No. C079260

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

AMERICAN CHEMISTRY COUNCIL,

Petitioner and Appellant,

vs.

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, ET AL.,

Respondents and Appellees.

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO
THE HONORABLE CHRISTOPHER KRUEGER
CASE NO. 34-2014-80001868

PROPOSED AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AMERICAN CHEMISTRY COUNCIL

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208(e), counsel states that it knows of no entity or person that either: (1) has an ownership interest of 10 percent or more in the party; or (2) has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: June 9, 2016

MUNGER, TOLLES & OLSON LLP
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By: /s/ *Fred A. Rowley, Jr.*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTERESTS OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the nation's largest federation of businesses and associations. The U.S. Chamber represents 300,000 members directly and represents indirectly the interests of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographic region, including California. The U.S. Chamber often represents its members' interests by filing amicus curiae briefs in cases involving issues of national concern to American business.

INTRODUCTION

The laudable objective of Proposition 65 is to protect Californians from exposure to certain substances that the State of California believes may be toxic. Proposition 65 seeks to achieve this objective in part by requiring companies to warn the public of those substances that the State has found might be toxic. The listing of a substance under Proposition 65 has wide-ranging and serious consequences: not only is compliance with Proposition 65's warning requirements itself burdensome, the failure to include a warning of any of the nearly 900 currently listed substances exposes businesses to lawyer-driven "bounty-hunter" lawsuits that are often cheaper settle than to fight. Indeed, Proposition 65 creates a perfect storm for compelling the settlement of even the most meritless lawsuits: not only are the penalties for Proposition 65 potentially ruinous, but the cost of defending against a Proposition 65 lawsuit is exceedingly high, frequently requiring extensive additional scientific research—even for substances that federal and international regulators do not consider unsafe. Because of the serious consequences that flow from a Proposition 65 listing, one would expect that the process for listing a substance under Proposition 65 would be rigorous, to ensure that the public is only warned of meaningful risks and that companies are not unnecessarily burned by meritless litigation and compliance costs. Indeed, the State of California has prescribed detailed standards and procedures for placing a chemical on the Proposition 65 list. Too often, however, state agencies fail to adhere to these procedural safeguards.

In this case, Appellant American Chemistry Council ("ACC") argues that the Office of Environmental Health Hazard Assessment ("OEHHA") and the Carcinogen

Identification Committee ("CIC") short-circuited the process in deciding to list diisononyl phthalate ("DINP") under Proposition 65. DINP is a common and useful chemical found in a wide range of everyday products ranging from roofing materials and vinyl flooring to coated fabric. As Appellant has explained in detail in its briefing, the Chairman of the CIC applied an incorrect legal standard that underplayed what Appellant argues is a lack of evidence of DINP's carcinogencity in humans. Appellant also argues that OEHHA's administrative process was biased and rushed, rendering the CIC's vote and recommendation arbitrary and capricious.

Amicus Curiae Chamber of Commerce of the United States of America ("U.S. Chamber") submits this brief in support of the ACC. Amicus will neither reprise the points made in Appellant's briefs, nor opine on the scientific questions regarding DINP. Rather, Amicus's objective is to underscore the serious consequences of the failure to follow the prescribed legal standards and procedures for listing a substance under Proposition 65.

If allowed to stand, the Superior Court's decision threatens to further spur costly litigation against businesses, with the bulk of financial recoveries going toward plaintiffs' attorney's fees rather than the public fisc. This is evident both from the abusive litigation practices that have marked past Proposition 65 litigation regarding other chemicals, and the hundreds of 60-day notices—precursors to litigation—that already have been filed with the Attorney General over DINP. Moreover, affirming the listing of DINP will contribute to the problem of over-warning. The ubiquity of product-warning labels may cause consumers to ignore warnings altogether, reducing their utility even for truly risky

products; at the same time, they may cause other consumers to overreact needlessly when it comes to chemicals that, like DINP, have not been proven unsafe. By virtue of the inadequate process that the OEHHA and CIC applied in this case, all those costs would be incurred by society and business without assurance that DINP actually meets the applicable listing criteria based on an impartial and careful consideration of the scientific evidence. These considerations counsel in favor of reversing the decision of the Superior Court to ensure that chemicals such as DINP are not unnecessarily listed, and that the serious consequences of listing are not borne in vain by businesses as well as consumers.

DISCUSSION

I. PROPOSITION 65'S INCENTIVE STRUCTURE ENCOURAGES PROFIT-SEEKING LITIGATION BY "BOUNTY HUNTERS"

In 1986, California voters passed the Safe Drinking Water and Toxic Enforcement Act, an initiative better known as Proposition 65. (See, e.g., Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65* (1996) 23 Ecology L.Q. 303, 305.) The law's laudable objective is to protect Californians from exposure to carcinogens—substances that cause cancer—and reproductive toxins. (See *id.*) It does so primarily by prohibiting companies from discharging toxic substances into rivers, lakes, and other "sources of drinking water." (See, e.g., *Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 238-239.) But the law goes further and also requires companies to warn the public of purportedly toxic chemicals that they might come in contact with. (See, e.g., Caso, *Bounty Hunters and the Public Interest—A Study of California Proposition 65* (2012) 13 Engage: J. Federalist Society Prac. Groups 30, 30 (hereafter Caso).) In theory, Proposition 65 would allow citizens to make informed

choices about the risks and benefits of their activity, consistent with the "information economics" paradigm. (See, e.g., Barsa, *California's Proposition 65 and the Limits of Information Economics* (1997) 49 Stan. L. Rev. 1223, 1224-1225, fn. 10; Christenson, *Interpreting the Purposes of Initiatives: Proposition 65* (1989) 40 Hastings L.J. 1031, 1053 (hereafter Christenson).)

As a result, California Health & Safety Code section 25249.6 provides: "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual." This provision imposes a broad warning requirement: businesses must provide a "clear and reasonable" warning prior to "knowingly and intentionally" exposing any individual to a listed chemical. The statute provides only a limited exception to this requirement. A warning is not required before exposing the public to a listed carcinogen if it poses "no significant" risk of cancer, defined by regulation as one excess cancer case per 100,000 persons over a lifetime. (Cal. Health & Saf. Code, § 25249.10, subd. (c); Cal. Code Regs. tit. 27, § 12703(b).)

Proposition 65 has an enforcement mechanism that is designed to encourage litigation. (See, e.g., Caso, *supra*, at p. 31.) Proposition 65 can be enforced by public prosecutors or by "any person in the public interest." (Cal. Health & Saf. Code, § 25249.7, subds. (c), (d).) Penalties for violating Proposition 65 are steep and include fines up to $2,500 per violation per day. (*Id.*, § 25249.7, subd. (b).) In a case brought by a private party, 25 percent of these fines go to the private party bringing the enforcement

action. (*Id.*, § 25192, subd. (a).) This bounty was created to establish a profit motive for bringing litigation—embracing the "private attorney general" enforcement model. (See, e.g., Caso, *supra*, at p. 30.) This bounty provision has led Proposition 65 plaintiffs to be dubbed "bounty hunters." (See, e.g., *ibid.*) In addition, such "bounty hunters" may recover attorney's fees and costs under Code of Civil Procedure section 1021.5, which authorizes fee awards to private plaintiffs for "enforcement of a right affecting the public interest."

The Legislature has recognized that these litigation incentives are subject to abuse. Because Proposition 65 was enacted as a popular initiative, it may be amended by the Legislature only in limited circumstances—any amendment must "further the purpose" of the initiative and be approved by a two-thirds vote. (See, e.g., Cal. Health & Safety Code, § 25249.5 (historical note); Christenson, *supra*, at p. 1034, fn. 20.) Both times the Legislature has amended Proposition 65 it did so in an attempt to address litigation abuses. (See, e.g., Caso, *supra*, at pp. 31-32.)

In 1999, the California legislature required bounty hunters to file copies of settlements with the Attorney General. (Stats. 1999, ch. 599, § 1.) With this reform, extortive plaintiffs (or culpable defendants) could no longer hide behind secret settlements. (See, e.g., Caso, *supra*, at pp. 31-32.) The Attorney General now posts summaries of Proposition 65 settlements on its website, which provides an important source of information for the public. (See *Annual Summaries of Private Settlements*, http://ag.ca.gov/prop65/index.php (last visited June 7, 2016).)

In 2001, the Legislature acted again. (See, e.g., Caso, *supra*, at p. 32.) The new amendment required bounty hunters to provide a "certificate of merit" before filing suit under Proposition 65. (Stats. 2001, ch. 578, § 1.) Such a certificate must state that the plaintiff consulted with an expert who reviewed the facts and data and believes that "there is a reasonable and meritorious case for the private action." (*Dipirro v. Am. Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 970.) The amendment also required courts to make specific findings that any settlement or civil penalty meets certain standards. (Stats. 2001, ch. 578, § 1.) Finally, the Attorney General was given special authority to participate in and help settle bounty hunter litigation. (See *ibid.*)

In practice today, however, the Attorney General has opposed only a few settlements, and has done little to ensure that any civil penalties assessed are related to an *actual danger* that Californians face from businesses' failure to comply with Proposition 65. (See, e.g., Caso, *supra*, at p. 32.) Moreover, former California Attorney General Bill Lockyer enacted regulations that allowed private groups to accept a higher private payoff in lieu of a civil penalty. (Cal. Code Regs., tit. 11, § 3203.) Thus, money that would have gone to the public treasury to help pay for enforcement of the law can now be diverted to the organizations that bring the legal challenges—increasing the profit motive to bring Proposition 65 litigation. (See *id.*; Caso, *supra*, at p. 32.)

II. THE DECISION BELOW WILL SPUR COSTLY LITIGATION AGAINST BUSINESSES WITHOUT ASSURANCE OF SUFFICIENT COUNTERVAILING BENEFITS

By design, Proposition 65 cases are easy to bring and hard to defend. The result has been an unrelenting stream of private litigation concerning listed chemicals, with the

bulk of financial recovery going to attorneys' fees awarded under Civil Procedure Code section 1021.5. Not surprisingly, the recent listing of DINP has already spurred a wave of costly litigation against businesses. The ease of enforcement and prospect of significant financial penalties on the *back-end* underscore the importance of ensuring that a substance is listed properly at the *front-end*. And that, in turn, highlights the importance of adhering to the procedural safeguards in the listing process. The immense social costs that result from a decision to list are unjustifiable if the listing decision itself was improper.

"[B]ringing Proposition 65 litigation is … absurdly easy." (*Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1217 (*Consumer Defense Group*).) Indeed, suing under Proposition 65 "is as easy as shooting the side of a barn, drawing circles around the bullet holes and then claiming you hit the bull's eye." (*Id.* at p. 1220.) A plaintiff need only create a boilerplate demand letter, search out businesses that contain or sell items containing substances listed under Proposition 65 including commonplace products like furniture or paint, and then bring suit if no warning is present or sufficiently prominent. (See *ibid.*)

Under Proposition 65, once the plaintiff brings suit the defendant bears the burden of proving that any exposure to a chemical identified on the list as a carcinogen poses "no significant risk"—defined as a theoretical risk of one excess cancer in a population of 100,000 assuming exposure over a lifetime. (Cal. Health & Saf. Code, § 25249.10; Cal. Code Regs., tit. 27, § 12703(b); *Consumer Defense Group*, *supra*, 137 Cal.App.4th at pp. 1214-1215.) And a business charged with exposing Californians to a chemical on the

Proposition 65 list of cancer causing substances without warning cannot defend itself by showing a long history of safe use. (See Caso, *supra*, at p. 31.) For example, evidence that a dental filling had been approved by the American Dental Association and used safely for 150 years was held to be irrelevant because it did not meet the statutory exception for reproductive toxins—exposure at 1,000 times below the no observable effect level. (*Consumer Cause v. SmileCare* (2001) 91 Cal.App.4th 454, 466.)

In some cases, substances are listed even though federal and international health regulators do not consider them unsafe for human use. For example, 4-MEI, which is used for caramel food coloring, is listed under Proposition 65[1] even though the FDA has stated that it "has no reason to believe that there is any immediate or short-term danger presented by 4-MEI at the levels expected in food from the use of caramel coloring" and the European Food Safety Authority "concluded that they had no concerns about Europeans being exposed to 4-MEI from the use of caramel coloring in food." (See Food and Drug Administration, *Questions and Answers on Caramel Coloring and 4-MEI*, http://www.fda.gov/food/ingredientspackaginglabeling/foodadditivesingredients/ucm364184.htm, as of June 9, 2016.)

Moreover, while Proposition 65 claims are cheap to initiate they are very costly for defendants and impose enormous pressure on them to settle. (See, e.g., *Consumer Defense Group, supra*, 137 Cal.App.4th at pp. 1216-1217 & fn. 22 [noting that small business are vulnerable to "shakedowns"].) The cost of bringing a Proposition 65

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[1]OEHAA, *4-Methylimidazole (4-MEI) A Fact Sheet*, http://oehha.ca.gov/proposition-65/4-methylimidazole-4-mei-fact-sheet, as of June 9, 2016.

enforcement action is very low. (See *ibid.*) And it costs even less to send out a demand letter and see what money one can obtain by way of settlement. (See *ibid.*) Authors of demand letters typically price settlement below the cost of what it would cost the business to defend the lawsuit. (See, e.g., Caso, *supra*, at p. 31.) And "if you're a small business, the pressure is on you to settle. You don't have the luxury of acting as a crusader against frivolous suits. The pressure is on you to meet a payroll." (McCarthy, *Toxic Showdown*, The Press-Enterprise (Feb. 16, 1998) p. A1.) If a business elects to defend itself instead of settle, there is little risk that the plaintiff would end up being on the hook for the business's attorneys' fees. (See *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 199 [affirming denial of "public interest" attorney's fees to successful Proposition 65 defendant because defendant's principal objective was to protect is own economic interests].)

Given these dynamics, it is not surprising that Proposition 65 litigation has been lucrative for plaintiffs and their counsel—and, by the same token, very costly for businesses. As discussed earlier, a bounty hunter can recover 25 percent of any eventual recovery. (See *supra* at p. 5.) The average settlement, moreover, has been estimated at about $60,000. (Scott, *Another View: To Fix Prop. 65, End Lawsuit Abuse*, Sacramento Bee (Dec. 9, 2014).) Between 2000 and 2010, defendants paid more than $142 million to settle suits brought under Proposition 65. (Caso, *supra*, at p. 32.[2]) That does not even

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[2] Professor Caso collected his data from the Attorney General's website and formulated it into tables which list the amount of settlements in total during this time period and broken down by three categories: civil penalties, attorneys' fees, and payments in lieu of

include the cost of cases that went to trial or other costs such as reformulating a product, which are likely greater than the cost of settlement but for which data is less readily available. (See *id.*; Lee, *State Law on Toxins Has Effects Worldwide; Companies Have Changed Thousands of Products to Avoid the Warnings Prop. 65 Requires*, San Diego Union Tribune (July 31, 2011) p. A-1 [estimating that more than $1.24 billion has been spent to reformulate products under Prop. 65].)

Notably, the *vast* majority of settlement payments in private party actions have gone to attorneys' fees. (See, e.g., Caso, *supra*, at p. 32.) About $88.8 million of the $142 million collected (62.4 percent) in those actions went to attorneys' fees. (*Ibid.*) Civil penalties, by contrast, account for only 14.5 percent. (*Ibid.*) The remaining 23.1 percent—nearly a quarter of all the money collected—is listed as "other"—payments made directly to the organization that brought the suit or some other organization it designates. (*Ibid.*[3]) By way of comparison, during the same time period the Attorney General collected only around $21.4 million in its Proposition 65 cases—around 15 percent of the total collected from Proposition 65 settlements in private litigation. (Caso, *supra*, at p. 33.) Of that $21.4 million, only 25.5 percent was collected as attorney fees. (*Ibid.*) And 43.4 precent of all money collected by the Attorney General was designated as civil penalties. (*Ibid.*) The remainder of the money, about $6 million, was presumably

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penalties. These tables are reproduced in the Appendix at the end of this brief.

[3] And plaintiffs during settlement often trade civil penalties (money that would otherwise be paid to the state treasury) for payments to themselves or allied organizations. (See, e.g., *Consumer Defense Group*., *supra*, 137 Cal.App.4th at p. 1217; *Caso*, supra, at p. 34.)

paid to private organizations that helped identify the problem that led to the litigation. (*Ibid.*)

It is no surprise, then, that the listing of DINP has spawned a veritable wave of litigation. DINP's listing became effective in December 2014. Since then, in less than a year and a half, there have been *286* notice letters served.[4] Defendants have already paid a total of $2,633,125 in attorney's fees, civil penalties, and payments in lieu of penalties. Of that, a staggering $2,241,375 went to attorneys' fees (85 percent) while only $343,250 went to civil penalties and $48,500 went to payments in lieu of penalties (likely to the private organizations bringing suit or designated by the plaintiff).

Appellant argues that it is not all that clear that DINP poses a threat to public health. It is worth noting the OEHHA itself has twice confirmed the safety of DINP for certain uses through "Safe Use Determinations"—the OEHAA's advisory determination that the use of a listed substance, under the specifications outlined in the determination, does not create a significant risk requiring a warning under Proposition 65. (*OEHHA Issues Safe Use Determination for Silica in Paints* (2004) 17 No. 15 Cal. Envtl. Insider 9, 9; see also OEHHA, *Fact Sheet on Propostion 65 Safe Use Determination (SUD) Process*

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[4] The data in this paragraph was obtained from the Attorney General's website by examining all 286 notice letters filed as of June 7, 2016 based on DINP and then, for the 87 for which data were available, calculating the listed total payment, civil penalties, attorneys' fees, and payments in lieu of penalties. (http://oag.ca.gov/prop65/60-day-notice-search-results?field_prop65_report_year_value=&field_prop65_id_value=&field_prop65_plaintiff_value=&field_prop65_defendant_value=&date_filter%5Bmin%5D%5Bdate%5D=&date_filter%5Bmax%5D%5Bdate%5D=&field_prop65_product_value=&field_prop65_chemical_tid%5B%5D=903&sort_by=field_prop65_id_value&items_per_page=100&=Search (as of June 7, 2016).

(2016).[5]) In December 2015, it issued a Safe Use Determination for the use of DINP in certain roofing products. (See Nov. 24, 2015 Letter from the Office of Environmental Health Hazard Assessment to the Chemical Fabrics & Film Assn. at p. 1 (hereafter Nov. 24, 2015 Letter).[6])

The OEHAA also issued a Safe Use Determination for DINP in the use of certain vinyl carpet tiles. (See May 26, 2016 Letter from the Office of Environmental Health Hazard Assessment to Tandus Centiva, Inc. at p. 1.[7]) It again explained that neither professional carpet installers—who deal with these tiles containing DINP on a daily basis—nor residents at homes with such tiles faced any significant additional cancer risk. (*Id.* at p. 3.)

This all underscores the need to ensure, at a minimum, that the correct standards and procedures were rigorously followed during the listing process, so that society and businesses are not saddled with exorbitant litigation costs for no good reason. Because the OEHAA manifestly failed to abide by those standards and procedures, its decision to list DINP was arbitrary and capricious, and should be vacated.

III. THE DECISION BELOW WILL CONTRIBUTE TO THE OVERWARNING PROBLEM

The Proposition 65 listing process must be applied and scrutinized with great care for an additional reason: unnecessary listings contribute to the growing "over-warning"

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[5] http://oehha.ca.gov/media/downloads/crnr/sudfacts03112016.pdf (as of June 7, 2016).
[6] http://oehha.ca.gov/media/downloads/crnr/112515sud3roofing.pdf (as of June 7, 2016).
[7] http://oehha.ca.gov/media/downloads/crnr/06102016supportsudvinylcarpettiles.pdf (as of June 7, 2016).

problem. The proliferation of warnings threatens to frustrate and confuse the public, resulting in disregard for important and meaningful warnings. Indeed, warnings are now provided for almost everything consumers see, touch, and consume on a daily basis: from alcoholic beverages to lawn mowers and everything in between. (See, e.g., Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer* (1994) 11 Yale J. on Reg. 293, 295 (hereafter Noah).) Often multiple warnings appear on the labels of these products. (See, e.g., *ibid.*) Indeed, perhaps 65 percent of all goods and services today come with a warning. (Oldenburg, *Words of Warning*, Wash. Post (Mar. 17, 1992) p. B5; Clark and Brock, Warning Label Location, Advertising, and Cognitive Responding, in Attention, Attitude and Affect in Response to Advertising 287, 296 (1994) ["The dollar value of products with warnings far exceeds the dollar value of products that are sold without warnings. We live in an era of warnings ... ."].) Proposition 65 listings have undoubtedly contributed to this trend. There are now nearly *900* substances listed under Proposition 65, all of which require scores of warnings. (Caso, *supra*, at p. 30.)

When everything carries a warning label the label loses meaning. (See, e.g., Morain, *The Conversation: State-Ordered Warnings Generate Mixing Results*, Sacramento Bee (Apr. 29, 2012) p. 1.) The overuse of warnings has at least two negative consequences: (1) diluting the impact of warnings for more serious harms; and (2) causing consumers to overreact to the risk of less serious harms. (Noah, *supra*, at p. 295.)

First, dilution occurs when additional warnings about relatively inconsequential hazards cause consumers to become less attentive to labels in general, including some important aspects of labeling like directions for proper use. (See, e.g., *ibid.* ["American consumers are being inundated with warnings. Hazard statements on product labels have become so commonplace that many consumers no longer notice their presence."].) Excessive warnings "'are likely to confuse people or raise their anxiety level, without providing much information relevant to decision making.'" (Noah, *supra,* at p. 381, fn. 440 [quoting Slovic *et al*., Informing People about Risk in Product Labeling (Morris *et al*. eds., 1980) pp. 177-178].)

Indeed, the Food and Drug Administration has long acknowledged the problems of information overload and warning dilution in a variety of contexts. (See, e.g., *Food Labeling; Declaration of Ingredients*, 56 Fed.Reg. 28592, 28615 (1991) [explaining that an additional warning "would overexpose consumers to warnings," and that then "consumers may ignore, and become inattentive to, all such statements"]; *Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices*, 73 Fed.Reg. 49603, 49605-49606 (2008) [explaining that an amendment was intended, among other things, "to prevent overwarning, which may deter appropriate use of medical products, or overshadow more important warnings]. The FDA's former Commissioner cautioned specifically with respect to warnings about carcinogens:

> We are greatly concerned that a requirement for placing warning labels on all such products will lead to consumer confusion and actually diminish the effect of the labeling that

> is now required … . Messages warning of product ingredients that actually pose no risk will prompt consumers not to read labeling at all. Indeed for products that now contain necessary warning labels, those warnings might be overlooked entirely, to the detriment of those citizens for which they were intended.

(Noah, *supra* at pp. 384-385 [quoting Frank E. Young, M.D., Statement before the Science Advisory Board of the California Health and Welfare Agency (Dec. 11, 1987) p. 16].)

Congress, courts, and commentators have expressed similar concerns. (See, e.g., H.R.Rep. No. 86-1861, p. 6 (1960) [House Commerce Committee report providing the following reasons for limiting a bill's warning requirements only to "substantial" hazards: "If labeling were required to caution against the risk of even the most trifling indisposition, there would hardly be any substance going into the household which would not have to bear cautionary labeling, so that consumers would tend more and more to disregard label warnings, thus inviting indifference to cautionary statements on packages of substances presenting a real hazard of substantial injury or illness."]; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 932 ["Against the benefits that may be gained by a warning must be balanced the dangers of overwarning and of less meaningful warnings crowding out necessary warnings, the problems of remote risks, and the seriousness of the possible harm to the consumer."]; *Cotton v. Buckeye Gas Products Co.* (D.C. Cir. 1988) 840 F.2d 935, 938 ["The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items

crowd each other out; they get lost in fine print."]; *Mason v. SmithKline Beecham Corp.* (7th Cir. 2010) 596 F.3d 387, 392 [explaining that "it is important for a manufacturer to warn of potential side effects" but that "it is equally important that it not overwarn because overwarning can deter potentially beneficial uses of the drug by making it seem riskier than warranted and can dilute the effectiveness of valid warnings"]; cf. Rest. 3d Torts: Products Liability, § 2, com. f, pp. 24-25 (Tentative Draft No. 1, 1994) ["Courts should be cautious to avoid imposing a duty to provide overly numerous or too detailed warnings. Such warnings are likely to be ignored and thus ineffective."].)

Second, overreaction is a complementary problem to dilution and occurs where consumers overestimate the dangers of relatively harmless substances. (See, e.g., Noah, *supra*, at p. 297.) When that happens, consumers may forego the use of net beneficial products in response to warning statements or may select equally beneficial substitutes that actually pose greater (but less alarming) risks. (*Ibid.*) The danger of overreaction is particularly high when the warning statement is intended to convey a message about statistically remote risks, such as cancer. (*Id.* at p. 385.) For example, when the FDA imposed a chlorofluorocarbon warning requirement on consumer products, it expressly rejected a request that the warning make specific reference to skin cancer effects precisely to avoid spurring overreaction. (See *Certain Fluorocarbon (Chlorofluorocarbon) Propellants In Self-Pressurized Containers*, 42 Fed.Reg. 22018, 22026 (1977).)

Listing a substance under Proposition 65, then, does not come without costs to consumer welfare and public safety. The risk of warning dilution and consumer

overreaction highlights the need to rigorously apply the operative standards and procedures during the listing process, and ensure that only appropriate substances are listed.

CONCLUSION

The decision of the Superior Court denying ACC's petition for a writ of mandate should be reversed.

Dated: June 9, 2016

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By: /s/ *Fred. A. Rowley, Jr.*

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.204(c)(1) of the California Rules of Court, that the enclosed Opening Brief of Appellants contains approximately 4,492 words, including footnotes. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

Dated: June 9, 2016

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APPENDIX

Figure 1: Private Litigation Statistics

Year	Penalty	Other	Penalty %	Attorney Fees	Atty Fees %	Total
2000	$868,620	$3,047,555.41	22%	$7,341,115.78	65%	$11,257,271.36
2000	$817,175.00	$3,976,291.09	17%	$6,188,567.00	56%	$10,982,034.00
2002	$1,213,130.00	$2,548,890.66	32%	$4,326,003.84	53%	$8,087,344.50
2003	$926,942.00	$2,258,978.99	29%	$5,546,273.12	65%	$8,482,194.11
2004	$1,857,507.50	$871,460.91	68%	$12,656,669.09	82%	$15,367,637.50
2005	$1,547,086.98	$2,464,707.98	39%	$6,276,267.97	61%	$10,288,062.95
2006	$3,081,850.00	$2,300,756.00	75%	$8,230,459.00	63%	$13,163,065.00
2007	$2,337,500.00	$2,768,381.00	46%	$6,740,856.00	57%	$11,846,737.00
2008	$4,632,700.00	$5,298,665.50	47%	$14,607,964.94	60%	$24,537,330.44
2009	$1,684,890.00	$3,869,614.80	30%	$9,035,122.90	62%	$14,608,177.70
2010	$1,622,679.00	$4,167,543.00	28%	$7,806,539.00	57%	$13,620,981.00
TOTAL	$20,590,080.98	$ 33,572,845.34	38%	$88,755,838.64	62%	$142,240,835.56

Figure 2: Attorney General Litigation Statistics

Year	Penalty	Other		Attorney Fees		Total
2000	$220,000.00	$310,000.00	42%	$130,000.00	20%	$660,000.00
2001	$257,300.00	$30,000.00	90%	$360,700.00	56%	$648,000.00
2002	$872,488.00	$106,553.00	89%	$582,215.00	37%	$1,561,846.00
2003	$360,642.00	$25,791.66	93%	$255,333.34	40%	$641,767.00
2004	$256,557.50	$15,057.50	94%	$100,250.00	27%	$371,865.00
2005	$132,286.98	$132,286.96	50%	$133,000.00	33%	$397,573.96
2006	$1,200,000.00	$1,379,900.00	47%	$2,499,100.00	49%	$5,079,000.00
2007	$1,433,000.00	$200,000.00	88%	$700,000.00	24%	$2,874,000.00
2008	$3,772,250.00	$2,530,250.00	60%	$430,726.00	6%	$6,766,226.00
2009	$755,500.00	$1,301,500.00	37%	$280,226.00	12%	$2,337,226.00
2010	$25,160.00	$48,590.00	34%	$ -	0%	$73,750.00
Totals	$9,285,184.48	$6,079,929.12	60%	$5,471,550.34	26%	$21,411,253.96

Source: Caso, *Bounty Hunters and the Public Interest – A Study of California Proposition 65* (2012) 13 Engage: J. Federalist Society Prac. Groups 30, 32-33; see also Enforcement Reporting, http://ag.ca.gov/prop65.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, Thirty-Fifth Floor, Los Angeles, California 90071-1560.

On June 9, 2016, I served true copies of the following document(s) described as

PROPOSED AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AMERICAN CHEMISTRY COUNCIL

on the interest parties in this action as follows:

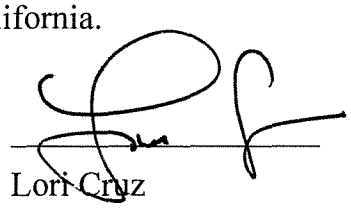
SEE ATTACHED SERVICE LIST

BY ELECTRONIC TRANSMISSION VIA TRUEFILING: Based on a court order and/or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent via TrueFiling to the persons indicated on the Service List as receiving electronic service. According to the TrueFiling website, these persons are registered TrueFiling users who have consented to receive electronic service of documents in this case. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons indicated in the Service List as receiving mail service. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with a postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 9, 2016, at Los Angeles, California.



Lori Cruz

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