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Attorneys for Plaintiff
ENVIRONMENTAL RESEARCH CENTER, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiff,

v.

BARIATRICFUSION LLC, a Delaware limited
liability company, and DOES 1 – 25,

Defendants.

Case No.

RG18896392

**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
BARIATRICFUSION LLC ("BARIATRIC FUSION") and DOES 1-25 (hereinafter
individually referred to as "DEFENDANT" or collectively as "DEFENDANTS") to warn
consumers in California that they are being exposed to lead and cadmium, chemicals 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 (also known as and referred to hereinafter as "Proposition 65"),

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

- Bariatric Fusion Meal Replacement Fuel 4 Life Unflavored - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life Chocolate Peanut Butter - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life Cinnamon Bun - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life Chocolate Mousse - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life Mint Chocolate Ice Cream - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life Orange Cream - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life Chicken Soup - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life French Vanilla - Lead
- Bariatric Fusion Meal Replacement Fuel 4 Life Strawberry Shortcake – Lead
- Bariatric Fusion Protein Bar Chocolate Fudge – Lead, Cadmium
- Bariatric Fusion Protein Bar Chocolate Peanut Butter – Lead, Cadmium
- Bariatric Fusion Fuel 4 Life Soft Chews Tropical Flavor Sugar-Free - Lead
- Bariatric Fusion Fuel 4 Life Soft Chews Mixed Berry Flavor Sugar-Free - Lead

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

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

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

1 **PARTIES**

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

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

10 7. BARIATRICFUSION LLC is now, and was at all times relevant herein, a limited
11 liability company organized under the laws of Delaware and is doing business within the
12 meaning of H&S Code §25249.11.

13 8. DEFENDANTS own, administer, direct, control and/or operate facilities and/or
14 agents, distributors, sellers, marketers or other retail operations who place their SUBJECT
15 PRODUCTS into the stream of commerce in California (including but not limited to Alameda
16 County) under the brand name Bariatric Fusion and other brand names, which contain the
17 LISTED CHEMICALS without first giving clear and reasonable warnings.

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

26 10. In this Complaint, when reference is made to any act or omission of a DEFENDANT,
27 such allegation shall mean that the owners, officers, directors, agents, employees, contractors, or
28 representatives of DEFENDANT acted or authorized such actions, and/or negligently failed and

omitted to act or adequately and properly supervise, control or direct its employees and agents while engaged in the management, direction, operation or control of the affairs of the business organization. Whenever reference is made to any act or omission of any DEFENDANT, such allegation shall be deemed to mean the act or omission of each DEFENDANT acting individually, jointly, and severally as defined by Civil Code Section 1430 *et seq.*

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

JURISDICTION AND VENUE

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

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

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

STATUTORY BACKGROUND

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

16. To effect this goal, Proposition 65 requires that individuals be provided with a "clear

1 and reasonable warning" before being exposed to chemicals listed by the State of California as
2 causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent part:

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

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

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

15 **FACTUAL BACKGROUND**

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

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

28 21. On May 1, 1997, the State of California officially listed the chemical cadmium as a

1 chemical known to cause reproductive toxicity. Cadmium became subject to the warning
2 requirement one year later and was therefore subject to the “clear and reasonable” warning
3 requirements of Proposition 65 beginning on May 1, 1998. (27 CCR §25000, et seq.; H&S
4 Code §25249.5, et seq.). Due to the high toxicity of cadmium, the maximum allowable dose
5 level for cadmium is 4.1 µg/day (micrograms a day) for reproductive toxicity. (27 CCR §
6 25805(b).)

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

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

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

24 25. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use
25 in California since at least December 5, 2014. The SUBJECT PRODUCTS continue to be
26 distributed and sold in California without the requisite warning information.

27 26. As a proximate result of acts by DEFENDANTS, as persons in the course of doing
28 business within the meaning of Health & Safety Code §25249.11, individuals throughout the

1 State of California, including in the County of Alameda have been exposed to the LISTED
2 CHEMICALS without a clear and reasonable warning on the SUBJECT PRODUCTS. The
3 individuals subject to the violative exposures include normal and foreseeable users of the
4 SUBJECT PRODUCTS, as well as all other persons exposed to the SUBJECT PRODUCTS.

5 27. On December 5, 2017, ERC served BARIATRIC FUSION and each of the
6 appropriate public enforcement agencies with a document entitled "Notice of Violations of
7 California Health & Safety Code Section 25249.5" that provided BARIATRIC FUSION and the
8 public enforcement agencies with notice that BARIATRIC FUSION was in violation of
9 Proposition 65 for failing to warn purchasers and individuals using the SUBJECT PRODUCTS
10 that the use of the SUBJECT PRODUCTS exposes them to lead and/or cadmium, chemicals
11 known to the State of California to cause cancer and/or reproductive toxicity ("Prop. 65 Notice").
12 A true and correct copy of the 60-Day Notice ("NOTICE") is attached hereto as Exhibit A and
13 is hereby incorporated by reference, and is available on the Attorney General's website located
14 at <http://oag.ca.gov/prop65>.

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

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

26 30. The California Attorney General was provided a copy of the NOTICE and a Certificate
27 of Merit by the attorney for the noticing party, stating that there is a reasonable and meritorious
28 case for this action, and attaching factual information sufficient to establish a basis for the

1 certificate, including 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, pursuant to H&S Code §25249.7(h)
3 (2) via online submission.

4 31. After expiration of the sixty (60) day notice period, the appropriate public enforcement
5 agencies failed to commence and diligently prosecute a cause of action under H&S Code
6 §25249.5, *et seq.* against DEFENDANTS based on the allegations herein.

7
8 **Basis for Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.***
9 **concerning the SUBJECT PRODUCTS described in the December 5, 2017 Prop. 65**
Notice of Violation Against DEFENDANTS

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

12 33. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant
13 to this action, and continuing through the present, have violated, or threaten to violate, H&S Code
14 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals
15 in California to chemicals known to the State of California to cause cancer or reproductive toxicity
16 without first giving clear and reasonable warnings to such persons who use, consume or handle
17 the SUBJECT PRODUCTS containing the LISTED CHEMICALS, pursuant to H&S Code §§
18 25249.6 and 25249.11(f).

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

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

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

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

5
6 **FIRST CAUSE OF ACTION**

7 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the**
8 **SUBJECT PRODUCTS described in the December 5, 2017, Prop. 65 Notice of Violation)**
9 **Against DEFENDANTS**

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

12 39. By committing the acts alleged in this Complaint, DEFENDANTS at all times
13 relevant to this action, and continuing through the present, have violated H&S Code §25249.6 by,
14 in the course of doing business, knowingly and intentionally exposing individuals in California
15 to chemicals known to the State of California to cause cancer or reproductive toxicity without
16 first giving clear and reasonable warnings to such persons who use, consume or handle the
17 SUBJECT PRODUCTS containing the LISTED CHEMICALS, pursuant to H&S Code §§
18 25249.6 and 25249.11(f).

19 40. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code
20 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure
21 to the LISTED CHEMICALS from the SUBJECT PRODUCTS, in an amount in excess of \$1
22 million.

23 **PRAYER FOR RELIEF**

24 Wherefore, PLAINTIFF prays for the following relief:

25 A. A preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),
26 enjoining DEFENDANTS, their agents, employees, assigns and all persons acting in concert or
27 participating with DEFENDANTS, from manufacturing, distributing, marketing or selling the
28 SUBJECT PRODUCTS in California without first providing a clear and reasonable warning,

1 within the meaning of Proposition 65, that the users and/or handlers of the SUBJECT
2 PRODUCTS are exposed to the LISTED CHEMICALS;

3 B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling
4 DEFENDANTS to identify and locate each individual who has purchased the SUBJECT
5 PRODUCTS since December 5, 2014, and to provide a warning to such person that the use of
6 the SUBJECT PRODUCTS will expose the user to chemicals known to cause cancer, birth
7 defects, and other reproductive harm;

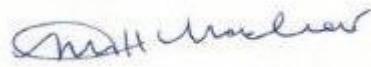
8 C. An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
9 against DEFENDANTS in the amount of \$2,500 per day for each violation of Proposition 65, in
10 an amount in excess of \$1 million, according to proof;

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

14 E. Such other and further relief as may be just and proper.
15

16 DATED: March 12, 2018

AQUA TERRA AERIS LAW GROUP

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19 Matthew C. Maclear
20 Anthony M. Barnes
21 Attorneys for Plaintiff
22 Environmental Research Center, Inc.
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EXHIBIT A



Matthew Maclear
mcm@atalawgroup.com
415-568-5200

December 5, 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:

BariatricFusion LLC

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

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

December 5, 2017

Page 2

1. **Bariatric Fusion Meal Replacement Fuel 4 Life Unflavored - Lead**
2. **Bariatric Fusion Meal Replacement Fuel 4 Life Chocolate Peanut Butter - Lead**
3. **Bariatric Fusion Meal Replacement Fuel 4 Life Cinnamon Bun - Lead**
4. **Bariatric Fusion Meal Replacement Fuel 4 Life Chocolate Mousse - Lead**
5. **Bariatric Fusion Meal Replacement Fuel 4 Life Mint Chocolate Ice Cream - Lead**
6. **Bariatric Fusion Meal Replacement Fuel 4 Life Orange Cream - Lead**
7. **Bariatric Fusion Meal Replacement Fuel 4 Life Chicken Soup - Lead**
8. **Bariatric Fusion Meal Replacement Fuel 4 Life French Vanilla - Lead**
9. **Bariatric Fusion Meal Replacement Fuel 4 Life Strawberry Shortcake - Lead**
10. **Bariatric Fusion Protein Bar Chocolate Fudge – Lead, Cadmium**
11. **Bariatric Fusion Protein Bar Chocolate Peanut Butter – Lead, Cadmium**
12. **Bariatric Fusion Fuel 4 Life Soft Chews Tropical Flavor Sugar-Free - Lead**
13. **Bariatric Fusion Fuel 4 Life Soft Chews Mixed Berry Flavor Sugar-Free - Lead**

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

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

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

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

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least December 5, 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 these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
December 5, 2017
Page 3

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 chemicals, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time-consuming litigation.

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

Sincerely,

A handwritten signature in dark ink, appearing to read "Matthew Maclear". The signature is written in a cursive, flowing style.

Matthew Maclear
AQUA TERRA AERIS LAW GROUP

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to BariatricFusion LLC 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.*
December 5, 2017
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CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by BariatricFusion LLC

I, Matthew Maclear, declare:

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

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemicals that are the subject of the notice.

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

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

Dated: December 5, 2017

Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
December 5, 2017
Page 5

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

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

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

On December 5, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO
BariatricFusion LLC
2741 Transit Road
Elma, NY 14059

The Corporation Trust Company
(BariatricFusion LLC's Registered
Agent for Service of Process)
Corporation Trust Center
1209 North Orange Street
Wilmington, DE 19801

LegalZoom.Com, Inc.
(BariatricFusion LLC's Registered
Agent for Service of Process)
101 North Brand Boulevard, 11th Floor
Glendale, CA 91203

On December 5, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** were served on the following party when a true and correct copy thereof was uploaded on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

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

On December 5, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:



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
mlatimer@co.lassen.ca.us

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

Allison Haley, District Attorney
Napa County
931 Parkway Mall
Napa, CA 94559
CEPD@countyofnapa.org

Paul E. Zellerbach, District Attorney
Riverside County
3072 Orange Street
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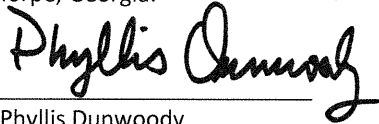
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On December 5, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by First Class Mail.

Executed on December 5, 2017, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink, appearing to read "Phyllis Dunwoody". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Phyllis Dunwoody



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

December 5, 2017

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APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

The text of Proposition 65 (Health and Safety Code Sections 25249.5 through 25249.13) is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.¹ These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

WHAT DOES PROPOSITION 65 REQUIRE?

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>.

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 make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

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

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

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

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

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

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

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

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business causing the exposure can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the “no observable effect level” divided by 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures to Naturally Occurring Chemicals in Food. Certain exposures to chemicals that naturally occur in foods (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant² it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

Discharges that do not result in a “significant amount” of the listed chemical entering any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a “significant amount” of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any detectable amount, except an amount that would meet the “no significant risk” level for

² See Section 25501(a)(4).

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 copy of the notice of special compliance procedure and proof of compliance form is included in Appendix B and can be downloaded from OEHHA's website at:
<http://oehha.ca.gov/prop65/law/p65law72003.html>.

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

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

Revised: May 2017

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11, Health and Safety Code.