

# CONSUMER DEFENSE GROUP ACTION

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**GRAHAM & MARTIN, LLP**

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## 60 Day Notice of Intent to Sue Eugene Burger Management Corporation Under Health & Safety Code Section 25249.6

Consumer Defense Group Action, a California corporation (hereinafter "CDG" or the "Noticing Party") hereby gives Notice of Intent to Sue Under Health & Safety Code Section 25249.5 (the "Notice") to Eugene J. Burger, the President/CEO of Eugene Burger Management Corporation (hereinafter referred to as "Eugene Burger"), as well as the governmental entities on the attached proof of service. The Noticing Party must be contacted through the following entity: Law Offices of Graham & Martin, LLP, 3 Park Plaza, Suite 2030, Irvine, California 92614.

This Notice is intended to inform Eugene Burger that it has violated Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with Health & Safety Code Section 25249.5) (hereinafter "Proposition 65") by failing and refusing to post clear and reasonable warnings at each of the facilities listed on Exhibit A hereto (which are owned/managed by Eugene Burger ) (hereinafter "the Facilities") that Eugene Burger (1) permits the smoking of tobacco products at the Facilities, which exposes customers, visitors and employees to tobacco smoke in the areas where smoking is permitted; and, (2) permits the operation of motor vehicles at the Facilities, which exposes customers, visitors and employees to diesel and gasoline exhaust fumes, and the chemicals contained in those fumes, in the areas where such vehicles are allowed to be operated.

### **Summary of Violation:**

Proposition 65 provides that when a party, such as Eugene Burger, has been and is knowingly and intentionally exposing its customers, visitors, employees and the general public to chemicals designated by the State of California to cause cancer and reproductive toxicity ("the Designated Chemicals") it has violated the statute unless, prior to such exposure, it provides clear and reasonable warning of that potential exposure to the potentially exposed persons (Health & Safety Code Section 24249.6). Tobacco smoke, as well as the constituent chemicals contained in tobacco smoke, are Designated Chemicals. Similarly, diesel and gasoline exhaust fumes contain Designated Chemicals.

Eugene Burger, in the ordinary course of business, controls much of the conduct and actions of its customers, visitors and employees at each of the Facilities. One of the actions EUGENE BURGER controls is whether or not to allow its customers, visitors and employees at each of the Facilities to smoke tobacco products. Similarly, EUGENE BURGER controls whether or not to allow its customers, visitors and employees at each of the Facilities to operate motor vehicles and the location of such operation at the Facilities.

Persons representing CDG have personally visited each of the Facilities during the last year (hereinafter referred to as the "Investigation Period"). During those investigations CDG discovered that the Facilities are owned and/or managed by EUGENE BURGER, and that EUGENE BURGER has more than nine employees. Those investigations showed that EUGENE BURGER has chosen to allow its customers, visitors and employees at each of the Facilities to smoke tobacco products, and has specifically

chosen to allow smoking in certain areas. Those areas are the apartments, the lobbies, corridors and hallways of floors where apartments where smoking is allowed are located, areas adjacent to pools, entrances and common areas where smoking is permitted, public walkways and parking areas where smoking is permitted. Further, those investigations showed that EUGENE BURGER has chosen to allow its customers, visitors and employees at each of the Facilities to operate motor vehicles in certain areas, the driveways and parking areas.

In the Facilities and areas noted EUGENE BURGER has chosen to allow its customers, visitors and employees to be exposed to: (1) tobacco smoke via the breathing of second hand tobacco smoke and via contact with their skin and clothing; and, (2) diesel and gasoline exhaust fumes via the breathing of such fumes (inhalation) and by contact with the skin and clothing (dermal contact). Evidence that (1) the smoking of tobacco products was taking place and had taken place at the Facilities, and (2) that the operation of motor vehicles (and thus exposures to diesel and gasoline exhaust fumes) was taking place at the Facilities, was seen by the investigators for CDG at the Facilities during the Investigation Period. The investigation by CDG at the Facilities showed that EUGENE BURGER has specifically chosen to ignore the requirements of Proposition 65 and has failed to post clear and reasonable warnings at any of the entrances to the Facilities, in the parking areas, in the areas leading into the Facilities from the parking areas, at the entrances to apartment buildings or floors where apartments where smoking is permitted are located, or in or near the walkways in the Facilities, so that its customers, visitors and employees, who may not wish to be exposed, can be warned that, upon entering any of those areas, they may be exposed to tobacco smoke. The investigation by CDG at the Facilities showed that EUGENE BURGER has specifically chosen to ignore the requirements of Proposition 65 and has failed to post clear and reasonable warnings at the parking areas or in the areas leading into the Facilities from the parking areas to warn its customers, visitors and employees, who may not wish to be exposed, that, upon entering any of those areas, they may be exposed to diesel and/or gasoline exhaust fumes, and chemicals known to the State of California to cause cancer and/or reproductive toxicity.

It is clear therefore that for the entire period of time that EUGENE BURGER has owned and/or controlled the Facilities prior to the Investigation Period, EUGENE BURGER has failed to post clear and reasonable warning signs at the Facilities in compliance with Proposition 65. Given that the maximum period of potential liability pursuant to Proposition 65 and Business & Professions Code §17200 (which are the operative statutes pursuant to which a complaint will be filed against EUGENE BURGER) is four years, this Notice is intended to inform EUGENE BURGER that it has been in violation of Proposition 65 from the time period from four years prior to the last date of the Investigation Period noted above, for every day upon which EUGENE BURGER owned and/or controlled any Facility listed on Exhibit A.

The written reports prepared by the investigators for CDG, prepared contemporaneously with the investigations conducted during the Initial Investigation Period, together with supporting photographic and other evidence from the Facilities, has been provided to the Office of the Attorney General responsible for Proposition 65 enforcement.

### **Environmental Exposures:**

While in the course of doing business at the Facilities, during the Investigation Period, and for up to four years prior to that time, EUGENE BURGER has been and is knowingly and intentionally exposing its customers and the public to tobacco smoke and other chemicals listed below and designated by the State of California to cause cancer and reproductive toxicity without first giving clear and reasonable warning of that fact to the exposed persons (Health & Safety Code Section 24249.6). The source of exposure is (1) tobacco smoke caused by the smoking of tobacco products by persons who EUGENE BURGER permits to smoke tobacco products at the Facilities, and (2) diesel and gasoline exhaust fumes produced by the

operation of motor vehicles which EUGENE BURGER permits at the Facilities. The areas at the Facilities where customers, visitors and employees are being exposed to tobacco smoke are the apartments, the lobbies, corridors and hallways of floors where apartments where smoking is allowed are located, areas adjacent to pools, entrances and common areas where smoking is permitted, public walkways and parking areas where smoking is permitted. The areas at the Facilities where customers, visitors and employees are being exposed to diesel and gasoline exhaust fumes the apartments and public walkways near to driveways and parking areas, and those driveways and parking areas.

**Occupational Exposures:**

While in the course of doing business at the Facilities, during the Investigation Period, and for up to four years prior to that time, EUGENE BURGER has been and is knowingly and intentionally exposing its employees to tobacco and tobacco smoke, diesel and gasoline exhaust fumes and other chemicals listed below and designated by the State of California to cause cancer and reproductive toxicity without first giving clear and reasonable warning of that fact to the exposed person (Health & Safety Code Section 25249.6). The source of exposure is (1) tobacco smoke caused by the smoking of tobacco products by persons who EUGENE BURGER permits to smoke tobacco products at the Facilities, and (2) diesel and gasoline exhaust fumes produced by the operation of motor vehicles which EUGENE BURGER permits at the Facilities. The source of exposure includes tobacco and tobacco smoke at the locations in Exhibit A. Employees include and are not limited to security personnel, maintenance workers, service personnel and administrative personnel. The areas at the Facilities where employees are being exposed to tobacco smoke are the apartments, the lobbies, corridors and hallways of floors where apartments where smoking is allowed are located, areas adjacent to pools, entrances and common areas where smoking is permitted, public walkways and parking areas where smoking is permitted. The areas at the Facilities where employees are being exposed to diesel and gasoline exhaust fumes the apartments and public walkways near to driveways and parking areas, and those driveways and parking areas.

The route of exposure for Occupational Exposures and Environmental Exposures to the chemicals listed below has been inhalation and dermal contact with (1) tobacco smoke and (2) diesel and gasoline exhaust fumes at the Facilities. In other words, via breathing and contact with the skin of (1) tobacco smoke and (2) diesel and gasoline exhaust fumes.

For each such type and means of exposure, EUGENE BURGER has exposed and is exposing the above referenced persons to the chemicals listed on the document attached hereto entitled "LIST OF CARCINOGENS/TOXINS."

Proposition 65 requires that notice and intent to sue be given to EUGENE BURGER sixty days before a suit is filed. With this letter, CDG gives notice of the alleged violations to EUGENE BURGER and the appropriate governmental authorities. This notice covers all violations of Proposition 65 that are currently known to CDG from information now available to them. CDG reserves the right to amend this Notice to inform EUGENE BURGER of other violations and/or exposures as it gathers further information. With the copy of this amended notice submitted to EUGENE BURGER, a copy is provided of "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary".

Dated: September 25, 2003

By:

## EUGENE BURGER MANAGEMENT CORP.

<b>Bear Mountain Village Apartments</b> 702 Meyer Street Arvin, CA 93203 60 Apartments	<b>Villa Capri Apartments</b> 1000 Pacheco Road Bakersfield, CA 93307 130 Apartments
<b>Aspen Manor Apartments</b> 3939 Maxson Road El Monte, CA 91732 45 Apartments	<b>Parkview Terrace Apartments</b> 3627 Penn Mar El Monte, CA 91732 26 Apartments
<b>Glenbrook Terrace Apartments</b> 1125 North Broadway Escondido, CA 92026 164 Apartments	<b>Westminster Arms Apartments</b> 13884 Euclid Avenue Garden Grove, CA 92843 88 Apartments
<b>Town And Country Apartments</b> 554 Grape Avenue Holtville, CA 92250 42 Apartments	<b>Shadow Mountain Apartments</b> 2132 Blossom Lane La Verne, CA 91750 96 Apartments
<b>Ocean Park Apartments</b> 145 Canyon Drive Oceanside, CA 92054 152 Apartments	<b>Oak Park Manor</b> 1808 Oak Park Blvd Pleasant Hill, CA 94523 40 Apartments
<b>American River Gardens</b> 4954 Ferigo Lane Sacramento, CA 95841 56 Apartments	<b>College Garden Apartments</b> 7761 College Town Drive Sacramento, CA 95826 100 Apartments
<b>Imperial Villa Apartments</b> 620 67th Street San Diego, CA 92114 38 Apartments	<b>Quailwood Apartments</b> 4926 Grouse Run Drive Stockton, CA 95207 100 Apartments
<b>The Villas</b> 1249 Stratford Circle Stockton, CA 95207 55 Apartments	<b>Vacaville Park Apartments</b> 1424 Alamo Dr Vacaville, CA 95687-6554 75 Apartments
<b>Cascade Terrace</b> 14380 Chestnut Street Westminster, CA 92683 80 Apartments	<b>Trask Apartments</b> 7731 Trask Avenue Westminster, CA 92683 52 Apartments

## **CERTIFICATE OF MERIT**

I, Anthony G. Graham, declare as follows:

1. I am a member of the State Bar of California, a partner of the law firm of Graham & Martin LLP, and one of the attorneys principally responsible for representing The Consumer Defense Group Action, the “Noticing Party” as to the “60 Day Notice of Intent to Sue” (hereinafter, “the Notice”) served concurrently herewith. I have personal knowledge of the facts set forth herein and, if called upon, could and would testify competently thereto.

2. I have consulted with appropriate and qualified scientific experts and, having reviewed relevant scientific data and results of relevant test reports, as well as having reviewed the facts as set forth below and the documentary evidence of those facts regarding the exposures to the chemicals as set forth in the Notice, I have a good faith basis for believing that the exposures set forth in the Notice are likely to be above the minimum significant risk level for the chemicals at issue. I have provided the information, documents, data, reports and/or opinions I have relied upon to the Attorney General’s office as required by the regulations promulgated under Proposition 65.

3. Based on the information obtained through those consultations, and on all 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 plaintiffs’ case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

4. The information referred to in paragraph 3 is as follows; by physical investigation

of the location referenced in the Notice and by investigation of relevant information, documents, data, and reports Consumer Defense Group Action discovered that:

- (1) the Violator is responsible for, and thus “operates”, the specific subject property or properties for purposes of Health and Safety Code section 25249.5 and 25249.6;
- (2) the Violator has more than nine employees;
- (3) the Violator permits and has permitted the “release” of the chemicals set forth in the Notice and such “releases” threaten to pass in sources of drinking water;
- (4) exposures to the chemicals set forth in the Notice have occurred and continue to occur both to offsite and onsite persons;
- (5) the Violator has not put in place a clear and reasonable warning as required under Health & Safety Code section 25249.6, or any other sign purporting to comply with the requirements of that section.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Irvine, California on September 23, 2003.

**CERTIFICATE OF SERVICE**

I am over the age of 18 and not a party to this case. I am a resident of or employed in the county where the mailing occurred. My business address is 3 Park Plaza, Suite 2030, Irvine, California 92614.

**I SERVED THE FOLLOWING:**

- 1.) 60-Day Notice of Intent to Sue Under Health & Safety Code Section 24249.6;
- 2.) The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary (*only sent to violators*); and
- 3.) Certificate of Merit;
- 4.) Supporting documents (*only sent to Office of Attorney General*)

by enclosing a true copy of the same in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid:

Date of Mailing: September 25, 2003

Place of Mailing: Irvine, California

**NAME AND ADDRESS OF EACH PERSON TO WHOM DOCUMENTS WERE MAILED:**

Eugene J. Burger, President/CEO Eugene Burger Management Corporation 481 Via Hidalgo Greenbrae, CA 94904	California Attorney General (Proposition 65 Enforcement Division) 1515 Clay Street, 20th Floor Oakland, CA
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Sacramento County DA  
P.O. Box 749  
Sacramento, CA 95812

San Diego County DA  
330 Broadway  
San Diego, CA 92101

San Diego City Attorney  
1200 3rd Ave. Ste. 1620  
San Diego, CA 92101

Los Angeles City Attorney  
200 N. Main St. N.E.  
Los Angeles, CA 90012

Kern County DA  
2100 College Avenue  
Bakersfield, CA 93305

Los Angeles County DA  
210 W. Temple Street, 18th Floor  
Los Angeles, CA 90012

San Joaquin DA  
225 W. Elm Street #C  
Lodi, CA 95240

Orange County District Attorney  
700 Civic Center Dr. W., 2<sup>nd</sup> Fl.  
Santa Ana, CA 92701

Fresno County DA  
2220 Tulare Street, #1000  
Fresno, CA 93721

Imperial County DA  
939 West Main Street  
El Centro, CA 92243

Solano County DA  
600 Union Avenue  
Fairfield, CA 94533

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Dated: September 25, 2003

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