

## 60-DAY NOTICE OF VIOLATION

### California Safe Drinking Water And Toxic Enforcement Act of 1986

Failure to Provide Required Warning Notice at:

**Auntie Anne's, 737 Spectrum Center Drive,  
Irvine, CA 92618**

**June 13, 2018**

This Notice of Violation is provided to you pursuant to and in compliance with California Health and Safety Code Section 25249.7(d).

- For general information regarding the California Safe Drinking Water and Toxic Enforcement Act, see the attached summary provided by the California Office of Environmental Health Hazard Assessment (OEHHA) (copies not provided to public enforcement agencies).
- This Notice of Violation is provided by Christopher Bair, c/o attorney Scott Ferrell, Pacific Trial Attorneys, 4100 Newport Drive Suite 800, Newport Beach CA 92660; (949) 706.6464. Mr. Bair is a consumer who has personally visited the establishment that is the subject of this Notice of Violation.

#### **Description of Violation:**

- Violators: The names and addresses of the violators known to Mr. Bair are:
  - FOCUS Brands Inc., 5620 Glenridge Drive NE Atlanta, GA 30342; Samuel R. Beiler, Chairman and Chief Executive Officer
  - Auntie Anne's, 737 Spectrum Center Drive, Irvine, CA, 92618
- Time Period of Exposure: The violations have been occurring since at least 6/4/2018, and are ongoing.
- Provision of Proposition 65: This Notice of Violation covers the “warning provision” of Proposition 65 for restaurants and other sellers of food products, which is found at California Health and Safety Code Section 25249.6, and 27 California Code of Regulations Section 25603.3(a)

(operative until August 30, 2018), and 27 California Code of Regulations Sections 25607.5 and 25607.6 (operative August 30, 2018).

- Chemicals Involved: The listed chemicals involved in these violations include, but are not limited to, Acrylamide, Bisphenol A, Mercury, DEHP, and Lead.
- Types of Products: The products at issue in this Notice of Violation are the food products sold at the Auntie Anne's location, including, but not limited to: (1) plant-based foods which, when cooked or processed at high temperatures may produce Acrylamide (potential cancer and male developmental toxicity); (2) Bisphenol A, contained in coatings for cans, jar lids and bottle caps (potential female toxicity); (3) Mercury, contained in fish, meat, and shellfish (potential developmental toxicity); (4) DEHP, found in many plastics (potential cancer and male developmental toxicity); (5) Lead, found in certain balsamic vinegars (cancer and male and female developmental toxicity); and (6) coffee, which contains Acrylamide (potential cancer and male developmental toxicity).
- Description of Exposure: Use of the food products sold at the Auntie Anne's location, including, but not limited to, plant-based foods which, when cooked or processed at high temperatures may produce Acrylamide (potential cancer and male developmental toxicity); Bisphenol A, contained in coatings for cans, jar lids and bottle caps (potential female toxicity); Mercury, contained in fish and sea foods (potential developmental toxicity); DEHP, found in many plastics (potential cancer and male developmental toxicity); and Lead, found in certain balsamic vinegars (cancer and male and female developmental toxicity), are at issue in this matter. The Acrylamide, Mercury and Lead substances may be ingested directly by eating the products or drinking coffee; and the Bisphenol A and DEHP may be ingested through inhalation or dermal exposure to products, all of which may result in human exposures to the listed substances. These exposures occur in the restaurant and where these products are ingested or used. No clear and reasonable warning is provided at the location with respect to the products regarding the hazards of these elements.

#### **Resolution of Noticed Claims:**

- Based on the allegations set forth in this Notice, Mr. Bair intends to file a citizen enforcement lawsuit against each of the alleged violators unless such alleged violator enters in to a binding written agreement to remedy the violations alleged herein by: (1) installing the warning signage and notice required by California Health and Safety Code Section 25249.6, and 27 California Code of Regulations Section 25603.3(a) (operative until August 30, 2018), and 27 California Code of Regulations Sections

25607.5 and 25607.6 (operative August 30, 2018); and (2) paying an appropriate civil penalty based on the factors enumerated in California Health and Safety Code Section 25249.7(b). If any alleged violator is interested in resolving this dispute without resort to litigation, please contact Mr. Bair through his counsel, Scott J. Ferrell, Pacific Trial Attorneys, 4100 Newport Place Drive, Ste. 800, Newport Beach, CA 92660, (949) 706-6464, sferrell@pacifictrialattorneys.com. It should be noted that neither Mr. Bair nor Mr. Ferrell can: (1) finalize any settlement until after the 60-day notice period has expired; nor (2) speak for the Attorney General or any District or City Attorney who received Mr. Bair's 60-day Notice. Therefore, while reaching any agreement with Mr. Bair will resolve his claims, such an agreement may not satisfy the public prosecutors.

**CERTIFICATE OF MERIT  
(Health & Safety Code § 25249.7(d))**

**California Safe Drinking Water  
And Toxic Enforcement Act of 1986**

**Failure to Provide Required Warning Notice at  
Auntie Anne's Location in Irvine, CA**

**June 13, 2018**

I, Scott J. Ferrell, declare as follows:

1. This Certificate of Merit accompanies the attached 60-day Notice in which it is alleged that the parties identified in the Notice have violated Health and Safety Code Section 25249.6 and 27 California Code of Regulations Section 25603.3(a) (operative until August 30, 2018), and 27 California Code of Regulations Sections 25607.5 and 25607.6 (operative August 30, 2018) by failing to provide clear and reasonable warnings.

2. I am the principal attorney of Pacific Trial Attorneys. Pacific Trial Attorneys represents the noticing party, Mr. Chris Bair.

3. I have consulted with an individual with relevant and appropriate experience or expertise who has reviewed facts, studies or other data regarding the exposures to the listed chemicals that are the subject of the action.

4. Based on the information obtained through these consultations, 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 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. The copy of the Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this Certificate, including the information identified in Health and Safety Code Section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relief upon by the certifier; and (2) the facts, studies or other data reviewed by those persons.



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Scott J. Ferrell  
Attorney for Chris Bair

## Certificate of Merit

### Factual Supplement Provided to California Attorney General

#### *Health and Safety Code § 25249.7*

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1. Identity of Person Consulted with:

Dr. David Frederic Goldsmith, MSPH, PhD  
Department of Environmental and Occupational Health  
Milliken Institute School of Public Health  
George Washington University  
950 New Hampshire Ave NW  
Washington DC 20037

2. Facts, Studies, and Other Data Relied Upon

- A. Summary of location visit
- B. Pictures of location visit
- C. Attestation of lack of signage at location by plaintiff Chris Bair
- D. Studies regarding toxicology of referenced chemicals
- E. Office of Environmental Health Hazard Assessment (“OEHHA”) Resource paper
- F. Conversations with Dr. Goldsmith

27 CCR Appendix A

Appendix A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986

(PROPOSITION 65): A SUMMARY

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

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

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

*WHAT DOES PROPOSITION 65 REQUIRE?*

*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\\_list/Newlist.html](http://www.oehha.ca.gov/prop65_list/Newlist.html).

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

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

chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

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

*DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?*

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

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

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

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

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

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

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

***Discharges that do not result in a “significant amount” of the listed chemical entering any source of drinking water.*** The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a “significant amount” of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and

that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any detectable amount, except an amount that would meet the “no significant risk” level for 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>.



## Appendix A, 27 CA ADC Appendix A

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

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

Revised: May 2017

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

<sup>2</sup> See Section 25501(a)(4).

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.

### HISTORY

1. New Appendix A filed 4-22-97; operative 4-22-97 pursuant to Government Code section 11343.4(d) (Register 97, No. 17).
2. Amendment filed 1-7-2003; operative 2-6-2003 (Register 2003, No. 2).
3. Change without regulatory effect renumbering title 22, section 12903 and Appendix A to title 27, section 25903 and Appendix A, including amendment of appendix, filed 6-18-2008 pursuant to section 100, title 1, California Code of Regulations (Register 2008, No. 25).
4. Amendment filed 11-19-2012; operative 12-19-2012 (Register 2012, No. 47).
5. Amendment of appendix and Note filed 11-19-2014; operative 1-1-2015 (Register 2014, No. 47).
6. Amendment of Appendix A filed 8-23-2017; operative 10-1-2017 (Register 2017, No. 34).

This database is current through 5/25/18 Register 2018, No. 21

27 CCR Appendix A, 27 CA ADC Appendix A

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End of Document

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