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Attorney General

State of California  
DEPARTMENT OF JUSTICE



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December 4, 2019

Danielle Fugere  
As You Sow  
2150 Kittredge St., Ste. 450  
Berkeley, CA 94704

RE: Proposition 65 Notices of Violation for Lead and Cadmium in Chocolate  
AGO Notice No. 2019-01818

Dear Ms. Fugere:

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 60-day notice of violation and accompanying certificate of merit that As You Sow sent to 22 companies that manufacture or sell chocolate products, dated September 20, 2019.<sup>1</sup> The notice alleges that the companies sell products that expose persons to lead and/or cadmium without providing a clear and reasonable warning. We have concluded that there is no merit to the action.

Proposition 65 requires companies with 10 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 60 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. (Health & Saf. Code, § 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 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).) If the Attorney General believes there is no

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<sup>1</sup> The Attorney General number for the notice is 2019-01818. A copy of the notice is posted on our website, at <https://oag.ca.gov/prop65/60-Day-Notice-2018-01818>.

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 to the noticing party and the alleged violator stating this position and make the letter available to the public. (Health & Saf. Code, §§ 25249.7, subs. (e)(1), (g).)

The referenced 60-day notice alleges that the companies expose persons to lead and/or cadmium in assorted chocolate products. It alleges that the companies have done so without providing a clear and reasonable warning that the products expose persons to chemicals known to cause birth defects or reproductive harm.

We are not able to disclose the contents of the supporting information for the certificate of merit. However, based on our review, we have concluded that there is not a credible basis that all elements of the plaintiff's case can be established with respect to the full range of products and chemicals identified in the notice.<sup>2</sup> In reaching this conclusion, we have taken into consideration the warning thresholds for lead and cadmium in chocolate products that As You Sow agreed to, and the court approved, in *As You Sow v. Trader Joe's Company et al.*, San Francisco Superior Court, Case No. CGC-15-548791 (Feb. 20, 2018). Because the evidence does not support the alleged violations, it is our view that any private action premised on the 60-day notice has no merit. (See *DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal. App.4<sup>th</sup> 966, 969 [failure to comply with prelitigation COM requirement mandates dismissal of private Proposition 65 causes of action].)

The 60-day notice does not give As You Sow authority to file suit in the public interest, or to settle claims based on the alleged violations. We ask that you withdraw it immediately.

Sincerely,



HARRISON M. POLLAK  
Supervising Deputy Attorney General

For XAVIER BECERRA  
Attorney General

cc: Attached list of notice recipients

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<sup>2</sup> As You Sow has submitted evidence sufficient to support the allegations as to cadmium in two of the products identified in the 60-day notice. We would not object if you were to expressly limit the notice to cadmium in those two products, although we are not at liberty to disclose which products they are. (See Health & Saf. Code, § 25249.7, subd. (i).)

## Service List

Mike Forbes  
Chief Executive Officer  
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San Francisco, CA 94103

Shawn Askinosie  
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Askinosie Chocolate  
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Springfield, MI 65803-2946

Robert L Taylor Jr  
Registered Agent  
Bob's Petro Products, In c.  
443 N Ryan Terrace  
Porterville, CA 93257

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Registered Agent  
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Tom Neuhaus  
Owner  
Mama Ganache Artisan Chocolates, Inc.  
1491 Monterey St.  
San Luis Obispo, CA 93401-2925

Hu Master Holdings, LLC  
c/o Registered Agent  
Corporation Service Company  
80 State St.  
Albany, NY 12207-2543

Hu Products, LLC  
c/o Jordan Brown and Jessica Karp  
Co-Founders  
Hu Kitchen  
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New York, NY 10011-8003

Tucker Garrison  
Chief Executive Officer  
Imlak'esh Organics  
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Chief Operations Officer  
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Chief Executive Officer  
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Service List

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**Dollar Tree, Inc.**  
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**Danielle Centeno**  
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**Hexx Chocolates & Confections**  
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**Tony's Chokoloney, Inc.**  
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**Peter-Jan J. M. Swinkels**  
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**Zotter Chocolates US, LLC**  
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Service List

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