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November 9, 2015

Via e-mail: Trish.Gerken@doj.ca.gov

Ms. Trish Gerken
Senior Legal Analyst
Office of the Attorney General
2550 Mariposa Mall, Rm. 5090
Fresno, CA 93721

Re: Proposed Amendments to Title 11, Division 4 of the California Code of Regulations (Regarding Proposition 65 Settlements)

Dear Ms. Gerken:

Thank you for the opportunity to comment on the proposed amendments to the Title 11, Division 4 regulations regarding settlement of Proposition 65 cases. As Governor Brown recognized, although Proposition 65 was enacted by the voters with good intentions, it has become more associated with “shakedown lawsuits” than with good public health policy. As attorneys representing individuals and companies providing employment in the state and useful products to its residents, we support the regulations’ attempt to re-direct Proposition 65 to its intended purposes.

There is one proposed amendment to the regulations that we would like to draw to your attention, however, as it is contrary to California law. The amendments propose to add a reference to “investigation costs” to section 3201(e). While we agree with and support the intent of subsection (e) that all *recoverable* attorney’s fees and costs be clearly documented with contemporaneously-prepared records, “*investigation costs*” are not recoverable under Code of Civil Procedure section 1021.5 and adding that term to section 3201(e) would only compound the confusion that already exists on this issue.

In *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1148, the Supreme Court held that the “attorneys’ fees” awardable under CCP § 1021.5 do *not* include “litigation costs.” In *Olson*, the Court disallowed expert fees that had been included as “litigation costs” in an attorneys’ fees award under CCP §1021.5. In doing so, it expressly disapproved *Beasley v. Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1151, which had held that expert fees and other traditionally unrecoverable costs were properly included in an award of

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attorneys' fees under §1021.5. The case of *Amaral v. Cintas Corp. No. 2*, (2008) 163 Cal. App. 4th 1157, 1218, confirmed that *Olson* bars the award of *any* costs in the guise of "attorneys' fees" under CCP § 1021.5. Only those costs specified in Code of Civil Procedure section 1033.5(a) may be recovered when there is an award of attorneys' fees under section 1021.5. *Id.* at 1218.

Because confusion obviously exists on this issue, in addition to removing the term "investigation [costs]" from the proposed amendments to section 3201(e), we suggest adding additional language to section 3201(e) to remind courts and counsel that such costs are not recoverable and should not be included in any award of "private attorney general" attorneys' fees. We suggest section 3201(e) be amended to read as follows (amendments currently proposed shown in *italics*; suggested modifications are shown underlined):

(e) **Documentation.** All attorney's fees and investigation costs should be justified by contemporaneously kept records of actual time spent *or costs incurred*, which describe the nature of the work performed or the costs incurred. Investigation costs and other costs not specified under Code of Civil Procedure section 1033.5(a) shall not be included in any claim for, or award of, attorney's fees.

Thank you for considering these comments and addressing these concerns.

Very truly yours,

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Peter W. McGaw

PWM

cc: Deputy Attorney General Harrison Pollak (Harrison.Pollak@doj.ca.gov)