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FILED  
ALAMEDA COUNTY

JUN 08 2018

*JUE PESHO*

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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,

vs.

LIFESTYLE EVOLUTION, INC., individually  
and doing business as NUGO NUTRITION, a  
Pennsylvania corporation; and DOES 1-25

Defendants.

Case No. RG 18904354

FIRST AMENDED 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 LIFESTYLE  
EVOLUTION, INC., individually and doing business as NUGO NUTRITION ("NUGO  
NUTRITION") 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

1 to hereinafter as “Proposition 65”), businesses must provide persons with a “clear and reasonable  
2 warning” before exposing individuals to chemicals known to the state to cause cancer or  
3 reproductive harm. DEFENDANTS manufacture, package, distribute, market, and/or sell in  
4 California certain products containing lead and/or cadmium (the “SUBJECT PRODUCTS”):

5 (1) NuGo Slim Chocolate Mint Dipped in Real Dark Chocolate – Lead,  
6 Cadmium

7 (2) NuGo Smarte Carb Sugar Free Peanut Butter Crunch – Lead

8 (3) NuGo Smarte Carb Sugar Free Chocolate Black Cherry - Lead

9 (4) NuGo Stronger Whey Protein Bar Peanut Cluster – Lead

10 (5) NuGo Stronger Whey Protein Bar Caramel Pretzel – Lead

11 (6) NuGo Dark Mocha Chocolate – Lead, Cadmium

12 (7) NuGo Dark Chocolate Chocolate Chip – Lead, Cadmium

13 (8) NuGo Dark Chocolate Pretzel With Sea Salt – Lead, Cadmium

14 (9) NuGo Dark Mint Chocolate Chip - Lead, Cadmium

15 (10) NuGo Organic Vegan Dark Chocolate Almond – Cadmium

16 (11) NuGo Slim Brownie Crunch – Lead, Cadmium

17 (12) NuGo Slim Raspberry Truffle – Lead, Cadmium

18 (13) NuGo Slim Crunchy Peanut Butter – Lead, Cadmium

19 (14) NuGo Stronger Cookies 'N Cream – Lead, Cadmium

20 (15) NuGo Fiber d'Lish Peanut Chocolate Chip- Lead

21 (16) NuGo Stronger Dark Chocolate Caramel with Real Dark Chocolate – Lead,  
22 Cadmium

23 (17) NuGo Slim Toasted Coconut – Lead, Cadmium

24 (18) NuGo Slim Crunchy Peanut Butter – Lead, Cadmium

25 (19) NuGo Organic Double Dark Chocolate – Lead, Cadmium

26 (20) NuGo Organic Dark Chocolate Pomegranate- Cadmium

27 (21) NuGo Fiber d'Lish Chocolate Brownie - Lead

28 (22) NuGo Nutrition to Go Coffee - Lead

1 (23) NuGo Free Gluten Free Dark Chocolate Trail Mix - Lead

2 (24) NuGo Free Gluten Free Dark Chocolate Crunch – Lead, Cadmium

3 (25) NuGo Slim Vegan Espresso Dipped In Real Dark Chocolate – Lead,  
4 Cadmium

5 (26) NuGO Slim Roasted Peanut Dipped In Real Dark Chocolate – Lead,  
6 Cadmium

7 (27) NuGo Dark Spicy Chocolate with Chili Peppers – Lead, Cadmium

8 (28) NuGo Dark Chocolate Coconut – Lead

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

11 3. Consumption of the SUBJECT PRODUCTS causes exposures to the LISTED  
12 CHEMICALS at levels requiring a “clear and reasonable warning” under Proposition 65.  
13 DEFENDANTS exposed consumers to the LISTED CHEMICALS and have failed to provide  
14 the health hazard warnings required by Proposition 65.

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

19 **PARTIES**

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

23 6. ERC is a person within the meaning of H&S Code §25249.11 and brings this  
24 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code §  
25 25249.7 (d) specifies that actions to enforce Proposition 65 may be brought by a person in the  
26 public interest, provided certain notice requirements and no other public prosecutor is diligently  
27 prosecuting an action for the same violation(s).  
28

1 7. NUGO NUTRITION is now, and was at all times relevant herein, a corporation  
2 organized under the laws of Pennsylvania and is doing business within the meaning of H&S  
3 Code §25249.11.

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

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

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

26 11. PLAINTIFF does not know the true names, capacities and liabilities of  
27 DEFENDANTS DOES Nos. 1-25, inclusive, and therefore sues them under fictitious names.  
28 PLAINTIFF will amend this Amended Complaint to allege the true name and capacities of the

1 DOE Defendants upon being ascertained. Each of these Defendants was in some way legally  
2 responsible for the acts, omissions, and/or violations alleged herein.

3 **JURISDICTION AND VENUE**

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

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

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

16 **STATUTORY BACKGROUND**

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

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

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

26 17. An exposure to a chemical in a consumer product is one “which results from a  
27 person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a  
28 consumer good, or any exposure that results from receiving a consumer service.” (Cal. Code

1 Regs., tit. 22, § 12601, subd. (b).)

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

7 **FACTUAL BACKGROUND**

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

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

20 21. On May 1, 1997, the State of California officially listed the chemical cadmium as a  
21 chemical known to cause reproductive toxicity. Cadmium became subject to the warning  
22 requirement one year later and was therefore subject to the “clear and reasonable” warning  
23 requirements of Proposition 65 beginning on May 1, 1998. (27 CCR §25000, *et seq.*; H&S  
24 Code §25249.5, *et seq.*). Due to the high toxicity of cadmium, the maximum allowable dose  
25 level for cadmium is 4.1 µg/day (micrograms a day) for reproductive toxicity. (27 CCR §  
26 25805(b).)

27 22. On October 1, 1987, the State of California officially listed the chemicals cadmium  
28 and cadmium compounds as chemicals known to cause cancer. Cadmium and cadmium

1 compounds became subject to the warning requirement one year later and were therefore  
2 subject to the “clear and reasonable” warning requirements of Proposition 65 beginning on  
3 October 1, 1988 (27 CCR §25000, et seq.; H&S Code §25249.6 *et seq.*).

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

13 24. At all times relevant to this action, DEFENDANTS, therefore, have knowingly and  
14 intentionally exposed the consumers of the SUBJECT PRODUCTS to the LISTED  
15 CHEMICALS without first giving a clear and reasonable warning to such individuals.

16 25. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use  
17 in California since at least February 28, 2015. The SUBJECT PRODUCTS continue to be  
18 distributed and sold in California without the requisite warning information.

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

25 27. On February 28, 2018, March 15, 2018, and April 6, 2018, ERC served NUGO  
26 NUTRITION and each of the appropriate public enforcement agencies with a document entitled  
27 “Notice of Violations of California Health & Safety Code Section 25249.5” that provided NUGO  
28 NUTRITION and the public enforcement agencies with notice that NUGO NUTRITION was in

1 violation of Proposition 65 for failing to warn purchasers and individuals using the SUBJECT  
2 PRODUCTS that the consumption of the SUBJECT PRODUCTS exposes them to lead and/or  
3 cadmium, chemicals known to the State of California to cause cancer and/or reproductive  
4 toxicity (“Prop. 65 Notices”). True and correct copies of the 60-Day Notices (“NOTICES”) are  
5 attached hereto as Exhibits A, B, and C respectively and each is hereby incorporated by reference  
6 and is available on the Attorney General’s website located at <http://oag.ca.gov/prop65>.

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

15 29. NUGO NUTRITION was also provided with the NOTICES a copy of the document  
16 entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A  
17 Summary," which is also known as Appendix A to Title 27 of CCR §25903, via Certified Mail.

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

24 31. After expiration of the sixty (60) day notice period, the appropriate public enforcement  
25 agencies failed to commence and diligently prosecute a cause of action under H&S Code  
26 §25249.5, *et seq.* against DEFENDANTS based on the allegations herein.

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**FIRST CAUSE OF ACTION**

**(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the SUBJECT PRODUCTS described in the February 28, 2018, March 15, 2018, and April 6, 2018 Prop. 65 Notices of Violation) Against DEFENDANTS**

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

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

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

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

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

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

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1 **SECOND CAUSE OF ACTION**

2 (Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the  
3 SUBJECT PRODUCTS described in the February 28, 2018, March 15, 2018, and April 6,  
4 2018 Prop. 65 Notices of Violation) Against DEFENDANTS

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

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

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

18 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

27 **PRAYER FOR RELIEF**

28 Wherefore, PLAINTIFF prays for the following relief:

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

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

6 B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling  
7 DEFENDANTS to identify and locate each individual who has purchased the SUBJECT  
8 PRODUCTS since February 28, 2015, and to provide a warning to such person that the  
9 consumption of the SUBJECT PRODUCTS will expose the consumer to chemicals known to  
10 cause cancer, birth defects, and other reproductive harm;

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

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

17 E. Such other and further relief as may be just and proper.  
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19 DATED: June 8, 2018

AQUA TERRA AERIS LAW GROUP

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23 \_\_\_\_\_  
24 Matthew C. Maclear  
25 Anthony M. Barnes  
26 Attorneys for Plaintiff  
27 Environmental Research Center, Inc.  
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# **EXHIBIT A**



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

Anthony Barnes  
[amb@atalawgroup.com](mailto:amb@atalawgroup.com)  
415-326-3173

February 28, 2018

**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:

**Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition**

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

- 1. NuGo Slim Chocolate Mint Dipped in Real Dark Chocolate – Lead, Cadmium**



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2. NuGo Smarte Carb Sugar Free Peanut Butter Crunch - Lead
3. NuGo Smarte Carb Sugar Free Chocolate Black Cherry - Lead
4. NuGo Stronger Whey Protein Bar Peanut Cluster - Lead
5. NuGo Stronger Whey Protein Bar Caramel Pretzel - Lead
6. NuGo Dark Mocha Chocolate – Lead, Cadmium
7. NuGo Dark Chocolate Chocolate Chip – Lead, Cadmium
8. NuGo Dark Chocolate Pretzel With Sea Salt – Lead, Cadmium
9. NuGo Dark Mint Chocolate Chip - Lead, Cadmium
10. NuGo Organic Vegan Dark Chocolate Almond - Cadmium
11. NuGo Slim Brownie Crunch – Lead, Cadmium
12. NuGo Slim Raspberry Truffle – Lead, Cadmium
13. NuGo Slim Crunchy Peanut Butter – Lead, Cadmium
14. NuGo Stronger Cookies 'N Cream – Lead, Cadmium
15. NuGo Fiber d'Lish Peanut Chocolate Chip- Lead
16. NuGo Stronger Dark Chocolate Caramel with Real Dark Chocolate – Lead, Cadmium
17. NuGo Slim Toasted Coconut – Lead, Cadmium
18. NuGo Slim Crunchy Peanut Butter – Lead, Cadmium
19. NuGo Organic Double Dark Chocolate – Lead, Cadmium
20. NuGo Organic Dark Chocolate Pomegranate- Cadmium

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

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

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

**Route of Exposure.** The consumer exposures that are the subject of this notice result from the 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 February 28, 2015, 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



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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 ingesting these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the 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", is written over a horizontal line.

Matthew Maclear  
AQUA TERRA AERIS LAW GROUP

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition)
- Additional Supporting Information for Certificate of Merit (to AG only)



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

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition**

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: February 28, 2018

A handwritten signature in cursive script that reads "Matthew Maclear".

Matthew Maclear





Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
February 28, 2018  
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 February 28, 2018 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  
Lifestyle Evolution, Inc., individually  
and doing business as NuGo Nutrition  
520 Second Street  
Oakmont, PA 15139

Current President or CEO  
Lifestyle Evolution, Inc., individually  
and doing business as NuGo Nutrition  
817 Main Street  
Pittsburgh, PA 15215

On February 28, 2018 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 February 28, 2018 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



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
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Dije Ndreu, Deputy District Attorney  
Monterey County  
1200 Aguajito Road  
Monterey, CA 93940  
Prop65DA@co.monterey.ca.us

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

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

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

Gregory Alker, Assistant District Attorney  
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gregory.alker@sfgov.org

Tori Verber Salazar, District Attorney  
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Stockton, CA 95202  
DAConsumer.Environmental@sjcda.org

Eric J. Dobroth, Deputy District Attorney  
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edobroth@co.slo.ca.us

Yen Dang, Supervising Deputy District Attorney  
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San Jose, CA 95110  
EPU@da.sccgov.org

Jeffrey S. Rosell, District Attorney  
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Santa Cruz, CA 95060  
Prop65DA@santacruzcounty.us

Stephan R. Passalacqua, District Attorney  
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jbarnes@sonoma-county.org

Phillip J. Cline, District Attorney  
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Visalia, CA 95370  
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Gregory D. Totten, District Attorney  
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daspecialops@ventura.org

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



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
February 28, 2018  
Page 7

On February 28, 2018 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 February 28, 2018, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink that reads "Phyllis Dunwoody". The signature is written in a cursive style with a long, sweeping tail on the final letter.

\_\_\_\_\_  
Phyllis Dunwoody



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
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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 Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
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	
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, Shasta County 1355 West Street Redding, CA 96001	
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, Sierra County 100 Courthouse Square, 2 <sup>nd</sup> Floor Downieville, CA 95936	
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, Siskiyou County Post Office Box 986 Yreka, CA 96097	
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, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
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, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Sutter County 463 2 <sup>nd</sup> Street Yuba City, CA 95991	
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, Tehama County Post Office Box 519 Red Bluff, CA 96080	
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, Trinity County Post Office Box 310 Weaverville, CA 96093	
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, Tuolumne County 423 N. Washington Street Sonora, CA 95370	
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, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901	
District Attorney, Inyo County P.O. Drawer D Independence, CA 93526	District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, San Bernardino County 303 West Third Street San Bernardino, CA 92415	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101	
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 Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102	
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. 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.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

#### *WHAT DOES PROPOSITION 65 REQUIRE?*

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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>.

**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 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 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

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<sup>2</sup> 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](mailto: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.

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# **EXHIBIT B**



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

Anthony Barnes  
[amb@atalawgroup.com](mailto:amb@atalawgroup.com)  
415-326-3173

March 15, 2018

**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:

**Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition**

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

1. NuGo Fiber d'Lish Chocolate Brownie - Lead

Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
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2. **NuGo Nutrition to Go Coffee - Lead**
3. **NuGo Free Gluten Free Dark Chocolate Trail Mix - Lead**
4. **NuGo Free Gluten Free Dark Chocolate Crunch – Lead, Cadmium**
5. **NuGo Slim Vegan Espresso Dipped In Real Dark Chocolate – Lead, Cadmium**
6. **NuGO Slim Roasted Peanut Dipped In Real Dark Chocolate – Lead, Cadmium**
7. **NuGo Dark Spicy Chocolate with Chili Peppers – Lead, Cadmium**

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

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

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

**Route of Exposure.** The consumer exposures that are the subject of this notice result from the 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 March 15, 2015, 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 ingesting these products with appropriate warnings that they are being exposed to these chemicals.

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



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
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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 black ink that reads "Matthew Maclear". The signature is written in a cursive style with a large, looped initial "M".

---

Matthew Maclear  
AQUA TERRA AERIS LAW GROUP

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition)
- Additional Supporting Information for Certificate of Merit (to AG only)



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
March 15, 2018  
Page 4

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition**

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.

A handwritten signature in cursive script that reads "Matthew Maclear".

Dated: March 15, 2018

\_\_\_\_\_  
Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
March 15, 2018  
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 March 15, 2018 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  
Lifestyle Evolution, Inc., individually  
and doing business as NuGo Nutrition  
520 Second Street  
Oakmont, PA 15139

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

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Contra Costa County  
900 Ward Street  
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Michelle Latimer, Program Coordinator  
Lassen County  
220 S. Lassen Street  
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mlatimer@co.lassen.ca.us



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Tori Verber Salazar, District Attorney  
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Stockton, CA 95202  
DAConsumer.Environmental@sjcda.org

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

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70 W Hedding St  
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EPU@da.sccgov.org

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jbarnes@sonoma-county.org

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Visalia, CA 95370  
Prop65@co.tulare.ca.us

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

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





Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
March 15, 2018  
Page 7

On March 15, 2018 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 March 15, 2018, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink that reads "Phyllis Dunwoody". The signature is written in a cursive, flowing style.

Phyllis Dunwoody



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
March 15, 2018  
Page 8

**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 Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113
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	
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, Shasta County 1355 West Street Redding, CA 96001	
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, Sierra County 100 Courthouse Square, 2 <sup>nd</sup> Floor Downieville, CA 95936	
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, Siskiyou County Post Office Box 986 Yreka, CA 96097	
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, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
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, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Sutter County 463 2 <sup>nd</sup> Street Yuba City, CA 95991	
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, Tehama County Post Office Box 519 Red Bluff, CA 96080	
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, Trinity County Post Office Box 310 Weaverville, CA 96093	
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, Tuolumne County 423 N. Washington Street Sonora, CA 95370	
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, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901	
District Attorney, Inyo County P.O. Drawer D Independence, CA 93526	District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, San Bernardino County 303 West Third Street San Bernardino, CA 92415	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101	
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 Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102	
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. 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.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

#### *WHAT DOES PROPOSITION 65 REQUIRE?*

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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>.

**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 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 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

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<sup>2</sup> 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](mailto: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.

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# EXHIBIT C





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

Anthony Barnes  
[amb@atalawgroup.com](mailto:amb@atalawgroup.com)  
415-326-3173

April 6, 2018

**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 product 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 this product. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Health and Safety Code Section 25249.7(d), 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:

**Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition**



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 6, 2018  
Page 2

**Consumer Product and Listed Chemical.** The product that is the subject of this notice and the chemical in that product identified as exceeding allowable levels are:

**NuGo Dark Chocolate Coconut - 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 this product. 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 6, 2015, as well as every day since the product was 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 product. 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 ingesting this product 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 product so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of this product; (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 product 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.



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 6, 2018  
Page 3

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

---

Matthew Maclear  
**AQUA TERRA AERIS LAW GROUP**

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition)
- Additional Supporting Information for Certificate of Merit (to AG only)



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 6, 2018  
Page 4

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Lifestyle Evolution, Inc., individually and doing business as NuGo Nutrition**

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.

A handwritten signature in cursive script that reads "Matthew Maclear".

Dated: April 6, 2018

\_\_\_\_\_  
Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 6, 2018  
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 April 6, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified 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”** were served on the following party when a true and correct copy thereof was sent via electronic mail to the party listed below:

Lifestyle Evolution, Inc. individually and doing  
Business as NuGo Nutrition  
c/o Judith M. Praitis  
Sidley Austin LLP  
555 West Fifth Street, Suite 4000  
Los Angeles, CA 90013-1010  
Email: [jpraitis@sidley.com](mailto:jpraitis@sidley.com)

On April 6, 2018 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  
Lifestyle Evolution, Inc., individually  
and doing business as NuGo Nutrition  
520 Second Street  
Oakmont, PA 15139

Current President or CEO  
Lifestyle Evolution, Inc., individually  
and doing business as NuGo Nutrition  
817 Main Street  
Pittsburgh, PA 15215

On April 6, 2018 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> :



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*  
April 6, 2018  
Page 6

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

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

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Prop65@sacda.org

Michelle Latimer, Program Coordinator  
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DAConsumer.Environmental@sjcda.org

Allison Haley, District Attorney  
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CEPD@countyofnapa.org

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edobroth@co.slo.ca.us

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

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



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

April 6, 2018

Page 7

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

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

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

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

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

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Executed on April 6, 2018, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink that reads "Phyllis Dunwoody". The signature is written in a cursive, flowing style.

Phyllis Dunwoody



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

April 6, 2018

Page 8

**Service List**

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1225 Fallon Street, Suite 900  
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District Attorney, Alpine County  
P.O. Box 248  
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District Attorney, Amador County  
708 Court Street, Suite 202  
Jackson, CA 95642

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

District Attorney, Calaveras County  
891 Mountain Ranch Road  
San Andreas, CA 95249

District Attorney, Colusa County  
346 Fifth Street Suite 101  
Colusa, CA 95932

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Crescent City, CA 95531

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Placerville, CA 95667

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District Attorney, Glenn County  
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Willows, CA 95988

District Attorney, Humboldt County  
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Eureka, CA 95501

District Attorney, Imperial County  
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El Centro, CA 92243

District Attorney, Inyo County  
P.O. Drawer D  
Independence, CA 93526

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

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

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

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

District Attorney, Madera County  
209 West Yosemite Avenue  
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Alturas, CA 96101-4020

District Attorney, Mono County  
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201 Commercial Street  
Nevada City, CA 95959

District Attorney, Orange County  
401 West Civic Center Drive  
Santa Ana, CA 92701

District Attorney, Placer County  
10810 Justice Center Drive, Ste 240  
Roseville, CA 95678

District Attorney, Plumas County  
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Quincy, CA 95971

District Attorney, San Benito  
County  
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Hollister, CA 95023

District Attorney, San Bernardino  
County  
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District Attorney, San Mateo County  
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Redwood City, CA 94063

District Attorney, Santa Barbara  
County  
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Santa Barbara, CA 93101

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

District Attorney, Sierra County  
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Downieville, CA 95936  
District Attorney, Siskiyou County  
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Yreka, CA 96097

District Attorney, Solano County  
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Fairfield, CA 94533

District Attorney, Stanislaus County  
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Modesto, CA 95354

District Attorney, Sutter County  
463 2<sup>nd</sup> Street  
Yuba City, CA 95991

District Attorney, Tehama County  
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Red Bluff, CA 96080

District Attorney, Trinity County  
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Weaverville, CA 96093

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

District Attorney, Yuba County  
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Marysville, CA 95901

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

San Diego City Attorney's Office  
1200 3rd Avenue, Ste 1620  
San Diego, CA 92101

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San Jose, CA 95113



## APPENDIX A

### OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. 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.<sup>1</sup> These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

#### *WHAT DOES PROPOSITION 65 REQUIRE?*

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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>.

**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 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 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

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<sup>2</sup> 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](mailto: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.