

# NICHOLAS & TOMASEVIC<sub>LLP</sub>

ATTORNEYS AT LAW

Tel: 619-325-0492  
Fax: 619-325-0496

225 Broadway, 19<sup>th</sup> Floor  
San Diego, CA 92101

December 20, 2018

**Via Certified Mail**

John Estefano  
Counsel for Art Hookah Lounge  
Estefano Law  
750 B Street, Suite 2350  
San Diego, CA 92101

**Re: Proposition 65 Supplemental Notice of Violation**

To Whom It May Concern,

Please note: this notice supplements the original notice AG 2018-01789 dated October 5, 2018

We represent Kim Embry, a citizen of the State of California acting in the interest of the general public. This letter serves as notice that the parties listed above are in violation of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, commencing with section 25249.6 of the Health and Safety Code ("Proposition 65"), by knowingly and intentionally exposing its customers, consumers, guests, the public, and employees to carcinogens and other toxicants resultant from charcoals and tobacco alternatives used for the smoking of hookah without first giving clear and reasonable warning of that fact to the exposed persons (Health & Safety Code Section 25249.6).

The violations alleged by this notice consist of types of harm that may potentially result from exposures to carcinogens released by charcoals and tobacco alternatives used with hookah smoking. Charcoals used for hookah smoking have been found to have high levels of carbon monoxide (CO), listed as a developmental toxin on July 1, 1989. Additionally, raw charcoals and steam stones listed as tobacco alternatives have been found to have high concentrations of arsenic, cadmium, lead, nickel and other toxic metals. A number of other carcinogens listed on the Proposition 65 chemical list have been found in the smoke released from charcoals. These carcinogens include, but are not limited to: benzene, quinoline, benzofuran, ethylbenzene, and styrene.

The route of exposure to the chemicals listed above have been and are from smoking through inhalation, meaning that smoke has been and is being breathed in via the ambient air by the exposed persons causing inhalation contact with their mouths, throats, bronchi, esophagi, and

lungs. In addition, the route of exposure for users of hookah pipes occurs through inhalation from a mouthpiece on the hookah device. Exposures have been occurring since the smoking of hookah has been permitted on the premises, which we understand has been at least for the past four years and continues to this day and will continue to occur as long as the establishment is in operation.

Proposition 65 requires that a clear and reasonable warning is provided regarding the exposures to environmental and direct inhalation of hookah smoke in designated smoking areas. The Parties are in violation of Proposition 65 by failing to provide such warning to consumers and as a result exposure to hookah smoke have been occurring without proper warnings.

Pursuant to Proposition 65, notice and intent to sue shall be provided to violators 60 days before filing a complaint. This letter provides notice of the alleged violation to the parties listed above and the appropriate governmental authorities. A summary of Proposition 65 is attached.

If you have any questions or wish to discuss any of the above, please contact me.

Sincerely,



Shaun Markley

Enclosures

## Appendix A

### OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA PROTECTION AGENCY THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACTION 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the office of Environmental Health Hazard Assessment, the lead and Toxic Enforcement Act 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 law. The reader is directed to the statute and its implementing regulations (See citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. 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 Regulations, Sections 250000 through 27000.

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

*The "Governor's List."* Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 725 chemicals have been listed as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release, or otherwise engage in activities involving those 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. 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. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of the listing of the chemical.

***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. Discharges are exempt from this requirement if they occur less than twenty months after the date of the listing of chemical.

#### **DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?**

Yes. The law exempts:

***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.

***Exposures that pose no significant risk of cancer.*** For chemicals that are listed as known to the State to cause cancer (“carcinogens”), a warning is not required if the business 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 for more than 250 listed carcinogens.

***Exposures that will produce no observable reproductive effect at 1,000 times the level in question.*** For chemicals known to the State to cause birth defects or other reproductive harm (“reproductive toxicants”), a warning is not required if the business 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 (NOEL), “ divided by a 1,000- fold safety or uncertainty factor. The “no observable effect level” is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

***Discharge that do not result in a “significant amount” of the listed chemical entering into 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 list chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any detectable amount; expect an amount that would meet the “ no significant risk” or “no observable effect” test if an individual were exposed to

such an 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 (those in cities with a population exceeding 750,000). Lawsuit 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. A notice must comply with the information and procedural requirements specified in regulations (Title 27. California Code of Regulations, Section 25903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of 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 of law to stop committing the violation.

### **FOR FURTHER INFORMATION....**

Contact the Office of Environmental Health Hazard Assessment’s Proposition 65 Implementation Office at (916)445-6900

## **CERTIFICATE OF MERIT**

I, Shaun Markley, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and 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 has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.

4. 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.

5. The copy of this 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 relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: December 20, 2018

  
\_\_\_\_\_  
Shaun Markley, Attorney at Law

## **CERTIFICATE OF SERVICE**

I, Anissa Elhaiesahar, declare that I am over the age of 18 years, and am not a party to the within action. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 225 Broadway, 19<sup>th</sup> Floor, San Diego, California 92101.

On December 20, 2018, I served the following documents: **(1) 60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(d); (2) CERTIFICATE OF MERIT; (3) PROPOSITION 65: A SUMMARY; and (4) CERTIFICATE OF MERIT ATTACHMENT (served only on the Attorney General)** on the parties listed below by placing a true and correct copy thereof in a sealed envelope, addressed to each party and depositing it at my business address with the U.S. Postal Service for delivery by Certified Mail with the postage thereon fully prepaid:

### **Via Certified Mail**

John Estefano  
Counsel for Art Hookah Lounge  
Estefano Law  
750 B Street, Suite 2350  
San Diego, CA 92101

On December 20, 2018, I served the California Attorney General (via website Portal) by uploading a true and correct copy thereof as a PDF file via the California Attorney General's website.

On December 20, I transmitted via electronic mail the above-listed documents to the electronic mail addresses of the City and/or District Attorneys who have specifically authorized e-mail service and the authorization appears on the Attorney General's web site.

### **See Attached Service List**

On December 20, 2018, I served the following persons and/or entities at the last known address by placing a true and correct copy thereof in a sealed envelope and depositing it at my business address with the U.S. Postal Service for delivery with the postage thereon fully prepaid, and addressed as follows:

### **See Attached Service List**

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

Executed on December 20, 2018, at San Diego, California.

*Anissa Elhaiesahar*  

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Anissa Elhaiesahar

## E-Mail Service List

Stacey Grassini, Deputy District Attorney  
CONTRA COSTA COUNTY  
900 Ward Street  
Martinez, CA 94553  
[sgrassini@contracostada.org](mailto:sgrassini@contracostada.org)

Michelle Latimer, Program Coordinator  
LASSEN COUNTY  
220 S. Lassen Street  
Susanville, CA 96130  
[mlatimer@co.lassen.ca.us](mailto:mlatimer@co.lassen.ca.us)

Dije Ndreu, Deputy District Attorney  
MONTEREY COUNTY  
1200 Aguajito Road  
Monterey, CA 93940  
[Prop65DA@co.monterey.ca.us](mailto:Prop65DA@co.monterey.ca.us)

Allison Haley, District Attorney  
NAPA COUNTY  
1127 First Street, Ste. C  
Napa, CA 94559  
[CEPD@countyofnapa.org](mailto:CEPD@countyofnapa.org)

Paul E. Zellerbach, District Attorney  
RIVERSIDE COUNTY  
3072 Orange Street  
Riverside, CA 92501  
[Prop65@rivcoda.org](mailto:Prop65@rivcoda.org)

Barbara Yook, District Attorney  
CALAVERAS COUNTY  
891 Mountain Ranch Rd.  
San Andreas, CA 95249  
[Prop65Env@co.calaveras.ca.us](mailto:Prop65Env@co.calaveras.ca.us)

Gregory Alker, Assistant District Attorney  
SAN FRANCISCO COUNTY  
732 Brannan Street  
San Francisco, CA 94103  
[gregory.alker@sfgov.org](mailto:gregory.alker@sfgov.org)

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](mailto:edobroth@co.slo.ca.us)

Yen Dang, Supervising Deputy District Attorney  
SANTA CLARA COUNTY  
70 W Hedding St  
San Jose, CA 95110  
[EPU@da.sccgov.org](mailto:EPU@da.sccgov.org)

Stephan R. Passalacqua, District Attorney  
SONOMA COUNTY  
600 Administration Drive  
Sonoma, CA 95403  
[jbarnes@sonoma-county.org](mailto:jbarnes@sonoma-county.org)

Phillip J. Cline, District Attorney  
TULARE COUNTY  
221 S Mooney Blvd  
Visalia, CA 95370  
[Prop65@co.tulare.ca.us](mailto:Prop65@co.tulare.ca.us)

Gregory D. Totten, District Attorney  
VENTURA COUNTY  
800 S Victoria Ave  
Ventura, CA 93009  
[daspecialops@ventura.org](mailto:daspecialops@ventura.org)

Jeff W. Reisig, District Attorney  
YOLO COUNTY  
301 Second Street  
Woodland, CA 95695  
[cfepd@yolocounty.org](mailto:cfepd@yolocounty.org)

Tori Verber Salazar, District Attorney  
SAN JOAQUIN COUNTY  
222 E. Weber Avenue, Room 202  
Stockton, CA 95202  
[DAConsumer.Environmental@sjcda.org](mailto:DAConsumer.Environmental@sjcda.org)

Kathryn L. Turner, Chief Deputy City Attorney  
CITY OF SAN DIEGO  
1200 Third Avenue  
San Diego, CA 92101  
[CityAttyCrimProp65@saniego.gov](mailto:CityAttyCrimProp65@saniego.gov)

Jeffrey S. Rosell, District Attorney  
SANTA CRUZ COUNTY  
701 Ocean Street  
Santa Cruz, CA 95060  
[Prop65DA@santacruzcounty.us](mailto:Prop65DA@santacruzcounty.us)

Dennis J. Herrera, City Attorney  
CITY OF SAN FRANCISCO  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102  
[Valerie.lopez@sfcityatty.org](mailto:Valerie.lopez@sfcityatty.org)

Christopher Dalbey, Deputy District Attorney  
SANTA BARBARA COUNTY  
1112 Santa Barbara St.  
Santa Barbara, CA 93101  
[DAProp65@co.santa-barbara.ca.us](mailto:DAProp65@co.santa-barbara.ca.us)

Nancy O'Malley, District Attorney  
ALAMEDA COUNTY  
7776 Oakport Street, Suite 650  
Oakland, CA 94621  
[CEPDProp65@acgov.org](mailto:CEPDProp65@acgov.org)



District Attorney  
ALAMEDA COUNTY  
1225 Fallon Street, Room 900  
Oakland, CA 94612

District Attorney  
ALPINE COUNTY  
PO Box 248  
Markleeville, CA 96120

District Attorney  
AMADOR COUNTY  
708 Court Street, #202  
Jackson, CA 95642

District Attorney  
BUTTE COUNTY  
25 County Center Drive —  
Administration Building  
Oroville, CA 95965

District Attorney  
CALAVERAS COUNTY  
891 Mountain Ranch Road  
San Andreas, CA 95249

District Attorney  
COLUSA COUNTY  
346 5th Street, Suite. 101  
Colusa, CA 95932

District Attorney  
CONTRA COSTA COUNTY  
900 Ward Street  
Martinez, CA 94553

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  
PO Box 430  
Willows, CA 95988

District Attorney  
HUMBOLDT COUNTY  
825 5th Street  
Eureka, CA 95501

District Attorney  
IMPERIAL COUNTY  
940 West Main Street, Suite. 102  
El Centro, CA 92243

District Attorney  
INYO COUNTY  
168 North Edwards  
Independence, CA 93526

District Attorney  
KERN COUNTY  
1215 Truxtun Avenue  
Bakersfield, CA 93301

District Attorney  
KINGS COUNTY  
1400 West Lacey Blvd.  
Hanford, CA 93230

District Attorney  
LAKE COUNTY  
255 N. Forbes Street  
Lakeport, CA 95453

District Attorney  
LASSEN COUNTY  
220 S. Lassen Street, Suite. 8  
Susanville, CA 96130

District Attorney  
LOS ANGELES COUNTY  
210 W. Temple Street  
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  
PO BOX 730  
Mariposa, CA 95338

District Attorney  
MENDOCINO COUNTY  
PO BOX 1000  
Ukiah, CA 95482

District Attorney  
MERCED COUNTY  
550 West Main Street  
Merced, CA 95340

District Attorney  
MODOC COUNTY  
204 S. Court Street, Room 202  
Alturas, CA 96101

District Attorney  
MONO COUNTY  
PO BOX 2053  
Mammoth Lakes, CA 93546

District Attorney  
MONTEREY COUNTY  
PO BOX 1131  
Salinas, CA 93902

District Attorney  
NAPA COUNTY  
1127 First Street, Ste. C  
Napa, CA 94559

District Attorney  
NEVADA COUNTY  
201 Commercial Street  
Nevada City, CA 95959

District Attorney  
ORANGE COUNTY  
401 Civic Center Drive West  
Santa Ana, CA 92701

District Attorney  
PLACER COUNTY  
10810 Justice Center Drive  
Roseville, CA 95678

District Attorney  
PLUMAS COUNTY  
520 Main Street, Room 404  
Quincy, CA 95971

District Attorney  
RIVERSIDE COUNTY  
3960 Orange Street  
Riverside, CA 92501

District Attorney  
SACRAMENTO COUNTY  
901 G Street  
Sacramento, CA 95812

District Attorney  
SAN BENITO COUNTY  
419 4th Street  
Hollister, CA 95023

District Attorney  
SAN BERNARDINO COUNTY  
303 W. Third Street  
San Bernardino, CA 92415

District Attorney  
SAN DIEGO COUNTY  
330 W. Broadway, Suite 1300  
San Diego, CA 92101

District Attorney  
SAN FRANCISCO COUNTY  
880 Bryant Street, Third Floor  
San Francisco, CA 94103

District Attorney  
SAN JOAQUIN COUNTY  
PO BOX 990  
Stockton, CA 95202

District Attorney  
SAN LUIS OBISPO COUNTY  
Courthouse Annex, 4th Floor  
San Luis Obispo, CA 93408

District Attorney  
SAN MATEO COUNTY  
400 County Center, Third Floor  
Redwood City, CA 94063

District Attorney  
SANTA BARBARA COUNTY  
1112 Santa Barbara Street  
Santa Barbara, CA 93101

District Attorney  
SANTA CLARA COUNTY  
70 West Hedding Street, West Wing  
San Jose, CA 95110

District Attorney  
SANTA CRUZ COUNTY  
701 Ocean Street, Room 200  
Santa Cruz, CA 95060

District Attorney  
SHASTA COUNTY  
1355 West Street  
Redding, CA 96001

District Attorney  
SIERRA COUNTY  
100 Courthouse Square  
Downieville, CA 95936

District Attorney  
SISKIYOU COUNTY  
PO BOX 986  
Yreka, CA 96097

District Attorney  
SOLANO COUNTY  
675 Texas Street, Suite 4500  
Fairfield, CA 94533

District Attorney  
SONOMA COUNTY  
600 Administration Drive, Room 212J  
Santa Rosa, CA 95403

District Attorney  
STANISLAUS COUNTY  
832 12th Street, Suite 300  
Modesto, CA 95353

District Attorney  
SUTTER COUNTY  
446 Second Street, Suite 102  
Yuba City, CA 95991

District Attorney  
TEHAMA COUNTY  
PO BOX 519  
Red Bluff, CA 96080

District Attorney  
TRINITY COUNTY  
PO BOX 310  
Weaverville, CA 96093

District Attorney  
TULARE COUNTY  
221 South Mooney Blvd., Suite 224  
Visalia, CA 93291

District Attorney  
TUOLUMNE COUNTY  
423 No. Washington Street  
Sonora, CA 95370

District Attorney  
VENTURA COUNTY  
800 South Victoria Avenue  
Ventura, CA 93009

District Attorney  
YOLO COUNTY  
301 Second Street  
Woodland, CA 95695

District Attorney  
YUBA COUNTY  
215 Fifth Street, Suite. 152  
Marysville, CA 95901

Mike Feuer  
City Attorney  
CITY OF LOS ANGELES  
200 N. Main Street  
Los Angeles, CA 90012

Jan Goldsmith  
City Attorney  
CITY OF SAN DIEGO  
1200 Third Avenue, 3rd Floor  
San Diego, CA 92101

Richard Doyle  
City Attorney  
CITY OF SAN JOSE  
200 East Santa Clara Street  
San Jose, CA 95113

Dennis J. Herrera  
City Attorney  
CITY OF SAN FRANCISCO  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102