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8 Attorneys for Plaintiff
9 ENVIRONMENTAL RESEARCH CENTER, INC.

ENDORSED
FILED
ALAMEDA COUNTY
NOV 19 2010
CLERK OF THE SUPERIOR COURT
By TANIA PIERCE Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

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

14 Plaintiff,

15 v.

16 SBD ENTERPRISES, LLC, a Delaware limited
17 liability company; NUTRISYSTEM, INC., a
18 Delaware corporation; NUTRI/SYSTEM IPHC,
19 INC., a Delaware corporation; and DOES 1 – 25,

20 Defendants.

Case No.

Rg 18929063

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

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

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

23 **INTRODUCTION**

24 1. This action seeks to remedy the continuing failure of Defendants SBD
25 ENTERPRISES, LLC; NUTRISYSTEM, INC.; NUTRI/SYSTEM IPHC, INC. (collectively
26 “SBD ENTERPRISES”) and DOES 1-25 (hereinafter individually referred to as
27 “DEFENDANT” or collectively as “DEFENDANTS”) to warn consumers in California that they
28 are being exposed to lead, a chemical known to the State of California to cause cancer, birth
defects, and other reproductive harm. According to the Safe Drinking Water and Toxic

1 Enforcement Act of 1986, Health and Safety Code (“H&S Code”) section 25249.5 (also known
2 as and referred to hereinafter as “Proposition 65”), businesses must provide persons with a “clear
3 and reasonable warning” before exposing individuals to a chemical known to the state to cause
4 cancer or reproductive harm. DEFENDANTS manufacture, package, distribute, market, and/or
5 sell in California certain consumer products, as defined in Cal. Code Regs., tit. 27, § 25600.1,
6 subd. (d) and (e), containing lead (the “SUBJECT PRODUCTS”):

- 7 • **South Beach Diet Phase 1 Entrée Shake Chocolate Caramel Shake**
- 8 • **South Beach Diet Phase 1 Breakfast Beach Shack Cappuccino Shake**
- 9 • **South Beach Diet Phase 1 Breakfast Beach Shack Chocolate Shake**
- 10 • **South Beach Diet Phase 1 Entrée Bar Peanut Butter Chocolate Bar**
- 11 • **South Beach Diet Phase 1 Entrée Bar Cinnamon Bun Bar**
- 12 • **South Beach Diet Phase 1 Entrée Bar Double Chocolate Bar**

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

15 3. Consumption of the SUBJECT PRODUCTS causes exposures to the LISTED
16 CHEMICAL at levels requiring a “clear and reasonable warning” under Proposition 65.
17 DEFENDANTS exposed consumers to the LISTED CHEMICAL and have failed to provide the
18 health hazard warnings required by Proposition 65.

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

23 **PARTIES**

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

27 6. ERC is a person within the meaning of H&S Code §25249.11 and brings this
28 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code §

1 25249.7(d) specifies that actions to enforce Proposition 65 may be brought by a person in the
2 public interest, provided certain notice requirements are met and no other public prosecutor is
3 diligently prosecuting an action for the same violation(s).

4 7. SBD ENTERPRISES, LLC, is now, and was at all times relevant herein, a limited
5 liability company organized under the laws of Delaware and is a person in the course of doing
6 business within the meaning of H&S Code §25249.11.

7 8. NUTRISYSTEM, INC., is now, and was at all times relevant herein, a corporation
8 organized under the laws of Delaware and is a person in the course of doing business within the
9 meaning of H&S Code §25249.11.

10 9. NUTRI/SYSTEM IPHC, INC., is now, and was at all times relevant herein, a
11 corporation organized under the laws of Delaware and is a person in the course of doing business
12 within the meaning of H&S Code §25249.11.

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

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

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

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

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

11 **JURISDICTION AND VENUE**

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

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

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

25 **STATUTORY BACKGROUND**

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

1 18. To effectuate this goal, Proposition 65 requires that individuals be provided with a
2 “clear and reasonable warning” before being exposed to chemicals listed by the State of
3 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
4 part:

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

8 19. An exposure to a chemical in a consumer product is one “that results from a person’s
9 acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer
10 product, including consumption of food.” (Cal. Code Regs., tit. 27, § 25600.1, subd. (e).) A
11 “consumer product” includes “any article, or component part thereof, including food, that is
12 produced, distributed, or sold for the personal use, consumption or enjoyment of a consumer,”
13 and the term “food” is further defined to include dietary supplements. (Cal. Code Regs., tit. 27, §
14 25600.1, subd. (d) and (g).)

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

20 **FACTUAL BACKGROUND**

21 21. On February 27, 1987, the State of California officially listed lead as a chemical
22 known to cause reproductive toxicity. Lead became subject to the warning requirement one year
23 later and was therefore subject to the “clear and reasonable” warning requirements of Proposition
24 65 beginning on February 27, 1988. (27 California Code of Regulations (“CCR”) §25600, *et*
25 *seq.*; H&S Code §25249.5, *et seq.*).

26 22. On October 1, 1992, the State of California officially listed lead and lead compounds
27 as chemicals known to cause cancer. Lead and lead compounds became subject to the warning
28 requirement one year later and were therefore subject to the “clear and reasonable” warning

1 requirements of Proposition 65 beginning on October 1, 1993. (27 CCR § 25600, *et seq.*; H&S
2 Code §25249.6, *et seq.*). Due to the high toxicity of lead, the maximum allowable dose level for
3 lead is 0.5 µg/day (micrograms a day) for reproductive toxicity and the no significant risk level
4 for carcinogens is 15µg/day (oral).

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

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

14 25. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use
15 in California since at least August 21, 2015. The SUBJECT PRODUCTS continue to be
16 distributed and sold in California without the requisite warning information.

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

23 27. On August 21, 2018, ERC served SBD ENTERPRISES and each of the appropriate
24 public enforcement agencies with a document entitled “Notice of Violations of California Health
25 & Safety Code Section 25249.5” that provided SBD ENTERPRISES and the public enforcement
26 agencies with notice that SBD ENTERPRISES was in violation of Proposition 65 for failing to
27 warn purchasers and individuals using the SUBJECT PRODUCTS that the consumption of the
28 SUBJECT PRODUCTS exposes them to lead, a chemical known to the State of California to

1 cause cancer and/or reproductive toxicity (“NOTICE”). A true and correct copy of the 60-Day
2 NOTICE is attached hereto as **Exhibit A** and is hereby incorporated by reference, and is available
3 on the Attorney General’s website located at <http://oag.ca.gov/prop65>.

4 28. The NOTICE was issued pursuant to, and in compliance with, the requirements of
5 H&S Code §25249.7(d) and the statute’s implementing regulations regarding the notice of the
6 violations to be given to certain public enforcement agencies and to the violator. The NOTICE
7 included, *inter alia*, the following information: the name, address, and telephone number of the
8 noticing individual; the name of the alleged violators; the statute violated; the approximate time
9 period during which violations occurred; and descriptions of the violations including the
10 chemical involved, the route of toxic exposure, and the specific products or type of products
11 causing the violations.

12 29. SBD ENTERPRISES was also provided copies of the document entitled “The Safe
13 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is
14 also known as Appendix A to Title 27 of CCR §25903, via Certified Mail.

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

21 31. After expiration of the sixty (60) day notice period, the appropriate public enforcement
22 agencies failed to commence and diligently prosecute a cause of action under H&S Code
23 §25249.5, *et seq.* against DEFENDANTS based on the allegations herein.

24 **FIRST CAUSE OF ACTION**

25 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the**
26 **SUBJECT PRODUCTS described in the August 21, 2018, Proposition 65 Notice of**
27 **Violation) Against DEFENDANTS**

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

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

7 34. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code
8 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure
9 to the LISTED CHEMICAL from the SUBJECT PRODUCTS, in an amount in excess of \$1
10 million.

11 **THE NEED FOR INJUNCTIVE RELIEF**

12 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**
13 **the SUBJECT PRODUCTS described in the August 21, 2018 Proposition 65 Notice of**
14 **Violation) Against DEFENDANTS**

15 35. PLAINTIFF re-alleges and incorporates by this reference Paragraphs 1 through 34,
16 as if set forth below.

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

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

1 38. A remedy of injunctive relief under Proposition 65 is specifically authorized by H&S
2 Code §25249.7(a).

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

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

10 **PRAYER FOR RELIEF**

11 Wherefore, PLAINTIFF prays for the following relief:

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

18 B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling
19 DEFENDANTS to identify and locate each individual who has purchased the SUBJECT
20 PRODUCTS since August 21, 2015, and to provide a warning to such person that the
21 consumption of the SUBJECT PRODUCTS will expose the consumer to a chemical known to
22 cause cancer, birth defects, and other reproductive harm;

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

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

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

2
3 DATED: November 19, 2018

AQUA TERRA AERIS LAW GROUP

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5
6 Matthew C. Maclear
7 Anthony M. Barnes
8 Attorneys for Plaintiff
9 Environmental Research Center, Inc.

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EXHIBIT A



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

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

August 21, 2018

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

Dear Alleged Violators 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 Violators 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 Violators 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 Violators identified below.

Alleged Violators. The names of the companies covered by this notice that violated Proposition 65 (hereinafter the "Violators") are:

**SBD Enterprises, LLC;
Nutrisystem, Inc.
Nutri/System IPHC, Inc.**



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
August 21, 2018
Page 2

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

1. **South Beach Diet Phase 1 Entrée Shake Chocolate Caramel Shake - Lead**
2. **South Beach Diet Phase 1 Breakfast Beach Shack Cappuccino Shake - Lead**
3. **South Beach Diet Phase 1 Breakfast Beach Shack Chocolate Shake - Lead**
4. **South Beach Diet Phase 1 Entrée Bar Peanut Butter Chocolate Bar - Lead**
5. **South Beach Diet Phase 1 Entrée Bar Cinnamon Bun Bar - Lead**
6. **South Beach Diet Phase 1 Entrée Bar Double Chocolate Bar - Lead**

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

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

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

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least August 21, 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 this known toxic chemical is either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemical. The method of warning should be a warning that appears on the product label. The Violators violated Proposition 65 because they failed to provide persons ingesting these products with appropriate warnings that they are being exposed to this chemical.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violators to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
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in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time-consuming litigation.

ERC has retained ATA Law Group as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violation to my attention, or the attention of ATA partner Anthony Barnes, using the address or contact information indicated on the letterhead.**

Sincerely,

A handwritten signature in black ink that reads "Matthew Maclear". The signature is written in a cursive style.

Matthew Maclear
AQUA TERRA AERIS LAW GROUP

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to SBD Enterprises, LLC; Nutrisystem, Inc.; and Nutri/System IPHC, Inc. and their Registered Agents for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
August 21, 2018
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CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.’s Notice of Proposition 65 Violations by SBD Enterprises, LLC; Nutrisystem, Inc.; and Nutri/System IPHC, Inc.

I, Matthew Maclear, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that the parties 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 Violators 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: August 21, 2018

Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
August 21, 2018
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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 August 21, 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
SBD Enterprises, LLC
600 Office Center Drive
Fort Washington, PA 19034

Nutri/System IPHC, Inc.
(Registered Agent for Nutri/System IPHC, Inc.)
1011 Centre Road, Suite 322
Wilmington, DE 19805

Current President or CEO
SBD Enterprises, LLC
251 S McCarren Blvd
Sparks, NV 89431

The Corporation Trust Company
(Registered Agent for SBD Enterprises, LLC)
Corporation Trust Center
1209 N. Orange Street
Wilmington, DE 19801

Current President or CEO
Nutrisystem, Inc.
600 Office Center Drive
Fort Washington, PA 19034

The Corporation Trust Company
(Registered Agent for Nutrisystem, Inc.)
Corporation Trust Center
1209 N. Orange Street
Wilmington, DE 19801

Current President or CEO
Nutri/System IPHC, Inc.
600 Office Center Drive
Fort Washington, PA 19034

On August 21, 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



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
August 21, 2018
Page 6

On August 21, 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:

Nancy O'Malley, District Attorney
Alameda County
7677 Oakport Street, Suite 650
Oakland, CA 94621
CEPDProp65@acgov.org

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

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

Mark Ankcorn, Deputy City Attorney
San Diego City Attorney
1200 Third Avenue
San Diego, CA 92101
CityAttyProp65@sandiego.gov

Michelle Latimer, Program Coordinator
Lassen County
220 S. Lassen Street
Susanville, CA 96130
mlatimer@co.lassen.ca.us

Gregory Alker, Assistant District Attorney
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Notice of Violation of California Health & Safety Code §25249.5 *et seq.*

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On August 21, 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 August 21, 2018, in Fort Oglethorpe, Georgia.

Phyllis Dunwoody



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Service List

District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012	District Attorney, San Bernardino County 303 West Third Street San Bernardino, CA 92415	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
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District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	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, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, Sierra County 100 Courthouse Square, 2 nd Floor Downieville, CA 95936	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Humboldt County 825 5th Street 4 th Floor Eureka, CA 95501	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354	
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District Attorney, Inyo County P.O. Drawer D Independence, CA 93526	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
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APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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

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

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

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

WHAT DOES PROPOSITION 65 REQUIRE?

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

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>.

female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at: http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

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

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

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

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

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

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

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

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

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

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

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

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

² See Section 25501(a)(4).

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.