission.

10 29. After expiration of the sixty (60) day notice period, the appropriate public enforcement
11 agencies have failed to commence and diligently prosecute a cause of action under
12 H&S Code section 25249.5, *et seq.* against CALIVA based on the allegations herein.

13 30. Based on information and belief, CALIVA has sold multiple strains of buds, flowers and
14 pre-rolled marijuana/cannabis products intended for combustion and inhalation by doctor-
15 recommended “patients” without giving clear and reasonable warnings that smoking medical
16 cannabis can cause cancer. CALIVA has sold dozens, if not hundreds, of units of SUBJECT
17 PRODUCT to a PERSON³ in the State of California during each and every month from [DATE]
18 through the present, amounting to numerous violative products sold in that period.

19 **Basis for Injunctive Relief for Violations of Health and Safety Code section 25249.6, *et seq.***
20 **concerning the SUBJECT PRODUCTS described in the January 25, 2017, Prop. 65 Notice**
21 **of Violation Against DEFENDANTS**

22 31. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 30, inclusive,
23 as if specifically set forth herein.

24 32. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant to
25 this action, and continuing through the present, have violated, or threaten to violate, H&S Code
26 section 25249.6 by, in the course of doing business, knowingly and intentionally exposing

27 ³ “PERSON” includes a natural person, firm, association, organization, partnership, business, trust, corporation,
28 public entity, joint venture, and any other incorporated or unincorporated association, business or enterprise.

1 individuals in California to a chemical known to the State of California to cause cancer without
2 first giving “clear and reasonable” warnings to such persons/patients who use or consume the
3 SUBJECT PRODUCTS containing the LISTED CHEMICAL, pursuant to H&S Code
4 sections 25249.6 and 25249.11(f).

5 33. By committing the acts alleged in this Complaint, DEFENDANTS have caused or
6 threaten to cause irreparable harm for which there is no plain, speedy, or adequate remedy at
7 law. In the absence of equitable relief, DEFENDANTS will continue to create a substantial risk
8 of irreparable injury by continuing to cause patients and consumers to be involuntarily and
9 unwittingly exposed to cancer-causing marijuana smoke through the foreseeable and/or intended
10 use and/or consumption of the SUBJECT PRODUCTS.

11 34. By the above-described acts, DEFENDANTS have violated, or threaten to violate, H&S
12 Code section 25249.6 and are therefore subject to preliminary and permanent injunctions ordering
13 DEFENDANTS to stop violating Proposition 65, to provide warnings to all present and future
14 patients and customers, and possibly be required to provide warnings to DEFENDANTS’ past
15 customers who purchased or used the SUBJECT PRODUCTS without receiving a clear and
16 reasonable warning.

17 35. An action for injunctive relief under Proposition 65 is specifically authorized by H&S
18 Code section 25249.7(a).

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

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

1 **FIRST CAUSE OF ACTION**

2 **(Civil Penalties for Violations of Health and Safety Code § 25249.6, et seq. concerning the**
3 **SUBJECT PRODUCTS described in the January 25, 2017, Prop. 65 Notice of Violation**
4 **Against DEFENDANTS)**

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

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

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

17 **PRAYER FOR RELIEF**

18 Wherefore, PLAINTIFF prays for the following relief:

19 A. A preliminary and permanent injunction, pursuant to H&S Code
20 section 25249.7(b), enjoining DEFENDANTS, their agents, employees, assigns and all persons
21 acting in concert or participating with DEFENDANTS, from manufacturing, distributing,
22 marketing, processing, selling or offering to sell the SUBJECT PRODUCTS to patients or
23 consumers in California without first providing a “clear and reasonable warning” regarding the
24 LISTED CHEMICAL within the meaning of Proposition 65;

25 B. An injunctive order, pursuant to H&S Code section 25249.7(b) and California
26 Code of Regulations, title 27, sections 25603 and 25603.1, compelling DEFENDANTS to
27 provide “clear and reasonable” warnings at the entrance to DEFENDANTS’ medical marijuana
28 facility; on DEFENDANTS’ website; inside DEFENDANTS’ membership agreement; on the
29 labels of the SUBJECT PRODUCTS; at the point of sale; inside display cases; at concerts and

1 conventions that DEFENDANTS participate in; and/or on receipts for SUBJECT PRODUCTS
2 that are delivered to consumers. The warnings should indicate that the SUBJECT PRODUCTS
3 will expose the user, consumer or patient to chemicals known to the State of California to cause
4 cancer;

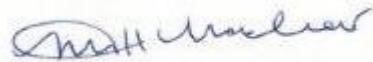
5 C. An assessment of civil penalties pursuant to H&S Code section 25249.7(b),
6 against DEFENDANTS in the amount of up to \$2,500 per day for each violation of Proposition
7 65, according to proof;

8 D. An award to PLAINTIFF of its reasonable attorneys' fees and costs of suit
9 pursuant to California Code of Civil Procedure sections 1032 *et. seq* and 1021.5, according to
10 proof; and

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

12
13 DATED: April 20, 2017

AQUA TERRA AERIS LAW GROUP

14
15 

16 _____
17 Matthew C. Maclear
18 Attorneys for Plaintiff
19 Center for Advanced Public Awareness, Inc.
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Exhibit A



Matthew M. Maclear
mcm@atalawgroup.com
415.568.5200

January 25, 2017

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

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

ATA Law Group represents the Center for Advanced Public Awareness, Inc. ("CAPA"), 180 Promenade Circle, Suite 300, Sacramento, CA 95834; CAPA 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, fostering and increasing the public awareness of chemicals used to manufacture consumer products, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

CAPA 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 product(s) 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. Section 25249.6 of the statute provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the State to cause cancer or reproductive toxicity without first providing a clear and reasonable warning to such individual . . ." Without proper warnings regarding the toxic effects of exposures to this listed chemical(s) that results from contact with this product, California citizens lack the information necessary to make an informed decision on whether and/or how to eliminate (or reduce) their risk of exposure to the listed chemical(s) from the reasonably foreseeable use of the product.

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), CAPA 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.

Certificate of Merit and General Information about Proposition 65. Pursuant to Title 11 C.C.R. § 3100, a certificate of merit is attached hereto. Pursuant to Title 27, C.C.R. §25903(b), 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:

NC3 Systems, Inc., doing business as Caliva
1695 S. 7th Street
San Jose, CA 95112



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
January 25, 2017

Consumer Products and Listed Chemical. All the medical marijuana “flowers” or “buds” sold to California residents by Violators are the subject of this Notice and Violators failed to clearly and reasonably warn consumers that Marijuana Smoke¹ is a chemical known to the State of California to cause cancer.

On June 19, 2009, the Office of Environmental Health Hazard Assessment (OEHHA) of the California Environmental Protection Agency added marijuana smoke to the Proposition 65 list.

OEHHA announced the selection of marijuana smoke as a chemical for consideration for listing by the Carcinogen Identification Committee (CIC) in the *California Regulatory Notice Register* on December 12, 2007, subsequent to consultation with the CIC at their November 19, 2007 meeting. The CIC determined that marijuana smoke was clearly shown, through scientifically valid testing according to generally accepted principles, to cause cancer. Consequently, marijuana smoke was added to the Proposition 65 list, pursuant to Title 27, California Code of Regulations, section 25305(a)(1) (formerly Title 22, California Code of Regulations, section 12305(a)(1)).

In summary, marijuana smoke was listed under Proposition 65 as known to the State to cause cancer:

Chemical	CAS No.	Toxicological Endpoint	Listing Mechanism
Marijuana smoke ²	--	Cancer	State’s qualified experts

Violations. The alleged Violator knowingly and intentionally has exposed and continues to knowingly and intentionally expose consumers within the State of California to marijuana smoke without providing clear and reasonable warning of this exposure. In particular, the products do not warn that they contain chemicals known to the State of California to cause cancer.

Route of Exposure. The consumer exposures that are the subject of this notice result from the combustion and inhalation of the products. Consequently, a primary route of exposure to the chemicals contained in marijuana is through direct smoking of the marijuana leaves, flowers, and stems.

Approximate Time of Violations. Ongoing violations have occurred every day since at least January 25, 2016, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until this known toxic chemical is either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemical. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65

¹ Many of the chemical constituents that have been identified in marijuana smoke are carcinogens. The following 33 marijuana smoke constituents are listed under Proposition 65 as causing cancer: acetaldehyde, acetamide, acrylonitrile, 4-aminobiphenyl, arsenic, benz[a]anthracene, benzene, benzo[a]pyrene, benzo[b]fluoranthene, benzo[j]fluoranthene, benzo[k]fluoranthene, benzofuran, 1,3-butadiene, cadmium, carbazole, catechol, chromium (hexavalent compounds), chrysene, dibenz[a,h]anthracene, dibenz[a,i]pyrene, dibenzo[a,e]pyrene, diethylnitrosamine, dimethylnitrosamine, formaldehyde, indeno[1,2,3,- c,d]pyrene, isoprene, lead, mercury, 5-methylchrysene, naphthalene, nickel, pyridine, and quinoline.

² *Marijuana Smoke Listed Effective June 19, 2009 as Known to the State of California to Cause Cancer*, Office of Environmental Health Hazard Assessment, June 19, 2009, available at: <http://oehha.ca.gov/proposition-65/cnr/marijuana-smoke-listed-effective-june-19-2009-known-state-california-cause> (last visited: Dec. 27, 2016).



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
January 25, 2017

because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to this chemical.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, CAPA is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) recall products already sold or undertake best efforts to ensure that the requisite health hazard warnings are provided to those who have received such products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 for products sold in the future. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time consuming litigation.

CAPA has retained Aqua Terra Aeris (ATA) Law Group 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 herein.**

Dated: January 25, 2017

Very truly yours,

A handwritten signature in blue ink that reads "Matthew C. Maclear".

Matthew C. Maclear
AQUA TERRA AERIS LAW GROUP
Attorney for Center for Advanced Public
Awareness

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to NC3 Systems, Inc., doing business as Caliva)
Additional Supporting Information for Certificate of Merit (to AG only)



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
January 25, 2017

CERTIFICATE OF MERIT

Re: Center for Advanced Public Awareness, Inc.’s Notice of Proposition 65 Violations by NC3 Systems, Inc., doing business as Caliva

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 chemical that is the subject of the notice.

4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiff’s case can be established and that the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.

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

Dated: January 25, 2017

A handwritten signature in blue ink that reads 'Matthew C. Maclear'.

Matthew C. Maclear
AQUA TERRA AERIS LAW GROUP
Attorney for Center for Advanced Public
Awareness



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
January 25, 2017

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 828 San Pablo Avenue, Albany, CA 94706. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at in Albany, California.

On January 25, 2017, 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:

Larry Thacker or Current President / CEO
NC3 Systems, Inc., doing business as Caliva
1695 S. 7th Street
San Jose, CA 95112

James K. Roberts or Current Agent for Service of Process
NC3 Systems, Inc., doing business as Caliva
150 Almaden Blvd., Suite 950
San Jose, CA 95113

On January 25, 2017, 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



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
January 25, 2017

On January 25, 2017, 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:

Santa Clara County District Attorney
70 W Hedding St., West Wing
San Jose, CA 95110
EPU@da.sccgov.org

On January 25, 2017, 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 below 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 US First Class Mail.

Executed on January 25, 2017, in Albany,
California.

A handwritten signature in blue ink, appearing to read "Matthew Maclear", is written over a light blue rectangular background.

Matthew Maclear

SERVICE LIST

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

Appendix A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986
(PROPOSITION 65): A SUMMARY

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

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 private party may not file an action against the alleged violator for these exposures, or recover in a settlement any payment in lieu of penalties any reimbursement for costs and attorney's fees, if the notice was served on or after October 5, 2013, and the alleged violator has done *all* of the following within 14 days of being served notice:

- Corrected the alleged violation;
- Agreed to pay a civil penalty of \$500 (subject to change as noted below) to the private party within 30 days; and
- Notified the private party serving the notice in writing that the violation has been corrected.

The written notification to the private-party must include a notice of special compliance procedure and proof of compliance form completed by the alleged violator as directed in the notice. On April 1, 2019, and every five years thereafter, the dollar amount of the civil penalty will be adjusted by the Judicial Council based on the change in the annual California Consumer Price Index. The Judicial Council will publish the dollar amount of the adjusted civil penalty at each five-year interval, together with the date of the next scheduled adjustment. An alleged violator may satisfy these conditions only one time for a violation arising from the same exposure in the same facility or on the same premises. The satisfaction of these conditions does not prevent the Attorney General, a district attorney, a city attorney of a city of greater than 750,000 population, or any full-time city prosecutor with the consent of the district attorney, from filing an enforcement action against an alleged violator. The amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator for the same alleged violation to a private-party.

A copy of the notice of special compliance procedure and proof of compliance form is included with this notice and can be downloaded from OEHHA's website at: <http://oehha.ca.gov/prop65/law/p65law72003.html>. The notice is reproduced here, below:

Date: January 25, 2017

Name of Noticing Party or attorney for Noticing Party: Center for Advanced Public Awareness, Inc. ("CAPA"),
Address: 180 Promenade Circle, Suite 300, Sacramento, CA 95834
Phone number: 415.568.5200

**SPECIAL COMPLIANCE PROCEDURE
PROOF OF COMPLIANCE**

You are receiving this form because the Noticing Party listed above has alleged that you are violating California Health and Safety Code §25249.6 (Prop. 65).

The Noticing Party may not bring any legal proceedings against you for the alleged violation checked below if:

1. **You have actually taken the corrective steps that you have certified in this form**
2. **The Noticing Party has received this form at the address shown above, accurately completed by you, postmarked within 14 days of your receiving this notice**
3. **The Noticing Party receives the required \$500 penalty payment from you at the address shown above postmarked within 30 days of your receiving this notice.**
4. **This is the first time you have submitted a Proof of Compliance for a violation arising from the same exposure in the same facility on the same premises.**

PART 1: TO BE COMPLETED BY THE NOTICING PARTY OR ATTORNEY FOR THE NOTICING PARTY

The alleged violation is for an exposure to: (check one)

Alcoholic beverages that are consumed on the alleged violator's premises to the extent on-site consumption is permitted by law.

A chemical known to the state to cause cancer or reproductive toxicity in a food or beverage prepared and sold on the alleged violator's premises for immediate consumption on or off premises to the extent: (1) the chemical was not intentionally added; and (2) the chemical 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.

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.

Chemicals known to the State to cause cancer or reproductive toxicity in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking noncommercial vehicles.

IMPORTANT NOTES:

1. You have no potential liability under California Health and Safety Code §25249.6 if your business has nine (9) or fewer employees.
2. Using this form will NOT prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action over the same alleged violations, and that in any such action, the amount of civil penalty shall be reduced to reflect any payment made at this time.

Date: January 25, 2017

Name of Noticing Party or attorney for Noticing Party: Center for Advanced Public Awareness, Inc. (“CAPA”),
Address: 180 Promenade Circle, Suite 300, Sacramento, CA 95834
Phone number: 415.568.5200

PART 2: TO BE COMPLETED BY THE ALLEGED VIOLATOR OR AUTHORIZED REPRESENTATIVE

Certification of Compliance

Accurate completion of this form will demonstrate that you are now in compliance with California Health and Safety Code §25249.6 for the alleged violation listed above. You must complete and submit the form below to the Noticing Party at the address shown above, postmarked within 14 days of you receiving this notice.

I hereby agree to pay, within 30 days of completion of this notice, a civil penalty of \$500 to the Noticing Party only and certify that I have complied with Health and Safety Code §25249.6 by (check only one of the following):

- Posting a warning or warnings about the alleged exposure that complies with the law, and attaching a copy of that warning and a photograph accurately showing its placement on my premises;
- Posting the warning or warnings demanded in writing by the Noticing Party, and attaching a copy of that warning and a photograph accurately its placement on my premises; OR
- Eliminating the alleged exposure, and attaching a statement accurately describing how the alleged exposure has been eliminated.

Certification

My statements on this form, and on any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I have carefully read the instructions to complete this form. I understand that if I make a false statement on this form, I may be subject to additional penalties under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65).

Signature of alleged violator or authorized representative Date

Name and title of signatory

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 2014

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>.

² See Section 25501(a)(4).

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.

HISTORY

1. New Appendix A filed 4-22-97; operative 4-22-97 pursuant to Government Code section 11343.4(d) (Register 97, No. 17).
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, section 25903 and Appendix A, including amendment of appendix, filed 6-18-2008 pursuant 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).
5. Amendment of appendix and Note filed 11-19-2014; operative 1-1-2015 (Register 2014, No. 47).
This database is current through 9/18/15 Register 2015, No. 38
27 CCR Appendix A, 27 CA ADC Appendix A