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MATTHEW C. MACLEAR (SBN 209228)  
ANTHONY M. BARNES (SBN 199048)  
AQUA TERRA AERIS LAW GROUP  
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Attorneys for Plaintiff  
ENVIRONMENTAL RESEARCH CENTER, INC.

**FILED BY FAX**  
ALAMEDA COUNTY  
July 11, 2017  
CLERK OF  
THE SUPERIOR COURT  
By Lynn Wiley, Deputy  
CASE NUMBER:  
**RG17867086**

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

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

Plaintiff,

v.

VITACOST.COM, INC., a Delaware  
corporation, and DOES 1 – 25,

Defendants.

) Case No.

) **COMPLAINT FOR PERMANENT  
INJUNCTION, CIVIL PENALTIES AND  
OTHER RELIEF**

) Health & Safety Code §25249.5, *et seq.*

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

**INTRODUCTION**

1. This action seeks to remedy the continuing failure of Defendants VITACOST.COM,  
INC. (“VITACOST”) and DOES 1-25 (hereinafter referred to individually as “DEFENDANT”  
or collectively as DEFENDANTS”) to warn consumers in California that they are being exposed  
to lead, a chemical known to the State of California to cause cancer, birth defects, and other  
reproductive harm. According to the Safe Drinking Water and Toxics Enforcement Act of 1986,  
Health and Safety Code (“H&S Code”) section 25249.5 *et seq.* (also known as and referred to  
hereinafter as “Proposition 65”), businesses must provide persons with a “clear and reasonable

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

- 4 • Harmonic Innerprizes Inc. HeartLight
- 5 • Harmonic Innerprizes Inc. Toxin Therapy
- 6 • Harmonic Innerprizes Etherium Black Re-Action Neutralizer
- 7 • Harmonic Innerprizes Inc. Aulterra
- 8 • Harmonic Innerprizes Inc. Etherium Pink (28.3g)
- 9 • Harmonic Innerprizes Inc. Aulterra Nutrient Optimizer
- 10 • Harmonic Innerprizes Etherium Gold Focused Brain
- 11 • Harmonic Innerprizes SuperSilica Plus!

12 2. Lead (hereinafter, the “LISTED CHEMICAL”) is a chemical known to the State of  
13 California to cause cancer, birth defects, and other reproductive harm.

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

18 4. DEFENDANTS’ continued distributing, marketing and/or sales of the SUBJECT  
19 PRODUCTS without the required health hazard warnings, causes, or threatens to cause,  
20 individuals to be involuntarily, unknowingly and unwittingly exposed to levels of the LISTED  
21 CHEMICAL that violate Proposition 65.

22 **PARTIES**

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

26 6. ERC is a person within the meaning of H&S Code §25249.11 and brings this  
27 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code §  
28 25249.7 (d) specifies that actions to enforce Proposition 65 may be brought by a person in the

1 public interest, provided certain notice requirements and no other public prosecutor is diligently  
2 prosecuting an action for the same violation(s).

3 7. VITACOST.COM, INC. is now, and was at all times relevant herein, a corporation  
4 organized under the laws of Delaware and is doing business within the meaning of H&S Code  
5 §25249.11.

6 8. DEFENDANTS own, administer, direct, control and/or operate facilities and/or  
7 agents, distributors sellers, marketers or other retail operations who place the SUBJECT  
8 PRODUCTS into the stream of commerce in California (including but not limited to Alameda  
9 County) under the brand name Harmonic Innerprizes, which contains the LISTED CHEMICAL  
10 without first giving clear and reasonable warnings.

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

19 10. In this Complaint, when reference is made to any act of a DEFENDANT, such  
20 allegation shall mean that the owners, officers, directors, agents, employees, contractors, or  
21 representatives of DEFENDANT acted or authorized such actions, and/or negligently failed and  
22 omitted to act or adequately and properly supervise, control or direct its employees and agents  
23 while engaged in the management, direction, operation or control of the affairs of the business  
24 organization. Whenever reference is made to any act of any DEFENDANT, such allegation shall  
25 be deemed to mean the act of each DEFENDANT acting individually, jointly, and severally as  
26 defined by Civil Code Section 1430 *et seq.*

27 11. PLAINTIFF does not know the true names, capacities and liabilities of  
28 DEFENDANT's DOES Nos. 1-25, inclusive, and therefore sues them under fictitious names.

1 PLAINTIFF will amend this Complaint to allege the true name and capacities of the DOE  
2 Defendants upon being ascertained. Each of these Defendants was in some way legally  
3 responsible for the acts, omissions, and/or violations alleged herein.

4 **JURISDICTION AND VENUE**

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

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

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

17 **STATUTORY BACKGROUND**

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

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

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

27 17. An exposure to a chemical in a consumer product is one “which results from a  
28 person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a

1 consumer good, or any exposure that results from receiving a consumer service.” (Cal. Code  
2 Regs., tit. 22, § 12601, subd. (b).)

3 18. Proposition 65 provides that any “person who violates or threatens to violate” the  
4 statute 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 19. On February 27, 1987, the State of California officially listed lead as a chemical  
10 known to cause reproductive toxicity. Lead became subject to the warning requirement one year  
11 later and was therefore subject to the “clear and reasonable” warning requirements of Proposition  
12 65 beginning on February 27, 1988. (27 California Code of Regulations (“CCR”) §25000, *et*  
13 *seq.*; H&S Code §25249.5, *et seq.*).

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

21 21. To test the SUBJECT PRODUCTS for lead, PLAINTIFF hired a well-respected and  
22 accredited testing laboratory. The results of testing undertaken by PLAINTIFF of the SUBJECT  
23 PRODUCTS show that the SUBJECT PRODUCTS tested were in violation of the 0.5 µg/day  
24 and/or 15 µg/day “safe harbor” daily dose limits set forth for lead, in Proposition 65’s  
25 regulations. Very significant is the fact that people are being exposed to lead through ingestion  
26 as opposed to other not as harmful methods of exposure such as dermal exposure. Ingestion of  
27 lead produces much higher exposure levels and health risks than does dermal exposure to this  
28 chemical.

1           22. At all times relevant to this action, DEFENDANTS, therefore, have knowingly and  
2 intentionally exposed the users, consumers and/or handlers of the SUBJECT PRODUCTS to the  
3 LISTED CHEMICAL without first giving a clear and reasonable warning to such individuals.

4           23. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use  
5 in California since at least April 28, 2014. The SUBJECT PRODUCTS continue to be distributed  
6 and sold in California without the requisite warning information.

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

13           25. On April 28, 2017, ERC served VITACOST and each of the appropriate public  
14 enforcement agencies with a document entitled “Notice of Violations of California Health &  
15 Safety Code Section 25249.5” that provided VITACOST and the public enforcement agencies  
16 with notice that VITACOST was in violation of Proposition 65 for failing to warn purchasers  
17 and individuals using the SUBJECT PRODUCTS that the use of the SUBJECT PRODUCTS  
18 exposes them to lead, a chemical known to the State of California to cause cancer and/or  
19 reproductive toxicity (“Prop. 65 Notice”). A true and correct copy of the 60-Day Notice  
20 (“NOTICE”) is attached hereto as Exhibit A and is hereby incorporated by reference, and is  
21 available on the Attorney General’s website located at <http://oag.ca.gov/prop65>.

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

1 causing the violations.

2 27. VITACOST was also provided a copy of the document entitled "The Safe Drinking  
3 Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is also known  
4 as Appendix A to Title 27 of CCR §25903, via Certified Mail.

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

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

14 **FIRST CAUSE OF ACTION**  
15 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**  
16 **the SUBJECT PRODUCTS described in the April 28, 2017 Prop. 65 Notice of Violation)**  
17 **Against DEFENDANTS**

18 30. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 29,  
19 inclusive, as if specifically set forth herein.

20 31. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant  
21 to this action, and continuing through the present, have violated, or threaten to violate, H&S Code  
22 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals  
23 in California to a chemical known to the State of California to cause cancer or reproductive  
24 toxicity without first giving clear and reasonable warnings to such persons who use, consume or  
25 handle the SUBJECT PRODUCTS containing the LISTED CHEMICAL, pursuant to H&S Code  
26 §§ 25249.6 and 25249.11(f).

27 32. By the above-described acts, DEFENDANTS have violated, or threaten to violate,  
28 H&S Code § 25249.6 and are therefore subject to preliminary and permanent injunctions ordering

1 DEFENDANTS to stop violating Proposition 65, to provide warnings to all present and future  
2 customers, and to provide warnings to DEFENDANTS' past customers who purchased or used  
3 the SUBJECT PRODUCTS without receiving a clear and reasonable warning.

4 33. An action for injunctive relief under Proposition 65 is specifically authorized by H&S  
5 Code §25249.7(a).

6 34. Continuing commission by DEFENDANTS of the acts alleged above will irreparably  
7 harm the citizens of the State of California, for which harm they have no plain, speedy, or  
8 adequate remedy at law.

9 35. In the absence of preliminary and then permanent injunctive relief, DEFENDANTS  
10 will continue to create a substantial risk of irreparable injury by continuing to cause consumers  
11 to be involuntarily, unknowingly and unwittingly exposed to the LISTED CHEMICAL through  
12 the use, consumption and/or handling of the SUBJECT PRODUCTS.

13 **SECOND CAUSE OF ACTION**

14 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the**  
15 **SUBJECT PRODUCTS described in the April 28, 2017, Prop. 65 Notice of Violation)**  
16 **Against DEFENDANTS**

17 36. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 35,  
18 inclusive, as if specifically set forth herein.

19 37. By committing the acts alleged in this Complaint, DEFENDANTS, at all times  
20 relevant to this action, and continuing through the present, has violated H&S Code §25249.6 by,  
21 in the course of doing business, knowingly and intentionally exposing individuals in California  
22 to a chemical known to the State of California to cause cancer or reproductive toxicity without  
23 first giving clear and reasonable warnings to such persons who use, consume or handle the  
24 SUBJECT PRODUCTS containing the LISTED CHEMICAL, pursuant to H&S Code §§  
25 25249.6 and 25249.11(f).

26 38. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code  
27 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure  
28 to the LISTED CHEMICAL from the SUBJECT PRODUCTS, in an amount in excess of \$1  
million.



1 **THE NEED FOR INJUNCTIVE RELIEF**

2 39. PLAINTIFF re-alleges and incorporates by this reference Paragraphs 1 through  
3 38, as if set forth below.

4 40. By committing the acts alleged in this Complaint, DEFENDANTS have caused  
5 or threaten to cause irreparable harm for which there is no plain, speedy or adequate remedy at  
6 law. In the absence of equitable relief, DEFENDANTS will continue to create a substantial risk  
7 of irreparable injury by continuing to cause consumers to be involuntarily and unwittingly  
8 exposed to the LISTED CHEMICAL through the use and/or handling of the SUBJECT  
9 PRODUCTS.

10 **PRAYER FOR RELIEF**

11 Wherefore, PLAINTIFF prays for the following relief:

12 A. A preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),  
13 enjoining DEFENDANTS, their agents, employees, assigns and all persons acting in concert or  
14 participating with DEFENDANTS, from manufacturing, distributing, marketing or selling the  
15 SUBJECT PRODUCTS in California without first providing a clear and reasonable warning,  
16 within the meaning of Proposition 65, that the users and/or handlers of the SUBJECT  
17 PRODUCTS are exposed to the LISTED CHEMICAL;

18 B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling  
19 DEFENDANTS to identify and locate each individual who has purchased the SUBJECT  
20 PRODUCTS since April 28, 2014, and to provide a warning to such person that the use of the  
21 SUBJECT PRODUCTS will expose the user to a chemical known to cause cancer, birth defects,  
22 and other reproductive harm;

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

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

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

2  
3 DATED: July 10, 2017

AQUA TERRA AERIS LAW GROUP

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6 Matthew C. Maclear  
7 Anthony M. Barnes  
8 Attorneys for Plaintiff  
9 Environmental Research Center, Inc.  
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# EXHIBIT A



Matthew Maclear  
[mcm@atalawgroup.com](mailto:mcm@atalawgroup.com)  
415-568-5200

April 28, 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:

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:

**Vitacost.com, Inc.**

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 28, 2017  
Page 2

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

1. **Harmonic Innerprizes Inc. HeartLight - Lead**
2. **Harmonic Innerprizes Inc. Toxin Therapy - Lead**
3. **Harmonic Innerprizes Etherium Black Re-Action Neutralizer - Lead**
4. **Harmonic Innerprizes Inc. Aulterra - Lead**
5. **Harmonic Innerprizes Inc. Etherium Pink (28.3g) - Lead**
6. **Harmonic Innerprizes Inc. Aulterra Nutrient Optimizer - Lead**
7. **Harmonic Innerprizes Etherium Gold Focused Brain - Lead**
8. **Harmonic Innerprizes SuperSilica Plus! - Lead**

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

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

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

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least April 28, 2014, 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 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, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 28, 2017  
Page 3

warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time consuming litigation.

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 black 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 Vitacost.com, Inc. and its Registered Agents 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 28, 2017  
Page 4

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Vitacost.com, 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 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: April 28, 2017

A handwritten signature in black ink that reads "Matthew Maclear". The signature is written in a cursive style with a large, looped initial "M".

Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 28, 2017  
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 28, 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 each of the parties listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President  
Vitacost.com, Inc.  
5400 Broken Sound Parkway NW,  
Suite 500  
Boca Raton, FL 33487

Corporation Service Company  
(Vitacost.com, Inc.'s Registered  
Agent for Service of Process)  
2711 Centerville Road, Suite 400  
Wilmington, DE 19808

Corporation Service Company  
(Vitacost.com, Inc.'s Registered  
Agent for Service of Process)  
1201 Hays Street  
Tallahassee, FL 32301

On April 28, 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

On April 28, 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 each of the parties listed below:

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

Michelle Latimer, Program Coordinator  
Lassen County  
220 S. Lassen Street  
Susanville, CA 96130  
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Notice of Violation of California Health & Safety Code §25249.5 *et seq.*

April 28, 2017

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On April 28, 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 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 28, 2017, in Fort Oglethorpe, Georgia.

Phyllis Dunwoody



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

April 28, 2017

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**Service List**

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012	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, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	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, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060	
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, Shasta County 1355 West Street Redding, CA 96001	
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, Sierra County PO Box 457 Downieville, CA 95936	
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, Siskiyou County Post Office Box 986 Yreka, CA 96097	
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, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
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, Sutter County 446 Second Street Yuba City, CA 95991	
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, Tehama County Post Office Box 519 Red Bluff, CA 96080	
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, Trinity County Post Office Box 310 Weaverville, CA 96093	
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, Tuolumne County 423 N. Washington Street Sonora, CA 95370	
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, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92401	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012	
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	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101	
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453			

**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.<sup>1</sup> 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](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 contaminant<sup>2</sup> 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 \$5B500 (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:

Date: April 28, 2017

Name of Noticing Party or attorney for Noticing Party: Environmental Research Center, Inc.

Address: 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108

Phone number: 619-500-3090

## **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: April 28, 2017

Name of Noticing Party or attorney for Noticing Party: Environmental Research Center, Inc.

Address: 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108

Phone number: 619-500-3090

**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](mailto:P65Public.Comments@oehha.ca.gov).

Revised: May 2014

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<sup>1</sup> 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>.

<sup>2</sup> 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