MATTHEW C. MACLEAR (SBN 209228)
ANTHONY M. BARNES (SBN 199048)
AQUA TERRA AERIS LAW GROUP
490 43rd Street
Suite 108
Oakland, CA 94609
Ph: 415.326.3173 |
Email: amb@atalawgroup.com

Attorneys for Plaintiff
ENVIRONMENTAL RESEARCH CENTER, INC.

ENDORSED
FILED
ALAMEDA COUNTY

AUG 20 2018

CLERK OF THE SUPERIOR COURT
By CURTIYAH GANTER
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

| | |
|---|---|
| ENVIRONMENTAL RESEARCH CENTER, INC., a non-profit California corporation,<br><br>Plaintiff,<br><br>v.<br><br>1908 BRANDS, INC., a Colorado corporation; and DOES 1 – 25,<br><br>Defendants. | Case No. RG18917359<br><br>**COMPLAINT FOR PERMANENT INJUNCTION, CIVIL PENALTIES AND OTHER RELIEF**<br><br>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 1908 BRANDS, INC. ("1908 BRANDS") 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, cadmium and/or acrylamide, chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm. According to the Safe Drinking Water and Toxics Enforcement Act of 1986, Health and Safety Code ("H&S Code")

section 25249.5 (also known as and referred to hereinafter as "Proposition 65"), businesses must provide persons with a "clear and reasonable warning" before exposing individuals to chemicals known to the state to cause cancer or reproductive harm. DEFENDANTS manufacture, package, distribute, market, and/or sell in California certain products containing lead, cadmium, and/or acrylamide (the "SUBJECT PRODUCTS"): (1) Thrive Tribe Paleo Snack Bar Chocolate Almond (lead, cadmium), (2) Thrive Tribe Paleo Snack Bar Apricot Pecan (lead, cadmium), (3) Thrive Tribe Paleo Snack Bar Dark Espresso (lead), (4) Thrive Tribe Paleo Snack Bar Cranberry Cashew (lead), (5) Thrive Tribe Paleo Bites Snack Clusters Maple Walnut (lead, acrylamide), (6) Thrive Tribe Bites Paleo Snack Clusters Ginger Root (lead, acrylamide), (7) Thrive Tribe Paleo Bites Snack Clusters Vanilla Almond (lead, acrylamide), (8) Thrive Tribe Paleo Bites Snack Clusters Cacao Nib (lead, cadmium, acrylamide), (9) Thrive Tribe Coconut Chips Vanilla (lead, acrylamide), (10) Thrive Tribe Coconut Chips Original (lead, acrylamide), (11) Thrive Tribe Coconut Chips Smokey BBQ (acrylamide), (12) Thrive Tribe Bites Paleo Snack Clusters Banana Chip (acrylamide), (13) Thrive Tribe Coconut Chips Toasted Onion (acrylamide), and (14) Thrive Tribe Paleo Bites Snack Clusters Apple Cinnamon (acrylamide).

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

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

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

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## PARTIES

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

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

7. 1908 BRANDS is now, and was at all times relevant herein, a corporation organized under the laws of Colorado and is doing business within the meaning of H&S Code §25249.11.

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

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

10. In this Complaint, when reference is made to any act or omission of a DEFENDANT, such allegation shall mean that the owners, officers, directors, agents, employees, contractors, or representatives of DEFENDANT acted or authorized such actions, and/or negligently failed and omitted to act or adequately and properly supervise, control or direct its employees and agents

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

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

## JURISDICTION AND VENUE

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

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

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

## STATUTORY BACKGROUND

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

16. To effectuate this goal, Proposition 65 requires that individuals be provided with a "clear and reasonable warning" before being exposed to chemicals listed by the State of

California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent part:

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

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

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

**FACTUAL BACKGROUND**

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

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

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

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

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

23. Acrylamide was officially listed as a chemical known to cause cancer on January 1, 1990. On February 25, 2011, the State of California officially listed acrylamide as a chemical known to cause developmental toxicity and male reproductive toxicity. (State of California EPA OEHHA Safe Drinking Water and Toxic Enforcement Act of 1986 Chemicals Known to the State to Cause Cancer and Reproductive Toxicity.) The MADL for acrylamide as a chemical known to cause reproductive toxicity is 140 micrograms per day. (Cal. Code Regs., tit. 27, §25805, subd. (b).) The No Significant Risk Level ("NSRL") for acrylamide as a chemical known to cause cancer is 0.2 micrograms per day. (Cal. Code Regs., tit. 27, §25705, subd. (b).)

24. To test DEFENDANTS' SUBJECT PRODUCTS for lead, cadmium and acrylamide, PLAINTIFF hired a well-respected and accredited testing laboratory. The results of testing undertaken by PLAINTIFF of DEFENDANTS' SUBJECT PRODUCTS show that the SUBJECT PRODUCTS tested were in violation of the 0.5 µg/day "safe harbor" daily dose limits set forth for lead, and/or 4.1 µg/day "safe harbor" daily dose limits for cadmium, and/or 0.2 µg/day NSRL for acrylamide in Proposition 65's regulations. Very significant is the fact that people are being exposed to lead, cadmium, and/or acrylamide through ingestion as opposed to other not as harmful methods of exposure such as dermal exposure. Ingestion of lead, cadmium,

and/or acrylamide produces much higher exposure levels and health risks than dermal exposure to these chemicals.

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

26. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use in California since at least April 20, 2015. The SUBJECT PRODUCTS continue to be distributed and sold in California without the requisite warning information.

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

28. On April 20, 2018 and June 8, 2018, ERC served 1908 BRANDS and each of the appropriate public enforcement agencies with documents entitled "Notice of Violations of California Health & Safety Code Section 25249.5" that provided 1908 BRANDS and the public enforcement agencies with notice that 1908 BRANDS was in violation of Proposition 65 for failing to warn purchasers and individuals using the SUBJECT PRODUCTS that the consumption of the SUBJECT PRODUCTS exposes them to lead, cadmium and/or acrylamide, chemicals known to the State of California to cause cancer and/or reproductive toxicity ("Prop. 65 Notices"). True and correct copies of the 60-Day Notices ("NOTICES") are attached hereto as **Exhibits A and B** respectively and each is incorporated by reference. The NOTICES are also available on the Attorney General's website located at http://oag.ca.gov/prop65.

29. The NOTICES were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to be given to certain public enforcement agencies and to the violator. The NOTICES included, *inter alia,* the following information: the name, address, and telephone number of the

noticing individual; the name of the alleged violator; the statute violated; the approximate time period during which violations occurred; and descriptions of the violations including the chemicals involved, the routes of toxic exposure, and the specific product or type of product causing the violations.

30. 1908 BRANDS was also provided copies of the document with the NOTICES entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is also known as Appendix A to Title 27 of CCR §25903, via Certified Mail.

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

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

## FIRST CAUSE OF ACTION

**(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the SUBJECT PRODUCTS described in the April 20, 2018 and June 8, 2018 Prop. 65 NOTICES of Violation) Against DEFENDANTS**

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

34. By committing the acts alleged in this 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).

35. 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.

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

37. 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.

38. 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.

## SECOND CAUSE OF ACTION

**(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the SUBJECT PRODUCTS described in the April 20, 2018 and June 8, 2018 Prop. 65 NOTICES of Violation) Against DEFENDANTS**

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

40. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant to this action, and continuing through the present, have violated 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).

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

million.

**THE NEED FOR INJUNCTIVE RELIEF**

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

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

**PRAYER FOR RELIEF**

Wherefore, PLAINTIFF prays for the following relief:

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

B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling DEFENDANTS to identify and locate each individual who has purchased the SUBJECT PRODUCTS since April 20, 2015, and to provide a warning to such person that the consumption of the SUBJECT PRODUCTS will expose the consumer to chemicals known to cause cancer, birth defects, and other reproductive harm;

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

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

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

DATED: August 20, 2018

AQUA TERRA AERIS LAW GROUP

Matthew C. Maclear
Anthony M. Barnes
Attorneys for Plaintiff
Environmental Research Center, Inc.

# EXHIBIT A

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

**Anthony Barnes**
amb@atalawgroup.com
**415-326-3173**

April 20, 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:

**1908 Brands, Inc.**



*828 San Pablo Avenue*
*Suite 115B*
*Albany, CA 94706*
*mcm@atalawgroup.com*
*amb@atalawgroup.com*
*(415) 568-5200*
*(415)-326-3173*

**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. **Thrive Tribe Paleo Snack Bar Chocolate Almond – Lead, Cadmium**
2. **Thrive Tribe Paleo Snack Bar Apricot Pecan – Lead, Cadmium**
3. **Thrive Tribe Paleo Snack Bar Dark Espresso - Lead**
4. **Thrive Tribe Paleo Snack Bar Cranberry Cashew – Lead**

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

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

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

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

**Approximate Time Period of Violations**. Ongoing violations have occurred every day since at least April 20, 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



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*mcm@atalawgroup.com*
*amb@atalawgroup.com*
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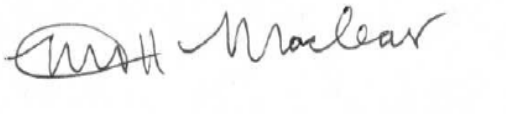
*(415)-326-3173*

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,



Matthew Maclear
**AQUA TERRA AERIS LAW GROUP**

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to 1908 Brands, Inc. and its Registered Agent for Service of Process only)
Additional Supporting Information for Certificate of Merit (to AG only)



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*Suite 115B*
*Albany, CA 94706*
*mcm@atalawgroup.com*
*amb@atalawgroup.com*
*(415) 568-5200*
*(415)-326-3173*

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by 1908 Brands, Inc.**

I, Matthew Maclear, declare:

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

2. I am an attorney for the noticing party.

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

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

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

Dated: April 20, 2018 _____

Matthew Maclear



828 San Pablo Avenue
Suite 115B
Albany, CA 94706

mcm@atalawgroup.com
amb@atalawgroup.com

(415) 568-5200
(415)-326-3173

## 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 20, 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
1908 Brands, Inc.
2100 Central Avenue, Suite 201
Boulder, CO 80301

Steve Savage
(Registered Agent for 1908 Brands, Inc.)
2100 Central Avenue, Suite 201
Boulder, CO 80301

On April 20, 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 April 20, 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



*828 San Pablo Avenue*
*Suite 115B*
*Albany, CA 94706*
*mcm@atalawgroup.com*
*amb@atalawgroup.com*
*(415) 568-5200*
*(415)-326-3173*

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

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

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

Christopher Dalbey, Deputy District Attorney
Santa Barbara County
1112 Santa Barbara Street
Santa Barbara, CA 93101
DAProp65@co.santa-barbara.ca.us

Paul E. Zellerbach, District Attorney
Riverside County
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

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

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

Kathryn L. Turner, Chief Deputy City Attorney
San Diego City Attorney
1200 Third Avenue
San Diego, CA 92101
CityAttyCrimProp65@sandiego.gov

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

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

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

Tori Verber Salazar, District Attorney
San Joaquin County
222 E. Weber Avenue, Room 202
Stockton, CA 95202
DAConsumer.Environmental@sjcda.org

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



828 San Pablo Avenue
Suite 115B
Albany, CA 94706
mcm@atalawgroup.com
amb@atalawgroup.com
(415) 568-5200
(415)-326-3173

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

On April 20, 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 April 20, 2018, in Fort Oglethorpe, Georgia.

Phyllis Dunwoody



*828 San Pablo Avenue*
*Suite 115B*
*Albany, CA 94706*

*mcm@atalawgroup.com*
*amb@atalawgroup.com*

*(415) 568-5200*
*(415)-326-3173*

## Service List

District Attorney, Alameda County
1225 Fallon Street, Suite 900
Oakland, CA 94612

District Attorney, Alpine County
P.O. Box 248
Markleeville, CA 96120

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

District Attorney, Del Norte County
450 H Street, Room 171
Crescent City, CA 95531

District Attorney, El Dorado County
515 Main Street
Placerville, CA 95667

District Attorney, Fresno County
2220 Tulare Street, Suite 1000
Fresno, CA 93721

District Attorney, Glenn County
Post Office Box 430
Willows, CA 95988

District Attorney, Humboldt County
825 5th Street 4th Floor
Eureka, CA 95501

District Attorney, Imperial County
940 West Main Street, Ste 102
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
Madera, CA 93637

District Attorney, Marin County
3501 Civic Center Drive, Room 130
San Rafael, CA 94903

District Attorney, Mariposa County
Post Office Box 730
Mariposa, CA 95338

District Attorney, Mendocino County
Post Office Box 1000
Ukiah, CA 95482

District Attorney, Merced County
550 W. Main Street
Merced, CA 95340

District Attorney, Modoc County
204 S Court Street, Room 202
Alturas, CA 96101-4020

District Attorney, Mono County
Post Office Box 617
Bridgeport, CA 93517

District Attorney, Nevada County
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
520 Main Street, Room 404
Quincy, CA 95971

District Attorney, San Benito County
419 Fourth Street, 2nd Floor
Hollister, CA 95023

District Attorney,San Bernardino County
303 West Third Street
San Bernadino, CA 92415

District Attorney, San Diego County
330 West Broadway, Suite 1300
San Diego, CA 92101

District Attorney, San Mateo County
400 County Ctr., 3rd Floor
Redwood City, CA 94063

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

District Attorney, Sierra County
100 Courthouse Square, 2nd Floor
Downieville, CA 95936

District Attorney, Siskiyou County
Post Office Box 986
Yreka, CA 96097

District Attorney, Solano County
675 Texas Street, Ste 4500
Fairfield, CA 94533

District Attorney, Stanislaus County
832 12th Street, Ste 300
Modesto, CA 95354

District Attorney, Sutter County
463 2nd Street
Yuba City, CA 95991

District Attorney, Tehama County
Post Office Box 519
Red Bluff, CA 96080

District Attorney, Trinity County
Post Office Box 310
Weaverville, CA 96093

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

District Attorney, Yuba County
215 Fifth Street, Suite 152
Marysville, CA 95901

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

San Francisco, City Attorney
City Hall, Room 234
1 Dr Carlton B Goodlett PL
San Francisco, CA 94102

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



828 San Pablo Avenue
Suite 115B
Albany, CA 94706

mcm@atalawgroup.com
amb@atalawgroup.com

(415) 568-5200
(415)-326-3173

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

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

## *WHAT DOES PROPOSITION 65 REQUIRE?*

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

***The "Proposition 65 List."*** Under Proposition 65, the lead agency (OEHHA) publishes a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. Chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at: http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

Only those chemicals that are on the list are regulated under Proposition 65. Businesses that produce, use, release or otherwise engage in activities involving listed chemicals must comply with the following:

***Clear and reasonable warnings.*** A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical unless an exemption applies. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

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

*DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?*

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

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

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

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

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

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

***Exposures to Naturally Occurring Chemicals in Food.*** Certain exposures to chemicals that naturally occur in foods (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant[2] it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

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

[2] See Section 25501(a)(4).

chemicals that cause cancer or that is 1,000 times below the “no observable effect” level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

*HOW IS PROPOSITION 65 ENFORCED?*

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of Title 27 and sections 3100-3103 of Title 11. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an enforcement action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to $2,500 per day for each violation. In addition, the business may be ordered by a court to stop committing the violation.

A private party may not file an enforcement action based on certain exposures if the alleged violator meets specific conditions. For the following types of exposures, the Act provides an opportunity for the business to correct the alleged violation:

- An exposure to alcoholic beverages that are consumed on the alleged violator's premises to the extent onsite consumption is permitted by law;

- An exposure to a Proposition 65 listed chemical in a food or beverage prepared and sold on the alleged violator's premises that is primarily intended for immediate consumption on- or off-premises. This only applies if the chemical was not intentionally added to the food, and was formed by cooking or similar preparation of food or beverage components necessary to render the food or beverage palatable or to avoid microbiological contamination;

- An exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises;

- An exposure to listed chemicals in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking non-commercial vehicles.

If a private party alleges that a violation occurred based on one of the exposures described above, the private party must first provide the alleged violator a notice of special compliance procedure and proof of compliance form.

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

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

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

Revised: May 2017

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

# EXHIBIT B

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

**Anthony Barnes**
amb@atalawgroup.com
**415-326-3173**

June 8, 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:

**1908 Brands, Inc.**



*490 43rd Street*
*Suite 108*
*Oakland, CA 94609*
*mcm@atalawgroup.com*
*amb@atalawgroup.com*
*(415) 568-5200*
*(415)-326-3173*

**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. **Thrive Tribe Paleo Bites Snack Clusters Maple Walnut – Lead, Acrylamide**
2. **Thrive Tribe Bites Paleo Snack Clusters Ginger Root – Lead, Acrylamide**
3. **Thrive Tribe Paleo Bites Snack Clusters Vanilla Almond – Lead, Acrylamide**
4. **Thrive Tribe Paleo Bites Snack Clusters Cacao Nib – Lead, Cadmium, Acrylamide**
5. **Thrive Tribe Coconut Chips Vanilla – Lead, Acrylamide**
6. **Thrive Tribe Coconut Chips Original – Lead, Acrylamide**
7. **Thrive Tribe Coconut Chips Smokey BBQ - Acrylamide**
8. **Thrive Tribe Bites Paleo Snack Clusters Banana Chip - Acrylamide**
9. **Thrive Tribe Coconut Chips Toasted Onion - Acrylamide**
10. **Thrive Tribe Paleo Bites Snack Clusters Apple Cinnamon - Acrylamide**

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.

On January 1, 1990, the State of California officially listed acrylamide as a chemical known to cause cancer. On February 25, 2011, the State of California officially listed acrylamide as a chemical known to cause developmental toxicity and male reproductive toxicity.

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 June 8, 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



*490 43rd Street*
*Suite 108*
*Oakland, CA 94609*
*mcm@atalawgroup.com*
*amb@atalawgroup.com*
*(415) 568-5200*
*(415)-326-3173*

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,

Matthew Maclear
**AQUA TERRA AERIS LAW GROUP**

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to 1908 Brands, Inc. and its Registered Agent for Service of Process only)
Additional Supporting Information for Certificate of Merit (to AG only)



*490 43rd Street*
*Suite 108*
*Oakland, CA 94609*

*mcm@atalawgroup.com*
*amb@atalawgroup.com*

*(415) 568-5200*
*(415)-326-3173*

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by 1908 Brands, Inc.**

I, Matthew Maclear, declare:

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

2. I am an attorney for the noticing party.

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

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

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

Dated: June 8, 2018

Matthew Maclear



*490 43rd Street*
*Suite 108*
*Oakland, CA 94609*

*mcm@atalawgroup.com*
*amb@atalawgroup.com*

*(415) 568-5200*
*(415)-326-3173*

## 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 June 8, 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
1908 Brands, Inc.
2100 Central Avenue, Suite 201
Boulder, CO 80301

Steve Savage
(Registered Agent for 1908 Brands, Inc.)
2100 Central Avenue, Suite 201
Boulder, CO 80301

On June 8, 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 June 8, 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



*490 43rd Street*
*Suite 108*
*Oakland, CA 94609*
*mcm@atalawgroup.com*
*amb@atalawgroup.com*
*(415) 568-5200*
*(415)-326-3173*

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

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

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

Christopher Dalbey, Deputy District Attorney
Santa Barbara County
1112 Santa Barbara Street
Santa Barbara, CA 93101
DAProp65@co.santa-barbara.ca.us

Paul E. Zellerbach, District Attorney
Riverside County
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

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

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

Kathryn L. Turner, Chief Deputy City Attorney
San Diego City Attorney
1200 Third Avenue
San Diego, CA 92101
CityAttyCrimProp65@sandiego.gov

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

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

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221 S Mooney Blvd
Visalia, CA 95370
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222 E. Weber Avenue, Room 202
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Jeff W. Reisig, District Attorney
Yolo County
301 Second Street
Woodland, CA 95695
cfepd@yolocounty.org

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Executed on June 8, 2018, in Fort Oglethorpe, Georgia.

Phyllis Dunwoody



*490 43rd Street*
*Suite 108*
*Oakland, CA 94609*

*mcm@atalawgroup.com*
*amb@atalawgroup.com*

*(415) 568-5200*
*(415)-326-3173*

## Service List

District Attorney, Alameda County
1225 Fallon Street, Suite 900
Oakland, CA 94612

District Attorney, Alpine County
P.O. Box 248
Markleeville, CA 96120

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

District Attorney, Del Norte County
450 H Street, Room 171
Crescent City, CA 95531

District Attorney, El Dorado County
515 Main Street
Placerville, CA 95667

District Attorney, Fresno County
2220 Tulare Street, Suite 1000
Fresno, CA 93721

District Attorney, Glenn County
Post Office Box 430
Willows, CA 95988

District Attorney, Humboldt County
825 5th Street 4th Floor
Eureka, CA 95501

District Attorney, Imperial County
940 West Main Street, Ste 102
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
Madera, CA 93637

District Attorney, Marin County
3501 Civic Center Drive, Room 130
San Rafael, CA 94903

District Attorney, Mariposa County
Post Office Box 730
Mariposa, CA 95338

District Attorney, Mendocino County
Post Office Box 1000
Ukiah, CA 95482

District Attorney, Merced County
550 W. Main Street
Merced, CA 95340

District Attorney, Modoc County
204 S Court Street, Room 202
Alturas, CA 96101-4020

District Attorney, Mono County
Post Office Box 617
Bridgeport, CA 93517

District Attorney, Nevada County
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
520 Main Street, Room 404
Quincy, CA 95971

District Attorney, San Benito County
419 Fourth Street, 2nd Floor
Hollister, CA 95023

District Attorney,San Bernardino County
303 West Third Street
San Bernadino, CA 92415

District Attorney, San Diego County
330 West Broadway, Suite 1300
San Diego, CA 92101

District Attorney, San Mateo County
400 County Ctr., 3rd Floor
Redwood City, CA 94063

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

District Attorney, Sierra County
100 Courthouse Square, 2nd Floor
Downieville, CA 95936

District Attorney, Siskiyou County
Post Office Box 986
Yreka, CA 96097

District Attorney, Solano County
675 Texas Street, Ste 4500
Fairfield, CA 94533

District Attorney, Stanislaus County
832 12th Street, Ste 300
Modesto, CA 95354

District Attorney, Sutter County
463 2nd Street
Yuba City, CA 95991

District Attorney, Tehama County
Post Office Box 519
Red Bluff, CA 96080

District Attorney, Trinity County
Post Office Box 310
Weaverville, CA 96093

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

District Attorney, Yuba County
215 Fifth Street, Suite 152
Marysville, CA 95901

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

San Francisco, City Attorney
City Hall, Room 234
1 Dr Carlton B Goodlett PL
San Francisco, CA 94102

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



490 43rd Street
Suite 108
Oakland, CA 94609

mcm@atalawgroup.com
amb@atalawgroup.com

(415) 568-5200
(415)-326-3173

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

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

## *WHAT DOES PROPOSITION 65 REQUIRE?*

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

***The "Proposition 65 List."*** Under Proposition 65, the lead agency (OEHHA) publishes a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. Chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at: http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

Only those chemicals that are on the list are regulated under Proposition 65. Businesses that produce, use, release or otherwise engage in activities involving listed chemicals must comply with the following:

***Clear and reasonable warnings.*** A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical unless an exemption applies. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

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

*DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?*

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

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

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

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

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

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

***Exposures to Naturally Occurring Chemicals in Food.*** Certain exposures to chemicals that naturally occur in foods (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant[2] it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

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

[2] See Section 25501(a)(4).

chemicals that cause cancer or that is 1,000 times below the “no observable effect” level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

*HOW IS PROPOSITION 65 ENFORCED?*

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of Title 27 and sections 3100-3103 of Title 11. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an enforcement action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to $2,500 per day for each violation. In addition, the business may be ordered by a court to stop committing the violation.

A private party may not file an enforcement action based on certain exposures if the alleged violator meets specific conditions. For the following types of exposures, the Act provides an opportunity for the business to correct the alleged violation:

- An exposure to alcoholic beverages that are consumed on the alleged violator's premises to the extent onsite consumption is permitted by law;

- An exposure to a Proposition 65 listed chemical in a food or beverage prepared and sold on the alleged violator's premises that is primarily intended for immediate consumption on- or off-premises. This only applies if the chemical was not intentionally added to the food, and was formed by cooking or similar preparation of food or beverage components necessary to render the food or beverage palatable or to avoid microbiological contamination;

- An exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises;

- An exposure to listed chemicals in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking non-commercial vehicles.

If a private party alleges that a violation occurred based on one of the exposures described above, the private party must first provide the alleged violator a notice of special compliance procedure and proof of compliance form.

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

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

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

Revised: May 2017

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