

**XAVIER BECERRA**  
**Attorney General**

**State of California**  
**DEPARTMENT OF JUSTICE**



1515 CLAY STREET, 20TH FLOOR  
P.O. BOX 70550  
OAKLAND, CA 94612-0550

Public: (510) 879-1300  
Telephone: (510) 879-1300  
Facsimile: (510) 622-2270  
E-Mail: Susan.Fiering@doj.ca.gov

February 1, 2021

Jake Shulte, Esq.  
Nicholas and Tomacevic LLP  
225 Broadway, 19th Floor  
San Diego, CA 92101

Noam Glick, Esq.  
Glick Law Group  
225 Broadway, Suite 2100  
San Diego, CA 92101

RE: Proposition 65 Notices 2020-1830, 1836, 1387, 1838, 1840

Dear Mr. Glick and Mr. Shulte:

We write to you pursuant to the Attorney General's authority under Health and Safety Code section 25249.7, subdivision (e)(1)(A), which is part of the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as "Proposition 65." We have reviewed the above 60-day notices of violation and accompanying certificate of merit that your client sent to a number of corporations (see attached list). The notices allege that the companies sell dark chocolate that exposes persons to lead without providing a clear and reasonable warning.

Based on our review of the notices, we have concluded that you have failed to provide sufficient information to indicate that there is a credible basis to conclude that there is merit to each element of the action on which plaintiff will have the burden of proof and that the information relied on does not prove that any affirmative defense has merit. The 60-day notices do not give your client authority to file suit in the public interest, or to settle claims based on the alleged violations. We ask that you withdraw the notices immediately. Our position is discussed in more detail below.

Proposition 65 requires companies with ten or more employees to provide clear and reasonable warnings to persons prior to knowingly and intentionally exposing them to chemicals known to cause cancer or reproductive toxicity. (Health & Saf. Code, § 25249.6.) Persons acting in the public interest can bring a private action to enforce Proposition 65 at least sixty days after sending a 60-day notice to the alleged violators and public enforcers, unless the Attorney General or other public enforcer is diligently prosecuting an action against the

violation. (*Id.*, § 25249.7, subd. (d).) Before sending a 60-day notice alleging a failure to warn, the private enforcer must consult with an expert who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical. Based on the consultation, the person sending the notice or his or her attorney must execute a certificate of merit stating his or her belief that, based on the consultation, “there is a reasonable and meritorious case for the private action.” (*Id.*, subd. (d)(1).) The enforcer must attach to the Attorney General’s copy of the certificate of merit factual information sufficient to establish its basis, which the Attorney General is required to maintain in confidence. (*Id.*, subds. (d)(1), (i).) The certificate of merit must document both exposure to the chemical and that there “is merit to each element of the action on which the plaintiff will have the burden of proof.” Further, the certifier must certify that “the information relied upon does not prove that any affirmative defense has merit.” (Tit. 11, Cal. Code Regs., § 3101(a).) If the Attorney General believes there is no merit to the action after reviewing the certificate of merit and meeting and conferring with the private enforcer, the Attorney General must serve a letter on the noticing party and the alleged violator stating this position and make the letter available to the public. (Health & Saf. Code, § 25249,7 subd. (e)(1).)

The referenced 60-day notices allege that the companies expose persons to the lead in dark chocolate without providing the required warning. We are not able to disclose the contents of the supporting information for the certificate of merit. However, based on our review and taking into consideration the court-approved consent judgment in *As You Sow v. Trader Joe’s Company et al.*, San Francisco Superior Court, Case No. CGC-15-548791 (Feb. 20, 2018), we have concluded that you have failed to provide sufficient information to indicate that the information relied upon does not prove that any affirmative defense has merit.<sup>1</sup>

The 60-day notices do not give your client authority to file suit in the public interest, or to settle claims based on the alleged violations. We ask that you withdraw the notices immediately.

Sincerely,

/S/ Susan S. Fiering

SUSAN S. FIERING  
Deputy Attorney General

For XAVIER BECERRA  
Attorney General

---

<sup>1</sup> A copy of the *Trader Joe’s* Consent Judgment is available at <https://oag.ca.gov/system/files/prop65/judgments/2014-01160J3733.PDF>.

February 1, 2021  
Page 3

CC: See attached

SF1994IN0809

February 1, 2021

Page 4

ATTACHMENT

Nestlé USA, Inc. CT Corporation System 4701 Cox Road STE 285 Glen Allen, VA 23060-6808

Nestlé USA, Inc. Attn. Legal Department 1812 N. Moore Street Arlington, VA 22209-0000

Amazon.com CSC -- Lawyers Incorporating Service 2710 Gateway Oaks Drive, STE 150 N  
Sacramento, CA 95833

Amazon Attn. Legal Department 410 Terry Avenue North Seattle, WA 98109-5210

ChocZero, Inc. C/O Michelle Wong 1376 E Valencia Dr Fullerton, CA 92831

Bouchard Chocolate Attn. Legal Department Skaldenstraat 11 9042 Gent, Belgium

Amazon.com CSC – Lawyers Incorporating Service 2710 Gateway Oaks Drive, STE 150 N  
Sacramento, CA 95833

Amazon Attn. Legal Department 410 Terry Avenue North Seattle, WA 98109-5210

Eating Evolved Inc. Attn. Legal Department 135 Ricefield Ln Hauppauge, NY 11788

The Chocolate Butcher, LLC Attn. Legal Department 160 Boyer Circle, Building B Williston,  
VT 05495

The Chocolate Butcher, LLC C/O Jeffrey T. Mannion P.O. Box 302 Williston, VT 05495

Amazon.com CSC – Lawyers Incorporating Service 2710 Gateway Oaks Drive, STE 150 N  
Sacramento, CA 95833

Amazon Attn. Legal Department 410 Terry Avenue North Seattle, WA 98109-5210