IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

AMERICAN CHEMISTRY COUNCIL, Petitioner and Appellant, **v.** **OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT AND DR. LAUREN ZEISE, ACTING DIRECTOR,** Respondents and Appellees	Case No. C079260

County Superior Court, Case No. 34-2014-80001868
Honorable Christopher Krueger, Judge

RESPONSE TO AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE

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INTRODUCTION

The document filed by the Chamber of Commerce (Chamber) in support of the American Chemistry Council is less an amicus curiae brief intended to assist this Court in resolving the issues before it, and more a continuation of the three decade battle that the Chamber and other entities have waged against the Safe Drinking Water and Toxic Enforcement Act (Health & Saf. Code, § 25249.5 *et seq.*), also known as "Proposition 65." In repeating the well-worn attacks on Proposition 65, the brief overlooks the multiple levels of safeguards that are built into the statute to prevent frivolous litigation and over warning, and ignores the acknowledged success of the statute in reducing toxic exposure.

Further, in stressing the need for "rigor" in the listing process under Proposition 65, the Chamber ignores the fact that the chemical at issue in this case, diisononyl phthalate ("DINP"), was listed by the most scientifically stringent of the listing mechanisms – independent review by a group of eminent and independent scientific experts after public comment and a public hearing; that these experts voted to list DINP six to one, with one vote abstaining; and that the single member who voted not to list noted that this was very much a "judgment call," that went against his "usual nature," and that, with so many tumor types, "it really is very difficult not to list it." [Administrative Record ("AR") 9517, 9518]

The Chamber's Brief addresses none of the issues that are before the Court. Nevertheless, Respondents and Appellees Office of Environmental Health Hazard Assessment and Dr. Lauren Zeise, Acting Director (jointly "OEHHA") respond briefly as follows.

DISCUSSION

I. PROPOSITION 65 CONTAINS MULTIPLE LEVELS OF SAFEGUARDS TO PREVENT OVER WARNINGS AND FRIVOLOUS LAWSUITS

A. The statute provides for exemptions from the warning requirement.

Proposition 65 is implemented in a two-step process. In the first step, chemicals are placed on the list of substances "known to the state to cause cancer or reproductive toxicity." (Health & Saf. Code, § 25249.8, subd. (a)[1]; *Exxon Mobil Corporation v. Office of Environmental Health Hazard Assessment* (2009) 169 Cal.App.4th 1264, 1291-92.) The decision to list a chemical is based solely on the "hazard" it poses. If a chemical has been shown to cause cancer or reproductive toxicity, at any level of exposure, it is placed on the Proposition 65 list of chemicals, regardless of the level of risk it poses based on current or anticipated exposures. (See *ibid*.)

The risk to humans is considered in the second step of Proposition 65 after the chemical is listed. For carcinogens like DINP, businesses must warn individuals about exposures to the chemical, unless the business can establish that the exposure will cause "no significant risk." (§§ 25249.6; 25249.10, subd. (c).) The No Significant Risk Level or "NSRL" is defined as the exposure that "is calculated to result in one excess case of cancer in an exposed population of 100,000. . . ." (§ 25249.10, subd. (c); Cal. Code Regs., tit. 27 ["27CCR"], § 25703, subd. (b).) Exposures that do not result in more than one excess case of cancer in an exposed population of 100,000 individuals do not require a warning.

Thus, contrary to the Chamber's arguments, Proposition 65 has a built-in mechanism to, as the Chamber puts it, "ensure that the public is only warned of meaningful risks." (Chamber Brief at p. 9.)

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[1] All further statutory references are to the Health and Safety Code unless otherwise noted.

B. OEHHA has taken steps to assist businesses in proving that they are exempt from the warning requirement.

In order to assist businesses in proving that they are exempt from the statutory requirements, i.e., that the exposure they cause is below the level that requires a warning, OEHHA has the discretion to enact regulations setting the NSRL for listed carcinogens. In the case of DINP, OEHHA adopted an NSRL of 146 micrograms per day. (27CCR, § 25705, subd. (b).) A business that can prove that the exposure it causes to DINP is no more than 146 micrograms per day need not provide a warning under the statute.

In addition to setting NSRLs for listed carcinogens, OEHHA may, at the request of a business entity, issue a Safe Use Determination ("SUD") that states whether, in the agency's best judgment, a particular business activity is exempt from the warning requirement of the statute. (27CCR, § 25204.) OEHHA has recently issued three SUDs for particular uses of DINP, in vinyl carpet tiles, roofing membranes, and vinyl flooring products (see http://oehha.ca.gov/media/downloads/crnr/06102016dinpcarpettile.pdf [for Tandus Centiva ER3 Modular Vinyl Carpet Tiles]; http://oehha.ca.gov/media/downloads/crnr/112515sudroofingcrnr.pdf [for Certain Single-ply Polyvinyl Chloride Roofing Membrane Products]; and http://oehha.ca.gov/proposition-65/crnr/issuance-safe-use-determination-exposure-residents-diisononyl-phthalate-vinyl [for residential use of vinyl flooring products]), and is considering a fourth request related to textiles used in outdoor furniture. (http://oehha.ca.gov/proposition-65/crnr/safe-use-determination-dinp-phifertexr-fabric.)

Thus, OEHHA has taken significant steps to assist businesses in proving that they are exempt from the Proposition 65 warning requirement because the exposures they cause are below the threshold warning level. By relying on the regulatory NSRL, and by seeking Safe Use Determinations, businesses can avoid over warning and significantly reduce their risk of being sued under Proposition 65.

II. THE LEGISLATURE AND THE ATTORNEY GENERAL HAVE TAKEN STEPS TO REDUCE MERITLESS LITIGATION UNDER PROPOSITION 65

As the Chamber points out, the California Legislature has twice amended Proposition 65 to impose limitations on private party lawsuits. Thus, private parties must now serve on the Attorney General a Certificate of Merit, accompanied by evidence, demonstrating that they have sufficient evidence to demonstrate a meritorious case for action under Proposition 65. (§ 25249.7, subd. (d)(1).) The Attorney General contacts private enforcers when their notices are not sufficient, often requiring them to withdraw the notice. The Attorney General has also publicly informed the noticed parties when a private enforcer has not provided an adequate certificate of merit. (See https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/letter-sheffer-111215.pdf?; https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/vorhees_ltr_fnl.pdf?; https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/prop65Alcoholic_Games_and_Novelties.pdf?

The Legislature also amended Proposition 65 to require parties to serve copies of their settlements on the Attorney General. If the settlement is of a filed action, the parties must seek court approval, and the Attorney General may appear and object to such settlements. (§ 25249.7, subd. (f)(4), (5).) The Attorney General has objected to a number of settlements, both private and in-court settlements (See e.g., https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/ERC_vitamin_power_settlement.pdf?; *Nasseri v. Cytosport, Inc.*, County of Los Angeles Superior Court No. BC43918, Attorney General's Objection to Approval of Second Amended Settlement Agreement (July 6, 2012)), objections which have, in some cases, resulted in the parties voluntarily revising their settlements or the court's declining to approve the settlements as written.

In 2003 the Attorney General enacted Settlement Guidelines, which are not binding on parties, but which inform the parties of the Attorney General's view of what is required for a settlement to be proper under Proposition 65. (Cal. Code Regs.,

tit. 11, §§ 3200-3204.) More recently, in 2015, the Attorney General proposed updated Settlement Guidelines notifying the settling parties that the Attorney General may object to settlements in which the payments in lieu of penalties exceed a certain portion of the penalty, and in which the payments do not have a close nexus to the underlying violation and sufficient safeguards to ensure that the money is spent for the purposes indicated.[2] (see https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/prop-65-nopr.pdf?)

III. PROPOSITION 65 HAS SUCCESSFULLY REDUCED EXPOSURES TO TOXIC CHEMICALS

Finally, the Chamber presents this Court with a very one-sided story, attacking Proposition 65 and using loaded words like "bounty hunter" suits. In fact, there is another, very different story to tell.

Proposition 65 has been uniquely instrumental in reducing Californians' exposure to toxic chemicals through air emissions, including emissions of chloroform, methylene chloride, ethylene oxide, asbestos, hexavalent chromium, and lead. (See, Freund, *Proposition 65 Enforcement: Reducing Lead Emissions in California* (1997) 10 Tul. Envtl. L.J. 333, 343-359; see also *id*. at p. 335 [noting that over a four year period Proposition 65 settlements led to the "reduction of thousands of pounds of lead emissions that were allowed by all other environmental regulations and laws"].) Moreover, of the chemicals on the United States Environmental Protection Agency's Toxic Release Inventory ("TRI"), releases of those chemicals that are also listed under Proposition 65 were reduced in quantity by approximately 85% in the State of

[2] The Chamber states that Attorney General Bill Lockyer enacted regulations that permitted private groups to accept payments in lieu of penalties. This is incorrect. Absent statutory restrictions on settlement payments, it is within the discretion of the courts to determine whether payments in lieu of penalties are proper. *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 116.) All the Attorney General can do, and has done, is to advise parties that she will object to certain settlements that contain such payments, unless they meet certain criteria. (See Cal.Code Regs., tit. 11, § 3203, subd. (b).)

California during the 1988 to 1997 time period. This contrasts with an approximately 50% reduction in the releases of the same chemicals over the rest of the country. The difference has been attributed to Proposition 65. Roe, *Toxic Chemical Control Policy: Three Unabsorbed Facts* (2002) 32 ELR 10232-34.

Further, Proposition 65 has filled in gaps left by federal law in the regulation of toxic chemicals, significantly reducing exposure to lead and other chemicals from a variety of consumer products, including ceramic ware and crystal, brass faucets, calcium supplements, wine bottles, galvanized pipe, baby powder and diaper rash medicine, anti-diarrheal medicine, and Mexican candy. (See Rechtschaffen, *How to Reduce Lead Exposures with One Simple Statute: The Experience of Proposition 65* (1999) 29 ELR 10581, 10583-88, 10591; Rechtschaffen, *The Continued Success of Proposition 65 in Reducing Toxic Exposures* (2005) 35 ELR 10850-56 [also noting reduction in exposure to arsenic from playground equipment and formaldehyde, benzene, and toluene from materials used to construct portable classrooms].)

Further, Proposition 65 has undoubtedly induced "quiet compliance" without the need for litigation, when manufacturers voluntarily take steps to limit exposure to listed chemicals. The law has also educated the general public about exposures to specific toxic chemicals in consumer products, buildings, and the environment, creating both demand and market reward for less-toxic products. Finally, Proposition 65 litigation has identified specific chemical exposure concerns and led to regulatory reforms to benefit public health at the state and national level. For example, the California Legislature adopted strict standards for lead in jewelry (§ 25214,1 et seq.) that were based on a Proposition 65 settlement over the failure to warn about lead in jewelry (see https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/amendedConsent.pdf), and state and federal restrictions on lead in candy (see § 110545 et seq.; http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ChemicalContaminantsMetalsNaturalToxinsPesticides/ucm077904.htm#ftn2)

are based on the lead level established in a Proposition 65 case. (See https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/People_v_Alpro_Alimentos_Proteinicos.pdf?)

While the Chamber complains about the burdens that Proposition 65 imposes on businesses, it ignores the clear benefits that the initiative has achieved in terms of protecting the public from toxic chemicals.

IV. DINP WAS LISTED UNDER A HIGHLY RIGOROUS AND PUBLIC PROCESS WITH FULL OPPORTUNITY FOR THE AMERICAN CHEMISTRY COUNCIL AND OTHER MEMBERS OF THE PUBLIC TO SUBMIT SCIENTIFIC ARGUMENTS

It is somewhat ironic that, of the four listing processes under Proposition 65, the process that the Chamber complains of here – listing by the State's Qualified Experts – is the most scientifically open of the processes, giving industry representatives full opportunity to present their scientific arguments to the experts. In this case, there is no dispute that the members of the Carcinogen Identification Committee ("CIC"), the panel that reviewed DINP, are the "state's qualified experts" with demonstrated scientific expertise in evaluating carcinogenic chemicals;[3] that the CIC first heard industry's argument about DINP – that the mechanism of carcinogenesis does not operate in humans – in 2009, and rejected that argument when the CIC ranked DINP as a "high priority" chemical for its review [AR661-62]; that OEHHA opened a sixty day data call-in period in October 2009 seeking relevant information on the carcinogenicity of DINP [*ibid.*]; that OEHHA opened a second 45 day comment period in 2013 seeking public comment after it issued the "Hazard Identification Document," summarizing relevant information about DINP [AR1539-40]; and that it

[3] The CIC is made up of independent experts with doctoral degrees and research experience in epidemiology, oncology, pathology, medicine, public health, statistics, biology, toxicology, and related fields, and with demonstrated expertise "in the conduct of advanced scientific work of relevance to the identification of carcinogenic chemicals using generally accepted and scientifically valid principles and methodologies." (Cal. Code Regs., titl 27, § 25302, subds. (b)(1)(i), (ii)); see also Clerk's Transcript ("CT")75-76 [summarizing qualifications of CIC members].)

provided all of the American Chemistry Council's and other public comments and the accompanying documents to the CIC for its review. [AR8895-8902]

Further, there is no dispute that the CIC held a public meeting at which industry scientists were permitted to present their views and argue against the listing [AR9466-9486]; that members of the CIC questioned the industry scientists directly and discussed the data [AR9486-9526]; and that the CIC voted six to one, with one abstention, to identify DINP as known to the state to cause cancer. [AR9526-9527] This public, thorough, and scientifically rigorous process ensured that the CIC heard and carefully considered all of the scientific arguments directly from the parties seeking to present them.

CONCLUSION

The Chamber's Amicus Brief is an attack on Proposition 65 in general that adds nothing to the resolution of the issues before the Court. OEHHA respectfully requests that this Court affirm the decision of the trial court ruling that OEHHA was not arbitrary and capricious in listing DINP as a carcinogen and denying the Petition for Writ of Mandate.

Dated: June 30, 2016

Respectfully submitted,

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OK2015950017

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONSE TO AMICUS CURIAE CHAMBER OF COMMERCE** uses a 13-point Times New Roman font and contains 2,248 words.

Dated: June 30, 2016

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/s/ Susan S. Fiering

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DECLARATION OF SERVICE BY FIRST-CLASS MAIL
AND ELECTRONIC MAIL

Case Name: ***American Chemistry Council v. Office of Environmental Health Hazard Assessment, et al.***

Case No.: **Court of Appeal of the State of California**
Third Appellate District, Case No. C079260
[Sacramento County Superior Court,
Case No. 34-2014-80001868]

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 20th Floor, P. O. Box 70550, Oakland, California 94612-0550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **June 30, 2016**, I served the attached **RESPONSE TO AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General; and also by transmitting a PDF copy via electronic mail to the e-mail address(es) for each of the parties as shown, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 30, 2016**, at Oakland, California.

DEBRA BALDWIN	/s/ Debra Baldwin
Declarant	Signature

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