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2550 Mariposa Mall, Room 5090
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Re: Comments Regarding Proposed Amendment to Proposition 65 Regulations
Our File No. 12789-000001

Dear Ms. Gerken:

On behalf of a coalition of two trade associations[1], numerous individual businesses, and myself, we thank the Office of the Attorney General ("OAG") for the opportunity to submit comments regarding proposed amendments to Title 11, Division 4, of the California Code of Regulations concerning Proposition 65 enforcement actions brought by private parties. We support the OAG's stated goals and objectives " to constrain private parties' use of payments-in-lieu-of penalties' to insure a sufficient nexus between funded activities and the violation; to ensure benefit to California; to increase the transparency of settlements in private party Proposition 65 cases; and to reduce excessive attorney's fee awards.[2]" We especially support the requirement for private plaintiffs to document more fully their fees and costs in all settlements, and to ensure that defendants have access to and comment on this information before fees are awarded by a court.

For the reasons set forth below, however, we believe that in their current form the Proposed Amendments will not achieve the stated objectives, and in many cases may make the current situation worse. We note also that at least two of the assumptions on which the Proposed Amendments are based are flawed and/or incomplete. Several federal statutes, including the Federal Food, Drug and Cosmetic Act ("FDCA") and the Occupational Safety and Health Act ("OSHA"), contain provisions that prohibit private enforcement, but the Notice of Proposed Rulemaking fails to acknowledge these limitations. Further, the economic analysis failed to evaluate the full impact of the Proposed Amendments, ignoring the impact on the regulated community.

We also believe that the existing regulations contain several provisions intended to curb private plaintiff abuse, such as the Certificate of Merit requirement and the OAG's authority to intervene

[1] The two trade associations are the American Sportfishing Association and the Society of Glass and Ceramic Decoration Professionals

[2] Notice of Proposed Rulemaking, page 3, published September 25, 2015.

and exercise jurisdiction, which the OAG has not exercised fully. In our view, the best way to constrain meritless cases is with OAG scrutiny and intervention at the beginning of a private prosecution.

I. PROPOSED AMENDMENTS

A. Payments In Lieu – Proposed § 3204 -

We request that the OAG adopt a provision that ***disallows all payments in lieu*** (also called Alternate Settlement Payments) in any settlement involving a private plaintiff. If the OAG decides to keep the provision, such payments should be limited and they should ONLY go to governmental entities. Under no circumstances should such payments be allowed where the private plaintiff or any of its related entities is the recipient of such money. Where the private plaintiff is the recipient of the money, it gives him a personal financial stake in the matter, which is unwarranted, fosters litigation abuse and should defeat an award of attorney's fees under Code of Civil Procedure §1021.5.[3]

B. Rebuttable Presumption of "Significant Public Benefit" for Reformulation Proposed § 3201(b)(2)

Reformulation terms in settlement agreements mask serious problems. First, only product manufacturers have the ability to reformulate products: retailers and distributors do not. Thus, if this provision is adopted at all, it must be made clear that private plaintiffs may not include a reformulation provision in a settlement unless the defendant manufactures or has the ability to control product reformulation. Currently, most private plaintiffs *require* – e.g. make it a nonnegotiable – that a reformulation provision be included in every settlement regardless of whether the defendant is a retailer or a manufacturer/importer. We believe this is included so that the private enforcer can use the reformulation claim for publicity and/or to argue for increased attorney's fee awards. As a practical matter, retailers and distributors *cannot* reformulate products. If forced to agree to reformulation, their only recourse is to remove the product from the California market.

In the case of FDA regulated products, where the formulas and ingredients may be controlled by federal law, reformulation presents additional problems and concerns. Private enforcers have no technical expertise and little concern for FDA requirements and regulations, making settlements involving these products difficult, time consuming and costly to achieve[4].

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[3] An award of attorney's fees under Code of Civil Procedure §1021.5 imposes a balancing test. Fees are not available when the financial "stake" of the plaintiff in the litigation is sufficient to warrant the prosecution.

[4] To illustrate by example, the OAG may recall the difficulty the parties had reaching settlement terms in the so-called "Coal Tar Shampoo" cases. In those cases, the OAG agreed to allow such shampoos to be sold in California without a warning if the coal tar content (an active ingredient to control dandruff) was set at the minimum content that FDA considered safe and effective.

Proposition 65 is a "right to know" law, not a reformulation law. Although reformulation may be appropriate in some cases, often its benefits are not only questionable, but illusory. Most retailers and distributors will take the product off the market when they receive a notice of intent to sue, and/or begin warning. This should lead to a speedy and inexpensive settlement, as the alleged violation has been cured – usually before the 60-day period is over. Plaintiffs and their attorneys have no incentive to settle too quickly, and the "reformulation demand" is a convenient artifice to increase the attorneys' fees, time and cost of settlements.

Further, reformulation has figured prominently where products containing a newly listed chemical have been subject to private enforcement based on "old" inventory in retail stores a day or so after the listing became effective[5]. In these cases, reformulation was demanded, even though the product may have already been reformulated..

In sum, the potential for reformulation as a tool for abuse is much greater than the public benefit because the party who can most effectively reformulate – the manufacturer – is likely already doing so, or will do so simply to avoid the stigma of a warning label. Proposed § 3204 is likely to increase the cost of settlement and will further encourage illusory settlement terms than achieve the OAG's stated goals.

With the above additional comments – and our specific request that reformulation provisions may not be applied to retailers and distributors - we generally agree with the comments of the California Chamber of Commerce on Reformulation, Proposed § 3204.

C. Reasonable Civil Penalty

Most defendants that receive a notice of intent to sue would like to settle all claims quickly. Ironically, the impediment is not the provision of a warning, which has often been remedied during the notice period. It is the monetary settlement demands of the private plaintiffs (and the reformulation demand in the case of retailers and other defendants who do not manufacture the product). To assist the parties and provide for more uniform settlements, the OAG should provide guidance on reasonable civil penalties – e.g. presumed reasonable civil penalties. The OAG as lead prosecutor for the state has significant experience imposing and collecting fines and civil penalties, and it is notable that when the AG has prosecuted under Proposition 65, the civil penalties imposed have been significantly less than are demanded by the private plaintiffs and their counsel.

For example, a presumed reasonable civil penalty where the violation is cured by warnings or removal from the market before the notice period lapses might be the amount of profit that that defendant would have made on the items sold in California without a warning during the past 12 months. Where the violation is not cured before a suit is filed, a presumed additional reasonable civil penalty may be twice the profit that the defendant would make on all items sold after suit was filed. Either party could argue for a higher or lower reasonable penalty based on the individual

[5] The OAG is aware of several examples of such "mass prosecution" where reformulation was demanded, but had likely already occurred. To name three: the lead in jewelry cases; the Cocamide DEA cases; and the "Flame Retardant" cases.

circumstances, but having a presumptive guideline would support the OAG's goals of expediting settlements while making them more consistent.

Another reason that the OAG should establish benchmark civil penalties is illustrated by the recent article: *Inside Cal/EPA*, "Prop. 65 'Enforcer' Argues A. G.'s Litigation Penalty Reforms Will Hike Fees," October 8, 2015. Clearly, private plaintiffs view these Proposed Regulations as an opportunity to increase civil penalties and their own fee demand. To achieve the Proposed Amendments' purposes, the OAG should provide reasonable civil penalty guidelines, and also place limits on attorney's fees awards as discussed below.

D. Reasonable Attorney's Fees

The Proposed Regulations do not propose to amend § 3201 (Attorney's Fees"), but the OAG should consider doing so. Specifically, the OAG should require plaintiffs to document all fees and costs, and should set guidelines for reasonable fees. Moreover, plaintiffs should be required to present this documentation to the defendant as part of the fee negotiation process. Currently, the private enforcer will make a lump sum demand, and if defendants do not agree to pay it, the case will not settle.

Proposition 65 requires the court to approve all consent judgments, and the plaintiff must submit information to the court justifying the reasonable fee. Currently, defendants are not provided with the plaintiff's fee information during the negotiation process, and after agreeing to settle, defendants are unable to protest. By separating the settlement from the attorney's fee award - especially if the OAG sets reasonable guidelines for civil penalty amounts - plaintiffs will be unable to hold settlements hostage to unconscionably high fee awards.

The current situation favors plaintiffs' counsel to the prejudice of defendants. The OAG should consider a provision that requires settling the underlying case separately from the fee provision unless the fees are below $10,000. Where larger fee awards are sought, the plaintiff should submit a fee application, which may be rebutted by defendant and the reasonable amount determined by the court at the consent judgment approval hearing.

II. REGULATORY ASSUMPTIONS IN THE NOTICE ARE INACCURATE AND INCOMPLETE

A. Conflict with Federal Law

While there is no federal law exactly "analogous" to Proposition 65, there are federal laws that prohibit private enforcement of labeling requirements. The Notice of Proposed Rulemaking fails to address well-documented conflicts with federal law that apply. There are several, but we note only two.

FDA regulated products: Proposition 65 imposes warnings on product labeling, and the **private enforcement** of Proposition 65 conflicts with federal law. Specifically, enforcement of the FDCA is entrusted exclusively to the federal government. 21 U.S.C. § 337(a) ("[A]ll such proceedings for enforcement, or to restrain violations of [the FDCA] shall be by and in the name of the United States."); Section 337(a) limits "standing" and prevents private challenges to the adequacy of labeling

for FDA-regulated products. Although there is an exception for enforcement by States' public prosecutors, ***this does not apply to private parties.***

Industrial use products: OSHA restricts private enforcement of Proposition 65 to conduct occurring in California, and specifically prohibits private enforcement against out-of state manufacturers who must only comply with OSHA requirements that apply in the state in which they place the product in commerce. OSHA determined that although California is free to require *California* employers and manufacturers of industrial use products to comply with Proposition 65 as to *activity in California*, the State could not compel out-of-state manufacturers to do so. Rather, each manufacturer must comply with the OSHA Act as it applies *in the state in which the manufacturer labels and places industrial use products in commerce.* In firmly rejecting the State's claims that Proposition 65 applies to every manufacturer whose product is used in California, OSHA said: "***Proposition 65 as incorporated into the State plan may only be enforced against in-State employers.***" 62 Fed. Reg. 31159, 31167. The application of Proposition 65 against manufacturers and distributors of workplace chemical products incorporated in other States is limited to worksites maintained by such companies in California, where the "'out-of-state" business also would be an "in-state" employer." *Id.*

The Proposed Amendments should make clear that private enforcement of some alleged violations may be not be available to private plaintiffs.

B. Economic Analysis Is Incomplete

We agree with the comments of the California Chamber of Commerce that the OAG failed to fully evaluate the economic impacts of the Proposed Amendments. As indicated above, the reformulation provision alone has potential to materially increase costs, and draw out the time and cost to complete settlements. In the case of retailers and others who do not have control over manufacturers, the reformulation provisions not only increase costs, but disrupt supply chains and the alleged benefits may be illusory.

III. CONCLUSION

In sum, the OAG should simplify the settlement regulations and eliminate provisions that increase cost of negotiating a resolution and serve as a financial incentive for private plaintiffs and their attorneys to prolong the settlement process and misuse litigation for their personal enrichment. Removing the payment-in-lieu provision entirely and limiting the reformulation provision to defendants who manufacture and/or control the product formulation is not only reasonable, but imperative to prevent abuse. The OAG should also set objective and reasonable civil penalties guidelines to reward defendants who act during the notice period to provide warnings. The OAG should also monitor private plaintiffs to ensure that they do not unreasonably reject defendant's settlement offers before filing suit. Private plaintiffs often refuse to settle even though defendants have cured the underlying violation, because the defendant will not agree to the "payment in lieu" donation to the plaintiff, and/or an unwarranted and excessive attorney's fee award. This problem can be easily solved by eliminating payments in lieu entirely and also separating the attorney fee award from the settlement of the underlying violation.

Thank you for your consideration of these comments. We appreciate the OAG's goals, and the opportunity to provide ideas and information to assist in the process.

Very truly yours,

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