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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

ENVIRONMENTAL RESEARCH CENTER, INC., Plaintiff, **v.** **88 ACRES FOODS, INC., et al.,** Defendants.	Case No. 22CV010885 **STATEMENT OF THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL IN SUPPORT OF MOTION TO APPROVE SECOND AMENDED CONSENT JUDGMENT** Date: November 17, 2023 Time: 9:00 a.m. Dept: 21 Judge: Hon. Evelio Grillo Reserv. ID. 956847668676

The California Office of the Attorney General ("AGO") files this statement in response to the issues raised in the Court's Order of September 28, 2023 and in support of the parties' motion to approve the Second Amended Stipulated Consent Judgment in this matter. The AGO appears pursuant to Health and Safety Code section 25249.7, subdivision (f)(5), which allows the AGO to appear and to participate in proceedings over private settlements of Proposition 65 cases without intervening.

BACKGROUND

I. THE PRIOR PROPOSED CONSENT JUDGMENT AND THE COURT'S ORDER

This is a private enforcement case brought under Health and Safety Code section 25249.5 et seq. ("Proposition 65"). Plaintiff Environmental Research Center ("ERC") alleges that Defendant 88 Acres Foods, Inc. ("88 Acres") sells food products that expose consumers to lead, a carcinogen and reproductive toxicant, without providing the warning required under Proposition 65. The parties entered into a Proposed Consent Judgment ("Proposed Consent Judgment") which was submitted to the Court for judicial approval on September 21, 2023. The agreement contained the following language: "6.2 Only ERC or the California Attorney General may enforce the terms of this Consent Judgment." On September 28, 2023, the Court entered an order stating that the parties were required to permit any person acting as a Proposition 65 enforcer to enforce the judgment:

> THE COURT IS CONCERNED THAT Agreement para 6.2 is problematic. It states that "Only ERC may enforce the terms of this consent judgment." That seems wrong. The Attorney General should be able to enforce the judgment. Any person acting as a Prop 65 enforcer should be able to enforce the judgment, just as any person acting as a Prop 65 enforcer is able to enforce Prop 65. (H&S 25249.7(d).)
>
> On 9/21/23, the parties submitted an amended proposed judgment that did not address this concern. The amended proposed judgment at para 6.2 states: "Only ERC or the California Attorney General may enforce the terms of this Consent Judgment." This is an unreasonable restriction on who can enforce the judgment. Any person acting as a Prop 65 enforcer should be able to enforce the judgment, just as any person acting as a Prop 65 enforcer is able to enforce Prop 65. (H&S 25249.7(d).) Given that the statute permits any person to enforce Prop 65, the court does not need to reach the issue of whether a private enforcer other than ERC would have public interest standing. (People ex rel. Becerra v. Superior Court (2018) 29 Cal.App.5th 486, 505-504.)

On November 10, 2023, ERC submitted a Second Amended Stipulated Consent Judgment ("Second Amended Consent Judgment"). The Second Amended Consent Judgment contains the following language: "This Consent Judgment may be enforced by the public entities identified in Health & Safety Code section 25249.7(c) (together 'Public Prosecutors') or ERC." The Second Amended Consent Judgment does not permit private enforcers to enforce the Second Amended Consent Judgment.

For the reasons discussed below, the AGO requests that the Court approve the Second Amended Consent Judgment in its current form with enforcement limited to ERC and Public Prosecutors.[1]

II. PROPOSITION 65 AND PRIVATE ENFORCEMENT

The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly called "Proposition 65," requires businesses with 10 or more employees to give clear and reasonable warnings for exposures to chemicals known to cause cancer or reproductive toxicity. (Health & Saf. Code, § 25249.6.) The Office of Environmental Health Hazard Assessment ("OEHHA"), the lead agency for Proposition 65, maintains a list of more than 800 chemicals, exposures to which require warnings. (Cal. Code Regs., tit. 27, § 27001.) Lead is listed both as a carcinogen and as a reproductive toxicant under Proposition 65. (*Ibid*.)

Violations of Proposition 65 may be enforced by the Attorney General, district attorneys and certain city attorneys, and also by private citizens acting in the public interest. (Health & Saf. Code, § 25249.7, subds. (c), (d).) A private citizen seeking to enforce Proposition 65 must first send a "60-day notice" to the alleged violator and to public prosecutors describing the alleged violations. (*Id*., subd. (d)(1).) The private enforcer can file an action after 60 days if no public prosecutor has filed first. (*Id.*, subd. (d)(2).) Notably, the private enforcer sues not on its own behalf but "in the public interest." *(Id*., subd. (d).) Private enforcers keep 25 percent of any civil penalties they recover. (*Id.*, § 25249.12, subd. (d).) In the event that the private enforcer succeeds in the Proposition 65 action, it may be entitled to an award of attorney's fees and costs pursuant to Code of Civil Procedure section 1021.5. (Health § Saf. Code, § 25249.7, subd. (f)(4); Cal. Code Regs., tit. 11, § 3201.)

III. COURT APPROVAL OF SETTLEMENT AGREEMENTS

Responding to a growing concern over private Proposition 65 actions that did "not provide any real protection to the public in the event of a violation, but [did] provide compensation to the plaintiffs' attorneys," in 2002 the Legislature adopted settlement approval requirements.

[1] As noted below, the AGO does not believe that it is necessary to include the AGO and other public enforcers in the enforcement provision of a private party consent judgment, but has no objection to the parties doing so.

(*Consumer Advocacy Group v. Kintetsu Enterprises* (2006) 141 Cal.App.4th 46, 49 [hereafter, "*Kintetsu*"].) Now, once a complaint is filed, private settlements require court approval. (Health & Saf. Code, § 25249.7, subd. (f)(4).)

Health and Safety Code section 25249.7, subdivision (f)(4), provides that, when a private enforcer has settled an action alleging a violation of Proposition 65, it shall submit the settlement to the court for judicial approval, and the court shall make certain findings; the enforcer shall produce evidence sufficient to sustain each required finding; and the enforcer shall serve the motion and all supporting papers on the Attorney General, "who may appear and participate in a proceeding without intervening in the case." (*Id*., subd. (f)(5).) The required statutory findings are as follows:

(A) The warning that is required by the settlement complies with [Proposition 65].

(B) The award of attorney's fees is reasonable under California law.

(C) The penalty amount is reasonable based on [the statutory criteria].

(*Id*., subd. (f)(4).)

The AGO has enacted non-binding settlement guidelines for review of private settlements. These settlement guidelines are designed to inform parties and the courts of the AGO's view of the legality of various settlement provisions and the type of evidence needed to sustain the burden of supporting the settlement. (See Cal. Code Regs., tit. 11, § 3200 et seq.)

ARGUMENT

I. THE COURT SHOULD APPROVE THE SECOND AMENDED CONSENT JUDGMENT ALLOWING ENFORCEMENT BY ERC AND PUBLIC PROSECUTORS

A. Private Enforcers Lack Standing to Enforce a Consent Judgment Entered by a Different Private Enforcer

In its prior ruling, this Court requested that the parties include other private enforcers as entities who can enforce the consent judgment. Those other private enforcers, however, lack standing to take action under Proposition 65. As a jurisdictional prerequisite for a private party to bring a lawsuit under Proposition 65, the enforcer must serve a 60-day notice on the public enforcers (Attorney General, District Attorneys, City Attorneys) and on the person alleged to

have violated Proposition 65. If no public enforcer has commenced and is prosecuting an action within the sixty-day time period, the private enforcer may file an action in court. (Health & Saf. Code, §25249.7, subd. (d).) Thus, a private party that has *not* served a 60-day notice cannot commence an action "in the public interest" against the alleged violator, and lacks standing to enforce a consent judgment entered by a different private party with the alleged violator. The non-settling private party simply has not completed the necessary prerequisite to acting "in the public interest" – serving the 60-day notice. The Second Amended Consent Judgment, therefore, properly does not permit other private enforcers to enforce it.

B. Nothing in Proposition 65 Requires that Private Party Consent Judgments be Enforced by Other Private Enforcers

Proposition 65 requires that the Court consider certain factors in approving a consent judgment: that the warning comply with Proposition 65; that the award of attorney's fees is reasonable under California law; and that the penalty amount is reasonable, based on the statutory factors. (Health & Saf. Code, §25249.7, subd. (f)(4).) Nothing in the statute requires or permits a private enforcer's consent judgment to be enforceable by other private enforcers, and no case so holds. Further, the Attorney General Guidelines for settlements (Cal. Code Regs., tit. 11, §§ 3200 et seq.), which are intended to address the Attorney General's views on what should be included in private party settlements, discuss attorney's fees (§ 3201), clear and reasonable warnings (§ 3202), reasonable civil penalty (§ 3203), and additional settlement payments (§ 3204). They do not discuss any requirement for enforcement by an entity other than the parties to the agreement itself. Thus, there is no requirement that outside parties, public or private, be entitled to enforce a private party consent judgment.

Permitting outside private parties to enforce other party's consent judgments would create the untenable result that any private citizen could, without having served a 60-day notice, without having filed an action, and without having entered into the consent judgment, appear in court to enforce a judgment entered between different parties. The courts could be faced with the chaos of multiple and diverse actions by outside parties seeking to enforce its order.

While outside private enforcers may not enforce a consent judgment approved between the parties to this matter, those enforcers and the public are not without remedy if neither ERC nor any Public Prosecutor enforces the Second Amended Consent Judgment. If 88 Acres violates the terms of the Second Amended Consent Judgment, any private enforcer may file its own 60-day notice against the company for the underlying violation of Proposition 65, and, if no public enforcer takes action, may file a new Proposition 65 lawsuit. Thus, the public will remain protected from any ongoing violations of the Second Amended Consent Judgment, even if neither ERC nor the Public Prosecutors take action to enforce it.

C. The Court Should Approve the Enforcement Provision of the Second Amended Consent Judgment

In response to the Court's concern, the parties have submitted the Second Amended Consent Judgment to allow the Attorney General and other Public Prosecutors to enforce the terms of the agreement. While the AGO does not believe it is necessary to include Public Prosecutors in the enforcement provision of consent judgments, it has no objection to the parties doing so. Given that other private enforcers lack standing to enforce the agreement, the Court should approve the Second Amended Consent Judgment in its current form.

CONCLUSION

For the reasons discussed above, the AGO requests that the Court approve the Second Amended Consent Judgment submitted to the Court on November 10, 2023.

Dated: November 9, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
LAURA J. ZUCKERMAN
Supervising Deputy Attorney General

/S/ *Susan S. Fiering*

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OK2011950008

DECLARATION OF SERVICE BY ELECTRONIC MAIL

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, Oakland, California 94612.

On November 9, 2023, I served the attached:

- **STATEMENT OF THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL IN SUPPORT OF MOTION TO APPROVE SECOND AMENDED CONSENT JUDGMENT**

by sending a true copy thereof by electronic mail, addressed as follows:

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A courtesy copy was provided to the Court at the following address:

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Dept 21, Hon. Evelio Grillo
Superior Court of California, Alameda County
Rene C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 9, 2023 in Oakland, California.

RYAN MALLARD
Declarant