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DEPARTMENT OF JUSTICE



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April 13, 2017

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

Craig Nicholas
Nicholas & Tomasevic, LLP
225 Broadway, 19th Floor
San Diego, CA 92101

RE: Proposition 65 settlement
AG● No. 2017-00

Dear Messieurs Glick and Nicholas:

We write to you concerning a document entitled "Confidential Release and Settlement" ("Settlement") that you reported to our office on April 11, 2017. The Settlement resolves Proposition 65 violations that Kimberly Embry ("Embry") alleged against Lambro Industries and True Value Company ("Lambro") in a 60-day notice dated February 13, 2017, based on the failure to warn about exposures to phthalates in white flexible vinyl vent hoses. In the Settlement, Lambro, which does not appear to be represented by counsel, agrees to pay you and your client \$14,900 and \$100, respectively, in exchange for Embry not filing a lawsuit or discussing publicly the claims or the settlement. Lambro does not agree to take any corrective action to remedy the alleged Proposition 65 violation. There are significant problems with the Settlement, which is, in our view, contrary to the public interest.

What follows is a list of the major issues with the settlement that are of concern to us. This is not intended as a comprehensive list, and we reserve the right to object to other aspects of the Settlement.

First, the Settlement purports to be on behalf of Kimberly Embry "and all similarly situated individuals and entities." Embry has no authority to settle Proposition 65 claims in a private, out-of-court settlement on behalf of anybody but herself. The Settlement is simply a private contract between the parties. Moreover, the parties executed the agreement on March 27

and 29, 2017, less than 60 days after Embry sent the 60-day notice, so Embry lacked any authority to settle in a representative capacity. (Health & Saf. Code, § 25249.7, subd. (d)(2).)

Second, the Settlement purports to resolve all “CLAIMS” and “DAMAGES.” The Settlement defines “CLAIMS” broadly to include Proposition 65 claims and “any other claim arising in law or equity of any kind whatsoever.” It defines “DAMAGES” to include any past, present, or future damages related to the Proposition 65 claims. Even if Embry had waited for the expiration of the 60-day time limit, her authority to resolve Proposition 65 claims would be limited to claims raised in the 60-day notice, namely, exposures to DEHP, DIDP, and DINP in white flexible vinyl vent hoses. It is misleading and deceptive to suggest that she is resolving claims beyond those identified in the 60-day notice. If she chooses to resolve additional claims solely in her individual capacity, then the settlement must make that explicit.

Third, the Settlement does not state what steps Lambro will take in the future to comply with Proposition 65. There is no commitment to provide warnings that allegedly are required or to reformulate the vinyl hoses to remove the phthalates. Lambro’s only obligation under the settlement is to pay Embry \$100 and to pay you \$14,900. Without any evidence that Lambro will remedy the alleged violations, the Settlement appears simply to be a payment to the enforcer and her counsel in exchange for the agreement not to sue. If Embry continued to believe there were violations, then she should have demanded measures to ensure compliance and not simply walked away in exchange for a monetary payment. On the other hand, if she determined that there were no violations, then she should have withdrawn the 60-day notice.

Fourth, there is no statutory authority for the settlement payments. The \$100 payment to Embry cannot be a civil penalty, because the Settlement does not provide for Embry to submit 75 percent of the payment to the Office of Health Hazard Assessment. (Health & Saf. Code, § 25249.12, subd. (c)(1).) To the extent the \$100 payment is an “Additional Settlement Payment,” it does not comply with any of the Attorney General’s guidelines for such payments. (See Cal. Code Regs., tit. 11, § 3204.) In fact, the guidelines specifically state that Additional Settlement Payments “should not be included in any Settlement that is not subject to judicial approval and ongoing judicial oversight.” (*Id.*, subd. (a).) Further, the \$14,900 in attorneys’ fees is not justified because there is no public benefit to the Settlement which, as discussed, does not require any corrective action on the part of Lambro to comply with Proposition 65. (See Code Civ. Proc., § 1021.5, subd. (a); Cal. Code Regs., tit. 11, § 3201, subd. (b).)

Finally, the Settlement is captioned “Confidential Release and Settlement,” and there is a lengthy confidentiality provision in Section 8. In it, Embry agrees not to disclose any information regarding the nature of her claims against Lambro or any aspect of the settlement agreement. Calling the agreement confidential in any manner is misleading because Embry is required by law to report the 60-day notice and the settlement to our office. (Health & Saf. Code, § 25249.7, subsd. (d), (f).) Our office, in turn, must make this information available to the public, which we do by posting them on a website. (*Id.*, subd. (g).) The settlement is therefore not, in any way, confidential.

As we stated at the beginning of this letter, this is not necessarily a comprehensive list of the Settlement's deficiencies. However, we believe that these problems, alone, render the Settlement contrary to the public interest. Embry had no authority to resolve claims on behalf of anyone other than herself, and she had no authority to accept \$15,000 payment to do so in this manner. The agreement is affirmatively misleading and appears to benefit only herself and her counsel. No private enforcer should enter into this kind of agreement under the auspices of Proposition 65.

In our opinion the agreement is void and against public policy.

Sincerely,



HARRISON M. POLLAK
Deputy Attorney General

For XAVIER BECERRA
Attorney General

cc: Shiv Anand, President
Lambro Industries of California, Inc., Lambro Industries, Inc., and Lambro-West, Inc.