SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	**FILED** Superior Court of California County of Alameda 06/07/2023 Chad Finke, Executive Officer / Clerk of the Court By: _____ Deputy A. Hewitt
PLAINTIFF/PETITIONER: Environmental Research Center, Inc., a California non-profit corporation	
DEFENDANT/RESPONDENT: Kos Naturals, LLC et al	
CERTIFICATE OF MAILING	CASE NUMBER: RG20075140

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the attached document upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Oakland, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Carol Rene Brophy
STEPTOE & JOHNSON LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024

Charles Poss
Enviormental Research Center, Inc.
3111 Camino Del Rio North
Suite 400
San Diego, CA 92108-

Jonathan Weissglass
Law Office of Jonathan Weissglass
1939 Harrison Street
Suite 150-B
Oakland, CA 94612

Margaret Toledo
Arnold & Porter Kaye Scholer LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024

Willis M. Wagner
Arnold & Porter Kaye Scholer LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

Chad Finke, Executive Officer / Clerk of the Court

Dated: 06/07/2023

By:

A. Hewitt, Deputy Clerk

CERTIFICATE OF MAILING

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Environmental Research Center, Inc., a California non-profit corporation Plaintiff/Petitioner(s) vs. Kos Naturals, LLC et al Defendant/Respondent(s)	No. RG20075140 Date: 06/06/2023 Time: 4:06 PM Dept: 21 Judge: Evelio Grillo ORDER re: Ruling on Submitted Matter

The Court, having taken the matter under submission on 06/02/2023, now rules as follows:

The Motion for Summary Judgment filed by Kos Naturals, LLC on 02/28/2023 is Denied.

The Motion of defendant Kos Naturals ("KOS") for summary judgment is DENIED.

BACKGROUND

This is a Proposition 65 case alleging that KOS sells products with lead and cadmium and that KOS must disclose that information to consumers.

This court's order of 12/13/22 denied the KOS first motion for summary judgment without prejudice. The order stated: "Any new motion should be clear whether the motion is (1) a challenge to Proposition 65 "as applied" to the Kos products or (2) is a "facial" challenge to the Proposition 65 regulations regarding lead and cadmium or (3) is a "facial" challenge to Proposition 65 as a whole or (4) some clearly identified combination."

The KOS second motion for summary Judgment is based on KOS' affirmative defenses that (1) Prop 65 is unconstitutional under the due process clause because it is vague (Aff Def 12) and (2) Prop 65 is unconstitutional under the First Amendment because it is compelled speech (Aff Def 14).

The KOS second motion "presents a facial challenge to the constitutionality of Prop 65, which seeks to invalidate the law itself, not an "as applied" challenge just as applied solely to KOS." (Moving at 9:19-20.) (See also Motion at 9:19; 12:26-27; 13:30; 18:16.)

MOTION FOR SUMMARY JUDGMENT – STATE LAW

The affirmative defense of First Amendment free speech is an affirmative defense. (North Coast Women's Care Medical Group, Inc. v. Superior Court (2008) 44 Cal.4th 1145, 1152-1153 ["Pertinent here is affirmative defense No. 32 stating that defendants' "alleged misconduct, if any" was protected by the rights of free speech and freedom of religion set forth in the federal and state Constitutions"]; Department of Fair Employment and Housing v. Superior Court of Kern County (2020) 54 Cal.App.5th 356, 393[" claim was not viable in the face of Miller's

constitutional free speech affirmative defense"].) Kos must prove all elements of the affirmative defense with undisputed evidence. (437c(f)(1).)

EVIDENCE

The court has considered all the evidence. All objections to evidence are OVERRULED.

PROPOSITION 65

Proposition 65 was adopted by the voters in 1986 to provide "greater protection against hazardous chemicals, specifically including information about exposures, strict enforcement and deterrence of actions threatening public health and safety." (Lee v. Amazon.com, Inc. (2022) 76 Cal.App.5th 200, 226.)

"Proposition 65 is not primarily about punishment for harm that has been inflicted; it is about protection from harmful chemicals, the ability to make informed choices about coming into contact with such chemicals, and deterrence of conduct that undermines these purposes." (Lee v. Amazon.com, Inc. (2022) 76 Cal.App.5th 200, 247.)

Proposition 65's first section states: "state government agencies have failed to provide them with adequate protection" and that the people have the following rights: "(b) To be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm. (c) To secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public health and safety." (Consumer Cause, Inc. v. SmileCare (2001) 91 Cal.App.4th 454, 462.)

IDENTIFYING THE RELEVANT ISSUE

KOS has many complaints about Proposition 65. The court separates them for ease of analysis so that the court can focus on what appears to be the substantive issue in this motion.

KOS's concern with the substance of Prop 65 appears to be with H&S 25249.6, which states: "No 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."

KOS's related substantive concern is with H&S 25249.10, which states that no warning is required if (1) an exposure "poses no significant risk assuming lifetime exposure at the level in question" and (2) the exposure "will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity."

Read together, these sections state when KOS must provide a warning and when KOS is not required to provide a warning. These are the substantive provisions of Prop 65. KOS argues that it is unconstitutional to require a warning when Prop 65 requires a warning.

The KOS motion is directed to Prop 65 statute (H&S 25249.6 et seq.) The motion is not directed to the related Prop 65 regulations.

The KOS motion is directed to Prop 65 facially and not "as applied." The court is not concerned with discrete "as applied" issues. For example, it is immaterial how Prop 65 applies to food or how Prop 65 applies to specific chemicals such as lead, cadmium, and mercury. (SSUF 2, SSUF 8, SSUF 9.)

The KOS motion regularly veers into the Prop 65 enforcement mechanism. Prop 65 states that "Actions pursuant to this section may be brought by a person in the public interest." (H&S 25249.7(d).) The substantive requirement is distinct from the enforcement mechanism.

The court's analysis of whether the substantive scope of Prop 65 is constitutional must be the same without regard to whether the statute is enforced by the Attorney General or by a person acting in the public interest. (H&S 25249.7(c), (d).) This is similar to the principle that "There can be only one correct interpretation of a statute that applies to all persons." (Markman v. Westview Instruments (Fed. Cir. 1995) 52 F.3d 967, 987.) (See also U.S. v. Santos, 553 U.S. 507, 522-23 (2008) ["[T]he meaning of words in a statute cannot change with the statute's application."].)

The California electorate was informed of the hazards of private enforcement. The Ballot Measure's rebuttal to the "pro" argument states: "Proposition 65 will take environmental regulation out of the hands of lawmakers and prosecutors and create a system of vigilante justice with bounty hunters seeking rewards." The Ballot Measure's "con" argument states: "Proposition 65 creates a lawyer's paradise: anyone can sue; almost anyone can be sued. People who sue will get a reward from penalties collected. Thus. environmental regulation is taken from the hands of government regulators and prosecutors and handed to private lawyers and judges." (Weissglass Dec. Exh 1)

The hazards of private enforcement are not unique to Prop 65. H&S 25249.7 (Prop 65) permits an action a person in the public interest. Labor Code 2699.3 (PAGA) permits an action as agent and proxy of the LWDA. (Kim v. Reins International California, Inc. (2020) 9 Cal.5th 73, 81.) Govt Code 12652(c) (California False Claims Act) permits an action on behalf of the State of California or the relevant political subdivision.) The federal government and the governments of other states also have statutes that deputize private persons to enforce statutes. (E.g. 31 USC 3729 [False Claims Act]; Texas H&S 171.208 [Heartbeat Act].)

The ability to file a lawsuit on behalf of the public can be abused. (E.g. People ex rel. Lockyer v. Brar (2005) 134 Cal.App.4th 659.) The legislative or initiative process can amend the enabling statutes and limit the opportunity for abuse. (McAdams v. Monier, Inc. (2010) 182 Cal.App.4th 174, 188 [Prop 64 limited standing under the UCL].)

The KOS motion regularly veers into the burden of litigation. (Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics (2022) 29 F.4th 468, 479-480; Nat'l Ass'n of Wheat Growers v. Zeise (E.D. Cal. 2018) 309 F.Supp.3d 842, 487-488.) Litigation is burdensome.

The court's analysis of whether the substantive scope of Prop 65 is constitutional does not concern the burden of litigation. A defendant concerned about the burden of litigation can ask the court to phase or set parameters on discovery or to set time limits on the trial. (CCP 2017.020;

2019.030; California Crane School, Inc. v. National Com. for Certification of Crane Operators (2014) 226 Cal.App.4th 12, 22-23 [time limits].) If a defendant prevails, then the defendant can ask the court for review of plaintiff's pre-filing certificate of merit, a finding that the case was frivolous, and (implicitly) an award of fees against the plaintiff. (H&S 25249.9(h)(2).)

The KOS motion argues that Prop 65 unfairly places the burden of proof on the defendant. That is not exactly accurate. The plaintiff has the burden under H&S 25249.6 to demonstrate that the defendant knowingly and intentionally exposed to the identified chemicals without first giving clear and reasonable warning. That initial burden, however light, is on the plaintiff. The defendant can then establish under H&S 25249.7(c) that the exposure was within the statutory exemption. (DiPirro v. Bondo Corp. (2007) 153 Cal.App.4th 150, 187.) This is consistent with the general law that a defendant bears the burden of proof when asserting that an exemption applies. (Rodriguez v. Parivar, Inc. (2022) 83 Cal.App.5th 739, 745.)

Summarizing the above, the court's analysis is of the substantive provisions of Prop 65. The court's analysis of the substantive provisions does not depend on whether the Attorney General or a private person is prosecuting a case, the burden of litigation, the burden of proof, or other procedural matters.

BURDEN ON FACIAL CHALLENGE – STATE AND FEDERAL LAW

California law on the standard for a facial challenge is a bit unclear. On the one hand, the California Supreme Court in Gerawan Farming, Inc. v. Agricultural Labor Relations Bd. (2017) 3 Cal.5th 1118, 1138, states: "The standard for a facial constitutional challenge to a statute is exacting. ... Under the strictest requirement for establishing facial unconstitutionality, the challenger must demonstrate that the statute 'inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." (See also Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1084.

On the other hand, the California Supreme Court in Gerawan Farming, Inc. v. Agricultural Labor Relations Bd. (2017) 3 Cal.5th 1118, 1138, states: "We have sometimes applied a more lenient standard, asking whether the statute is unconstitutional "in the generality or great majority of cases."

The California Supreme Court not taken the opportunity to clarify this issue. In Gerawan, 3 Cal.5th at 1138, the court states: "But we need not decide which test applies." In T-Mobile West LLC v. City and County of San Francisco (2019) 6 Cal.5th 1107, fn 6, the court states: "We need not settle on a precise formulation of the applicable standard." The United States Supreme Court is equally unclear on this issue. (Guardianship of Ann S. (2009) 45 Cal.4th 1110, 1126.) The California Court of Appeal has also not resolved this issue. (Taking Offense v. State (2021) 66 Cal.App.5th 696, 705-706.)

This court will therefore apply both tests to wherever they lead.

VAGUENESS - STATE AND FEDERAL LAW

"The void-for-vagueness doctrine is a component of the constitutional requirement of due process of law. (U.S. Const., 5th & 14th Amends.)" (Ivory Education Institute v. Department of Fish & Wildlife (2018) 28 Cal.App.5th 975, 981.)

Statutes or ordinances that are not clear as to the regulated conduct are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. (Concerned Dog Owners of California v. City of Los Angeles (2011) 194 Cal.App.4th 1219, 1231.)

The third application of constitutional vagueness applies when an ordinance "clearly implicates free speech rights," and in such cases it will survive a facial challenge so long as "it is clear what the statute proscribes 'in the vast majority of its intended applications.' " ... In such instances heightened vagueness scrutiny is triggered where the "challenged statute regulates and potentially chills speech which, in the absence of any regulation, receives some First Amendment protection." (Concerned Dog Owners of California v. City of Los Angeles (2011) 194 Cal.App.4th 1219, 1231.) The touchstone of a facial vagueness challenge in the First Amendment context, however, is not whether some amount of legitimate speech will be chilled; it is whether a substantial amount of legitimate speech will be chilled." (194 Cal.App.4th at 1232.)

There is a "strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (Tobe, 9 Cal.4th at 1107.) "[E]conomic regulation is subject to a less strict vagueness test" and there is "greater tolerance of enactments with civil rather than criminal penalties." (Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489, 498-99.)

VAGUENESS – APPLICATION TO THIS CASE

The motion for summary judgment based on vagueness is DENIED.

Proposition 65 "clearly implicates free speech rights." Proposition 65 "is clear what the statute proscribes in the vast majority of its intended applications." What the statute proscribes is selling products that contain listed chemicals without the required warning. (H&S 25249.6.) The state lists the chemicals. (Pltf Fact 3; Heptinstall Dec. para 12; 27 CCR 27001.) A defendant simply has to test its products to determine whether a warning is required. There is a triable issue of fact whether Proposition 65 is unconstitutionally vague.

KOS's implicit concern is not that the statute is vague. KOS's implicit concern is that it is expensive for a manufacturer to determine whether a product contains a level of a chemical that requires a warning. "[A] facial void-for vagueness challenge considers only the text of the measure itself, not its application to the particular circumstances of an individual." (Ivory Education Institute v. Department of Fish & Wildlife (2018) 28 Cal.App.5th 975, 982.)

OVERBREADTH - STATE AND FEDERAL LAW

Under the First Amendment overbreadth doctrine, "an [ordinance] is facially invalid if it prohibits a substantial amount of protected speech." The Supreme Court has "vigorously enforced the requirement that an [ordinance]'s overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." (Concerned Dog Owners of California v. City of Los Angeles (2011) 194 Cal.App.4th 1219, 1230.)

"[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep." (City of Chicago v. Morales (1999) 527 U.S. 41, 52.)

There is case law that the court should not permit a commercial party to assert an overbreadth argument regarding commercial speech. The reasoning is that commercial speech "is linked to commercial well-being, [so] it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." (Bates v. State Bar of Arizona (1977) 433 U.S. 350, 380-381.) That comment, however, was in the context of whether an entity that was not clearly affected by a restraint on speech had standing to assert a claim. This is the different situation where the business already is a defendant and is arguing that the statute is overbroad because it regulates speech outside of its "plainly legitimate sweep."

OVERBREADTH – APPLICATION TO THIS CASE

The motion for summary judgment based on overbreadth is DENIED.

Prop 65 compels speech in the form of warnings consistent with its public health and safety purpose. Tracking the relevant test, Proposition 65 compels "a substantial amount of protected speech" within "the statute's plainly legitimate sweep."

KOS's concern is with the scope of Proposition 65's "legitimate sweep." KOS argues that Prop 65 is overcautious and overwarns when in H&S 25249.10 it sets the statutory exemption at (1) an exposure "poses no significant risk assuming lifetime exposure at the level in question" and (2) the exposure "will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity." (Moving at 17.)

KOS presents evidence that as a matter of science, Prop 65 requires warnings when the risk of injury is extremely remote and that neither CalOEHHA nor the FDA uses the Prop 65 1,000-fold safety factor. (SSUF 3, 4; Beck Dec, para 22, 23, 28.)

The court cannot find that the electorate's "legitimate sweep" was unconstitutionally overbroad in light of the intended purpose. When Proposition 65 as adopted in 1986 it set the exemption at 1000 times the level in question. The California electorate was informed of the cost/benefit ratio of Prop 65. The Ballot Measure's "con" argument states: "This initiative will result in chasing after trivial amounts of manmade carcinogens at enormous cost with minimal benefit to our health." The California electorate was informed of the "legitimate sweep" and voted for

Proposition 65.

There is a triable issue of fact whether Proposition 65 is unconstitutionally overbroad.

COMPELLED COMMERCIAL SPEECH - STATE AND FEDERAL LAW

KOS's affirmative defense concerns whether the First Amendment protects it from Prop 65's compelled commercial speech.

There is "lesser protection to commercial speech than to other constitutionally guaranteed expression." (Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York (1980) 447 U.S. 557, 562-63.) The Supreme Court recently held: "This Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts." National Institute of Family and Life Advocates v. Becerra (2018) ___ U.S. ___, ___, 138 S.Ct. 2361, 2372 ("NIFLA")

Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 651, states: "we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." The facts in Zauderer were that the state was requiring that an attorney "include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." The legal standard articulated Zauderer is not to be confused with the facts in Zauderer.

Beeman v. Anthem Prescription Management, LLC (2013) 58 Cal.4th 329, 335, uses the same legal standards and states: "we hold that the statute, which requires factual disclosures in a commercial setting, is subject to rational basis review and satisfies that standard because the compelled disclosures are reasonably related to the Legislature's legitimate objective of promoting informed decisionmaking" by consumers.

Beeman goes on to state: "Laws requiring a commercial speaker to make purely factual disclosures related to its business affairs, whether to prevent deception or simply to promote informational transparency, have a "purpose ... consistent with the reasons for according constitutional protection to commercial speech." ... Because such laws facilitate rather than impede the "free flow of commercial information" ..., they do not warrant intermediate scrutiny. Instead, we hold that rational basis review is the proper standard for evaluating such laws under California's free speech clause." (58 Cal.4th at 356.)

Thus, there are two standards: (1) rational basis review if the commercial information is "purely factual disclosures" and (2) intermediate scrutiny review if the commercial information is not purely factual and uncontroversial information.

COMPELLED COMMERCIAL SPEECH – APPLICATION TO THIS CASE

It is undisputed that Prop 65 compels commercial speech.

Plaintiff makes the argument that Prop 65 does not compel speech because Prop 65 does not

compel use of the "safe harbor" warning language. There is compelled speech because H&S 25249.6 requires that a business give a "clear and reasonable warning." The "safe harbor" warning language is material to the issue of whether the warning is "purely factual."

There is a triable issue of fact whether the Prop 65 "safe harbor" warning is a "purely factual" warning. The Prop 65 "safe harbor" warning states: "WARNING: Consuming this product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer." (27 CCR 25607.1(b); 27 CCR 25607.2(a)(1), (3).)

KOS presents evidence that the format of Prop 65 warnings, including the box and the signal word "WARNING" suggest to the reasonable consumer that the product is hazardous. (SSUF 5, 7) Plaintiff presents evidence that customers perceive the Prop 65 warning less threateningly as information about an exposure. (Pltf Fact 16, 17, 18, 19, 20; Kukla Dec; Motley Dec.)

The underlying issue is determining what the Prop 65 warning is intended to convey because the "safe harbor" warning by definition conveys the intended information. Prop 65 on is face is about warning of "exposure" to chemicals. That is what H&S 25249.6 states. That is what the safe harbor states. The Ballot argument in favor of Prop 65 states: "We each have a right to know, and to make our own choices about being exposed to these chemicals."

KOS's argument is that the "safe harbor" warning conveys false information because it suggests a significant threat to health rather than just an "exposure" to a chemical that is known to the State of California to cause cancer. The court would probably use a "reasonable consumer" standard in determining what message the Prop 65 warning conveyed. (Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 680.) The parties could present a range of evidence about consumer perception. (Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal.App.4th 1351, 1361-1362.)

The court notes, by way of dicta, that in many situations such as arbitration agreements, warranties, and liability waivers that the law assumes that consumers read documents carefully and understand the precise text in those documents. In this motion, KOS takes the position usually taken by consumers and is arguing that a reasonable consumer would only glance at the document and would understand a document (the warning) to mean something other than what a close reading suggests it actually states.

At this stage, the court finds that there is a triable issue of fact whether, as asserted by KOS, that the Prop 65 "safe harbor" warning conveys the message that the product is harmful as opposed to conveying the less threatening message that the product will expose a person to a chemical that can cause cancer.

DISCLOSURES OF PURELY FACTUAL INFORMATION – RATIONAL BASIS REVIEW

There is a triable issue of fact whether Prop 65 facially requires "factual disclosures" or "purely factual and uncontroversial information." If the warning simply conveys that there is an exposure without conveying that use or consumption is hazardous, then the warning is conveying purely factual information.

Because KOS makes a facial challenge, KOS must demonstrate that a Prop 65 warning is either (1) not factual in all cases ["inevitably pose[s] a present total and fatal conflict"] or (2) not factual "in the generality or great majority of cases." (Gerawan Farming, Inc. v. Agricultural Labor Relations Bd. (2017) 3 Cal.5th 1118, 1138.)

KOS has not demonstrated with undisputed evidence that that Prop 65 does not provide factual warnings in the generality or great majority of cases, much less that Prop 65 does not provide factual warnings in all cases. The court therefore applies the rational basis review for compelled factual disclosures.

There is a triable issue of fact whether the Prop 65 compelled disclosures are "reasonably related to the [electorate's] legitimate objective of promoting informed decisionmaking." (Beeman v. Anthem Prescription Management, LLC (2013) 58 Cal.4th 329, 335.)

DISCLOSURES OF DISPUTED INFORMATION – INTERMEDIATE LEVEL REVIEW

Assuming that Prop 65 does not compel the disclosure of purely factual information, then intermediate scrutiny applies. The intermediate scrutiny standard is "First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." (Central Hudson Gas & Electric Corp. v. Public Service Commission (1980) 447 U.S. 557, 564.)

The state interest is stated in Section 1 of the Ballot Measure: to inform the public about exposures to chemicals and to secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public health and safety. (Consumer Cause, 91 Cal.App.4th at 462.)

There is a triable issue of fact whether Prop 65 "directly advances" the state interest involved. The plain text of Proposition 65 requires businesses to inform the public about chemicals while permitting businesses to avoid a warning when there is no threat to health. KOS's concern seems to be that the electorate in Prop 65 decided to adopt a regulatory scheme that was cautious and erred on the side of overwarning. (SSUF 6)

The California electorate was informed of the risks of over-warning. The Ballot Measure's rebuttal to the "pro" argument states: "It requires "'warnings'" on millions of ordinary and safe items. We won't know what products are really dangerous anymore. THE WARNINGS WE REALLY NEED WILL GET LOST IN LOTS OF WARNINGS WE DONT NEED." (Exh 1.) This suggests that the public knew that Prop 65 would lead to overwarning, that the state interest was to err on the side of overwarning, and that the electorate adopted the regulatory regime that served the state interest.

There is a triable issue of fact whether the governmental interest could be served as well by a "more limited restriction" on commercial speech.

Clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record.

Dated: 06/06/2023

Evelio Grillo / Judge