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Attorney General

State of California
DEPARTMENT OF JUSTICE



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May 21, 2021

By electronic delivery and U.S. mail
Gregory M. Sheffer, Esq.
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RE: Proposition 65 Notice No. 2021-00921

Dear Mr. Sheffer:

We write to you pursuant to the Attorney General's authority under Health and Safety Code section 25249.7, subdivision (e)(1)(A), which is part of the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as "Proposition 65." We have reviewed the above 60-day notice of violation and accompanying certificate of merit that Susan Davia sent to Galaxy Enterprises, Inc.; Galaxy Medical; Allegro Medical Supplies, Inc.; AllegroMedical.com; and Scrip, Inc. on April 23, 2021. The notice alleges that the companies sell products that expose persons to Diisononyl phthalate (DINP) without providing a clear and reasonable warning. The notice alleges both consumer and occupational exposures.

Based on our review of the notice, we have concluded that, as to the consumer aspect of your notice, you have failed to provide sufficient information to indicate that there is a credible basis to conclude that there is merit to each element of the action on which plaintiff will have the burden of proof and that the information relied on does not prove that any affirmative defense has merit. Further, as to the occupational aspect of the notice, the notice lacks the language required by Title 8, section 338, subdivision (b). The 60-day notice therefore does not give Susan Davia authority to file suit in the public interest, or to settle claims based on the alleged violations. We ask that you withdraw the notice immediately. Our position is discussed in more detail below.

Proposition 65 requires companies with ten or more employees to provide clear and reasonable warnings to persons prior to knowingly and intentionally exposing them to chemicals known to cause cancer or reproductive toxicity. (Health & Saf. Code, § 25249.6.) Persons acting in the public interest can bring a private action to enforce Proposition 65 at least sixty

days after sending a 60-day notice to the alleged violators and public enforcers, unless the Attorney General or other public enforcer is diligently prosecuting an action against the violation. (*Id.*, § 25249.7, subd. (d).) Before sending a 60-day notice alleging a failure to warn, the private enforcer must consult with an expert who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical. Based on the consultation, the person sending the notice or his or her attorney must execute a certificate of merit stating his or her belief that, based on the consultation, “there is a reasonable and meritorious case for the private action.” (*Id.*, subd. (d)(1).) The enforcer must attach to the Attorney General’s copy of the certificate of merit factual information sufficient to establish its basis, which the Attorney General is required to maintain in confidence. (*Id.*, subds. (d)(1), (i).) The certificate of merit must document both exposure to the chemical and that there “is merit to each element of the action on which the plaintiff will have the burden of proof.” Further, the certifier must certify that “the information relied upon does not prove that any affirmative defense has merit.” (Tit. 11, Cal. Code Regs., § 3101(a).) Finally, if the notice states occupational violations, it must set out the language contained in Title 8, section 338, subdivision (b). If the Attorney General believes there is no merit to the action after reviewing the certificate of merit and meeting and conferring with the private enforcer, the Attorney General must serve a letter on the noticing party and the alleged violator stating this position and make the letter available to the public. (Health & Saf. Code, § 25249.7 subd. (e)(1).)

The referenced 60-day notice alleges that the companies expose persons to the phthalate DINP in certain products without providing the required warning. We are not able to disclose the contents of the supporting information for the certificate of merit. However, based on our review, we have concluded that, as to a consumer exposure, you have failed to provide sufficient information to indicate that there is a credible basis to conclude that there is merit to each element of the action on which plaintiff will have the burden of proof and that the information relied upon does not prove that any affirmative defense has merit. Further, as to the occupational exposure, the notice lacks the statement required by Title 8, section 338, subdivision (b). This statement must be included in any notice that “alleges the existence of violations of Proposition 65 with respect to occupational exposures . . .” (Title. 8, Cal. Code Regs., § 338 subdivisions (a) and (b).)

For both of the above reasons, the 60-day notice does not give Susan Davia authority to file suit in the public interest, or to settle claims based on the alleged violations. We ask that you withdraw the notice immediately.

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Sincerely,

/s/ Susan S. Fiering

SUSAN S. FIERING
Deputy Attorney General

For ROB BONTA
Attorney General

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