

LITIGATION AND TRIAL LAW

Kevin J. Cole, Esq.
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May 5, 2020

VIA CERTIFIED MAIL

The Pottery Inc., A California Corporation
c/o Kyle Kazan
3711 Long Beach Blvd., Suite 814
Long Beach, California 90807

Re: 60-Day Notice of Proposition 65 Violation (California Health & Safety Code § 25249 et seq.)

Dear Mr. Kazan:

This firm represents Kelli Smith, a citizen of the State of California acting in the interest of the general public. Ms. Smith has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986, commencing with Section 25249.5 of the Health and Safety Code ("Proposition 65"), with respect to the products identified below. These violations have occurred and continue to occur because The Pottery Inc., A California Corporation ("The Pottery") failed to provide required clear and reasonable warnings with these products. Section 25249.6 of the statute provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . ."

This letter serves as notice of these violations to The Pottery and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d), Ms. Smith 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 and Summary of Proposition 65. A copy of a summary of Proposition 65 prepared by the Office of Environmental Health Hazard Assessment ("OEHHA") is attached to this letter.

Consumer Products and Listed Chemical. The products ("Products") which are causing an exposure without a warning in violation of Proposition 65 include all the medical marijuana "flowers" or "buds" sold to California residents for consumption by smoking. The Pottery failed to clearly and reasonably warn consumers that Marijuana Smoke is a chemical known to the State of California to cause cancer.¹ On June 19, 2009, OEHHA,

¹ Many of the chemical constituents that have been identified in Marijuana Smoke are carcinogens. "The following 33 marijuana smoke constituents . . . are listed under Proposition 65 as causing cancer: acetaldehyde, acetamide, acrylonitrile, 4-aminobiphenyl, arsenic, benz[a]anthracene, benzene, benzo[a]pyrene, benzo[b]fluoranthene, benzo[j]fluoranthene, benzo[k]fluoranthene, benzofuran, 1,3-butadiene, cadmium, carbazole, catechol, chromium (hexavalent compounds), chrysene, dibenz[a,h]anthracene, dibenz[a,i]pyrene, dibenzo[a,e]pyrene, diethylnitrosamine, dimethylnitrosamine, formaldehyde, indeno[1,2,3,-c,d]pyrene, isoprene, lead, mercury, 5-methylchrysene, naphthalene, nickel, pyridine, and quinoline." Tomar, R.S., J. Beaumont, and J.C.Y. Hsieh, *Evidence on the Carcinogenicity of Marijuana Smoke*. Aug. 2009, California Environmental

part of California's Environmental Protection Agency, added Marijuana Smoke to the Proposition 65 list. OEHHA announced the selection of Marijuana Smoke as a chemical for consideration for listing by the Carcinogen Identification Committee (the "CIC") in the *California Regulatory Notice Register* on December 12, 2007, subsequent to consultation with the CIC at its November 19, 2007 meeting. The CIC determined that Marijuana Smoke was clearly shown, through scientifically valid testing according to generally accepted principles, to cause cancer. As a result, Marijuana Smoke was added to the Proposition 65 list, pursuant to Title 27, California Code of Regulations, section 25305(a)(1) (formerly Title 22, California Code of Regulations, section 12305(a)(1)).

Listed Chemical and Route of Exposure.

Chemical	CAS No.	Toxicological Endpoint	Listing Mechanism
Marijuana Smoke ²	---	Cancer	State's Qualified Experts

The consumer exposures that are the subject of this Notice result from the use of the Products in accordance with their intended use, including the combustion and inhalation of the Products. Consequently, the primary route of exposure to the chemicals contained in marijuana is through direct smoking of marijuana leaves, flowers, and stems.

Period of Exposure and Violation. Exposures to Marijuana Smoke from the use of the Products have occurred each day since the Products were introduced into the California marketplace, but at a minimum since July 9, 2019. Moreover, these exposures will continue every day until clear and reasonable warnings are provided to purchasers and users. Without proper warnings regarding the toxic effects of exposures to Marijuana Smoke resulting from contact with the Products, California citizens lack the information necessary to make informed decisions on whether and how to eliminate (or reduce) the risk of exposure to the listed chemicals from reasonable foreseeable use of the Products.

Resolution of Noticed Claims. Consistent with the public interest goals of Proposition 65, Ms. Smith is interested in seeking a constructive resolution to this matter to have the ongoing violations of California law quickly rectified. To that end, Ms. Smith intends to file a private enforcement action as provided for in Proposition 65 for the alleged violations by The Pottery, unless it agrees in an enforceable written instrument to: (i) recall the listed Products or undertake best efforts to ensure that the requisite health hazard warnings are provided to those who have received such Products; (ii) affix clear and reasonable Proposition 65 warning labels for Products sold in the future; and (iii) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals and avoid costly and time-consuming litigation.

Protection Agency, Reproductive and Cancer Hazard Assessment Branch, Office of Environmental Health Hazard Assessment.

² See *Marijuana Smoke Listed Effective June 19, 2009 As Known To The State Of California To Cause Cancer*, Office of Environmental Health Hazard Assessment, Jun. 19, 2009, available at <https://oehha.ca.gov/proposition-65/cmr/marijuana-smoke-listed-effective-june-19-2009-known-state-california-cause> (last visited May 4, 2020).

If you are interested in discussing a potential early resolution of this matter, you may communicate directly with Ms. Smith's attorneys using the below contact information.

Contact Information. Please direct all questions or issues concerning this Notice to Ms. Smith's counsel at the following address:

Kevin J. Cole, Esq.
KJC Law Group, A Professional Corporation
6700 Fallbrook Avenue, Suite 207
West Hills, CA 91307
Telephone: (818) 392-8995
e-Mail: kevin@kjclawgroup.com

Sincerely,



Kevin J. Cole

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to Violator only)
Additional Supporting Information for Certificate of Merit (to the California Attorney General only)

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.

CERTIFICATE OF MERIT

I, Kevin J. Cole, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day Notice in which it is alleged the party identified in the Notice has violated California 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 Plaintiff's 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: May 5, 2020

Kevin J. Cole, Esq.
KJC Law Group, A Professional Corporation
Attorneys for Kelli Smith

CERTIFICATE OF SERVICE

I, Chen Wang, 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 Los Angeles, California, where the mailing occurs; and my business address is 6700 Fallbrook Avenue, Suite 207, West Hills, CA 91307.

On May 5, 2020, 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

The Pottery Inc., A California Corporation
c/o Kyle Kazan
3711 Long Beach Blvd., Suite 814
Long Beach, California 90807

On May 5, 2020, 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 May 5, 2020, 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 email service and the authorization appears on the Attorney General's website.

See Attached Service List

On May 5, 2020, 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 May 5, 2020 in Los Angeles, California



Chen Wang

Electronic Service List

Office	Contact Information
ALAMEDA	Nancy O'Malley, District Attorney 7776 Oakport Street, Suite 650 Oakland, CA 94621 CEPDProp65@acgov.org
CALAVERAS	Barbara Yook, District Attorney 891 Mountain Ranch Rd. San Andreas, CA 95249 Prop65Env@co.calaveras.ca.us
CONTRA COSTA	Stacey Grassini, Deputy District Attorney 900 Ward Street Martinez, CA 94553 sgrassini@contracostada.org
INYO	Thomas L. Hardy, District Attorney 168 North Edwards Street Independence, CA 93526 inyoda@inyocounty.us
LASSEN	Michelle Latimer, Program Coordinator 220 S. Lassen Street Susanville, CA 96130 mlatimer@co.lassen.ca.us
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MONTEREY	Jeannine M. Pacioni, District Attorney 1200 Aguajito Road Monterey, CA 93940 Prop65DA@co.monterey.ca.us
NAPA	Gary Lieberstein, District Attorney 931 Parkway Mall Napa, CA 94559 CEPD@countyofnapa.org
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SAN LUIS OBISPO	Eric J. Dobroth, Deputy District Attorney County Government Center Annex, 4th Floor San Luis Obispo, CA 93408 edobroth@co.slo.ca.us
SANTA BARBARA	Christopher Dalbey, Deputy District Attorney 1112 Santa Barbara St. Santa Barbara, CA 93101 DAProp65@co.santa-barbara.ca.us
SANTA CLARA	Bud Porter, Supervising Deputy District Attorney 70 W Hedding St San Jose, CA 95110 EPU@da.sccgov.org
SANTA CRUZ	Jeffrey S. Rosell, District Attorney 701 Ocean Street Santa Cruz, CA 95060 Prop65DA@santacruzcounty.us
SONOMA	Stephan R. Passalacqua, District Attorney 600 Administration Dr. Sonoma, CA 95403 jbarnes@sonoma-county.org

TULARE	<p>Phillip J. Cline, District Attorney 221 S Mooney Blvd Visalia, CA 95370 Prop65@co.tulare.ca.us</p>
VENTURA	<p>Gregory D. Totten, District Attorney 800 S Victoria Ave Ventura, CA 93009 daspecialops@ventura.org</p>
YOLO	<p>Jeff W. Reisig, District Attorney 301 Second Street Woodland, CA 95695 cfepd@yolocounty.org</p>

Service List

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District Attorney, Butte
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245
Oroville, CA 95965

District Attorney, Colusa
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346 Fifth Street Suite 101
Colusa, CA 95932

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

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Placerville, CA 95667

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Fresno, CA 93721

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Willows, CA 95988

District Attorney, Humboldt
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