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October 30, 2008

The Honorable Presiding Justice Ignazio Ruvolo
and the Associate Justices
Court of Appeal, First District, Fourth Division
350 McAllister Street
San Francisco, California 94102-3600

RE: *Urban Outfitters, Inc. and Urban Outfitters West LLC v. Alameda County Superior Court*
California Court of Appeal, First District Case No. A122860

Dear Presiding Justice Ruvolo and Associate Justices,

The Attorney General submits this response to the referenced petition for writ of mandate ("Petition") pursuant to the Court's orders dated October 9 and October 23, 2008. We thank the Court for this opportunity to respond.

I. INTRODUCTION

Petitioners, Urban Outfitters, Inc. and Urban Outfitters West LLC ("Petitioners"), challenge an order by the trial court compelling discovery in a Proposition 65 case that Real Party in Interest, Center for Environmental Health ("CEH"), is prosecuting under Proposition 65's private enforcement provision. (Health & Saf. Code, § 25249.7, subd. (d).)[1] The Attorney General takes no position on whether the trial court erred in granting the discovery motion. We ask, however, that if the Court grants the writ and rules in a manner that limits discovery, the Court distinguish this case from an action that a public enforcer brings in the name of the People of the State of California to enforce Proposition 65, since public enforcers are not subject to the 60-day notice requirement that gives rise to this dispute. (Compare § 25249.7, subd. (c) to § 25249.7, subd. (d)(1).)

In this letter brief, we address an issue that the Court may not reach, but that is central to Petitioners' claim. The gravamen of Petitioners' argument is that the 60-day notice that CEH provided as a prerequisite to filing this Proposition 65 private enforcement action – and thus, the

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[1]"Proposition 65" is the commonly-used name for the Safe Drinking Water and Toxic Enforcement Act of 1986, which is codified at Health and Safety Code sections 25249.5 *et seq.* Throughout this letter brief, unless otherwise noted, references to statutory sections are to the Health and Safety Code.

complaint – does not encompass all "jewelry," as it purports to do. Instead, the notice is limited to the single exemplar of Petitioners' jewelry that the 60-day notice lists – the so-called "Skull Ring." (Petition, p. 3.) While we agree that the 60-day notice does not encompass all jewelry, we do not agree that it is limited to the Skull Ring. Properly construed, the 60-day notice applies to all of Petitioners' jewelry that, based on the totality of information in the 60-day notice, a reasonable person would understand allegedly requires a warning under Proposition 65.

We also address an issue that should not be intertwined with whether CEH adequately described the product at issue in the 60-day notice. The separate issue is what evidence CEH has to support the allegation that jewelry Petitioners sell besides the Skull Ring requires a warning. CEH must have enough evidence to "establish the basis" for its belief that the allegation has merit. (Health & Saf. Code, § 25249.7, subd. (d)(1).) The extent of a plaintiff's evidence when it sends a 60-day notice does not control whether the notice properly identifies the type of product that the notice covers.

II. ARGUMENT

A. The 60-Day Notice is a Prerequisite to Filing a Private Action to Enforce Proposition 65.

Private parties have the authority to enforce Proposition 65, but only if they provide at least 60 days notice of the violation to the alleged violator, to the Attorney General, and to other public prosecutors. (§ 25249.7, subd. (d)(1).)[2] In actions to enforce the Proposition 65 warning requirement (§ 25249.6), the notice must contain a certificate of merit, in which the attorney for the noticing party must certify that he or she has consulted with someone with "relevant and appropriate experience or expertise," and that based on the consultation, the attorney believes that there is a reasonable and meritorious case for the private action. (§ 25249.7, subd. (d)(1).) The noticing party also must submit underlying information "sufficient to establish the basis of the certificate" to the Attorney General. (*Id.*)

The 60-day notice is a prerequisite to any lawsuit that a private citizen brings to enforce Proposition 65. (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* ("*Kintetsu II*") (2007) 150 Cal.App.4th 953, 963; *Yeroushalmi v. Miramar Sheraton* ("*Miramar*") (2001) 88 Cal.App.4th 738, 748, fn. 8.) Courts dismiss actions where the notices do not meet applicable requirements. (See, e.g., *Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1221 ("*Rental Housing*"); *DiPirro v. American Isuzu Motors, Inc.* ("*Isuzu Motors*") (2004) 119 Cal.App.4th 966, 972; *Miramar*, 88 Cal.App.4th at pp. 748-50.)

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[2]A second condition placed on private parties is that they may pursue a private action only if the Attorney General or other public prosecutor has not commenced, and is not diligently prosecuting, an action against the violation. (§ 25249.7, subd. (d)(2).)

The 60-day notice requirements serve several important purposes. A 60-day notice provides the public prosecutor the means to assess whether to intervene on behalf of the public, and it affords the accused the opportunity to forestall litigation by settling with the plaintiff or by curing any violation. (*Kintetsu II*, 150 Cal.App.4th at pp. 963-64.) The Office of Environmental Health Hazard Assessment ("OEHHA"), which adopted regulations to implement Proposition 65, also noted that the notice requirement ensures that the private enforcer's ability to proceed in the public interest and to seek civil penalties "is not to be taken lightly." (Petition, Exh. 8, p 188 (Final Statement of Reasons).)

B. The 60-Day Notice Must Provide Sufficient Information to Assess the Nature of the Alleged Violation.

OEHHA has promulgated a regulation that sets forth the required contents of a 60-day notice. (Cal. Code Regs., tit. 27, § 25903, subd. (a) [former tit. 22, § 12903, subd. (a)].)[3] A notice must satisfy the requirements of section 25903 to be valid. (*Id.*; *Kintetsu II*, 150 Cal.App.4th at p. 966.)

The regulation instructs that a 60-notice shall provide "adequate information from which to allow the recipient to assess the nature of the alleged violation." (Cal. Code Regs., § 25903, tit. 27, subd. (b)(2).) The information must be "reasonably clear," and "expressed in terms of common usage and understanding." (*Id.*) In its Final Statement of Reasons, OEHHA explained that the term "reasonably clear" ensures that the regulation is not interpreted to require that the notice is "more precise than necessary to assure that the recipients of the notice are given the proper information." (Petition, Exh. 8, p. 198.)

Sixty-day notices that allege failure to provide a clear and reasonable warning must identify the noticing party and the names of the alleged violators, the approximate time period when the violations occurred, the name of each listed chemical involved in the violation, and the route of exposure by which exposure is alleged to occur. (Cal. Code Regs., tit. 27, § 25903, subds. (b)(2)(A), (C).) Where the alleged violation involves a consumer product, the notice also must identify the product. (*Id.*, subd. (D).) The specificity with which it must identify the product lies at the heart of this dispute.

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[3]On June 18, 2008, the Proposition 65 regulations were moved from title 22 to title 27 of the Code of Regulations. Most of the regulations, including the former section 12903, were renumbered from 12xxx to 25xxx. In this letter brief, we refer to section 25903 by its new section number, but it is the same regulation as the former section 12903. A chart with the renumbered regulations is available at www.oehha.ca.gov/prop65/pdf/title22to27.pdf.

C. A 60-day Notice that Alleges Violations of Proposition 65 Based on a Consumer Product Must Identify the Product With Sufficient Detail to Inform a Reasonable Person Which Types of Product Allegedly Require a Warning.

The issue of how much information a 60-day notice must provide about a consumer product being sold in violation of Proposition 65 has been one of the most problematic in evaluating notices. (See Petition, Exh. 8, p. 195 (Final Statement of Reasons).) Section 25903 provides some guidance, but it does not establish a bright-line test. The regulation states that the 60-day notice shall identify the product as follows:

> For notices of violation of Section 25249.6 of the Act involving consumer product exposures, the name of the consumer product or service, or the specific type of consumer product or services, that cause the violation, with sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged.

(Cal. Code Regs., § 25903, subd. (b)(2)(D).)

There are thus three components to evaluating the product description in a 60-day notice. First, the notice must adequately identify "the consumer product. . . or the specific type of consumer product." Second, the notice must inform the recipients of the nature of the items. The recipients include the Attorney General and other public prosecutors, as well as the alleged violator. (§ 25249.7, subd. (d)(1).) Third, the notice must allow the recipients to distinguish between products that allegedly are in violation of the Proposition 65 warning requirement and those that are not. (*Kintetsu II*, 150 Cal.App.4th at p. 966.) The second and third components of the product description requirement relate back to the underlying purposes of the 60-day notice: to give notice recipients an opportunity to assess the allegations, and to allow the alleged violators to cure the violation. (*Id.* at pp. 963-64.)

Something that is *not* required of a 60-day notice is that it identify each specific unit or item within a product type. Otherwise the distinction in the quoted part of section 25903 between the "name of the consumer product" and the "specific type of consumer product," both of which are allowed, would have no meaning. By way of illustration, in the Final Statement of Reasons, OEHHA explains that, because "aerosol spray paint" adequately describes spray paint, it would not be necessary to list in the 60-day notice every shade of spray paint that the notice covers. (Petition, Exh. 8, p. 195.) Other examples of sufficiently narrow categories are "car wax" and "paint thinner." (*Id.*) OEHHA further explains that allowing the noticing party to inform recipients *of the nature* of the items that allegedly cause the violations allows for some use of categories. According to OEHHA, "[i]nclusion of the phrase 'of the nature' is necessary to assure that the regulation is not interpreted to require identification of the precise items, e.g., the individual cans of paint." (*Id.* at p.

199.) The regulation itself recognizes that the noticing party does not need to provide a UPC number, SKU number, model or design number, stock number, or other more specific identification of products, to sufficiently inform the recipients which types of product are subject to the notice. (Cal. Code Regs., tit. 27, § 25903, subd. (b)(4)(D).)

That is not to say that every product category provides sufficient detail about an alleged violation. In fact, OEHHA rejected as too broad the term "category" in this section of the regulation – as in, the notice must describe the *category* of consumer product. (Petition, Exh. 8, p. 199 (Final Statement of Reasons).) The agency explained that using the term "category" may be interpreted to allow "extremely general descriptions such as 'paints and coatings,' cosmetics' or other commonly used descriptions of broad categories of products." (*Id.*) Instead of "category," OEHHA used "specific type," which it felt would "require a somewhat more particular description, e.g., 'aerosol spray paint,' 'typewriter correction fluid,' or 'paint stripper,' without requiring an unnecessarily particular identification of the product." (*Id.*)

The question, then, is how much specificity is required to identify a "specific type of consumer product" (Cal. Code Regs., tit. 27, § 25903, subd. (b)(2)(D)) in a manner that complies with the statutory requirement to provide "notice of the alleged violation" (§ 25249.7, subd. (d)(1))? The *Kintetsu II* Court faced this question when it considered notices directed at a variety of tobacco products sold in hotels and then smoked at various locations on the premises. (*Kintetsu II*, 150 Cal.App.4th at p. 970.) The court upheld notices that specified "cigars," presumably because cigars are a readily identifiable product distinct from other types of tobacco products. (*Id.*; see also *Miramar*, 88 Cal.App.4th at p. 746 [treating "cigar" as an adequate description of the product type].) But the *Kintetsu II* Court found notices invalid where they simply identified "tobacco products," reasoning that "'tobacco products' encompasses a wide variety of products and therefore does not give the [alleged violator] sufficient notice because it is impossible to discern which product [the plaintiff] alleges was sold in violation of the required warnings." (*Kintetsu II*, 150 Cal.App.4th at p. 970.)

Any articulation of a rule must serve the two essential purposes of the notice, i.e., to provide public officials and alleged violators sufficient information to assess the allegations, and to allow the alleged violator to cure the violation. That means that the product description must give enough information for the notice recipient to conduct a meaningful investigation into the allegations. If the notice alleges violations based on products that are so dissimilar in function or in composition, or if it alleges violations based on the presence of a long list of chemicals, then the recipient may not know where even to begin the investigation, making meaningful review impossible. (See *Rental Housing*, 137 Cal.App.4th at p. 1212.) But if the notice identifies a commonly-understood type of product that allegedly triggers the Proposition 65 warning requirement based on similar exposures, the recipient can use the information to conduct an investigation. The notice would comply with OEHHA's mandate that the notice be "reasonably clear," and "expressed in terms of common usage and understanding." (Cal. Code Regs., tit. 27, § 25903, subd. (b)(2).) The appropriate test is whether the entirety of the 60-day notice informs a reasonable person the types of product to which the notice applies.

As discussed in the next section, defining the product category merely as "jewelry," without supplying specific examples of jewelry subject to the notice or including additional information about the alleged violations, would not provide an adequate product description. In this case, however, CEH did both.

D. Petitioners Could Determine from CEH's 60-Notice the "Specific Type of Product" That Allegedly Requires a Clear and Reasonable Warning to Comply with Proposition 65.

According to the Petitioners, the 60-day notice they received from CEH applies only to the Skull Ring. Petitioners claim that "the Notice is, on its face, too vague to cover anything but the specifically identified exemplar." (Petition, p. 38.) But Petitioners disregard additional information in the 60-day notice that can assist in their investigation. We believe the notice provides sufficient information to allow the recipient to determine which of its jewelry allegedly requires a warning, and which jewelry does not.

In the first place, while the 60-day notice to Petitioners identifies a single ring that Petitioners sold, the ring is part of a list of 23 "non-exclusive" examples of jewelry subject to the notice. (Petition, Exh. 7, pp. 167-168 (Notice of Violation).) The list contains rings, necklaces, earrings, bracelets, pearl beads, and hair clips. (*Id.*) Petitioners therefore are correct when they observe that the term "'jewelry'. . . could mean earrings, it could mean necklaces, or it could mean something as far fetched as a hair accessory." (Petition, p. 38.) By providing Petitioners with a list of examples of what it means by "jewelry," CEH left no doubt that the term applies to items beyond the Skull Ring.

Furthermore, the 60-day notice that Petitioners received does not simply say that all "jewelry" requires a warning. The notice explains that the jewelry causing the violations "is made of and contains Lead." (NOV, Petition, Exh. 7, p. 163.) The notice then describes where the lead is found, albeit this task is made difficult by the fact that the lead appears to be ubiquitous. The notice states that lead is contained in "the metallic and non-metallic parts of the jewelry," and that "non-metallic cords of bracelets and necklaces contain Lead, as does the pearl coating on imitation pearls and the metallic components such as beads, pendants, clasps, posts and other components of the jewelry." (*Id.*) This information informs a reasonable person receiving the notice that jewelry made with lead-containing materials allegedly requires a warning, which, in turn, allows the recipient to look further into the matter.

Petitioners contend that the 60-day notice must inform them "with certainty" which pieces of jewelry allegedly require a warning. (Petition, p. 38.) But CEH does not need to provide them with a comprehensive list at the notice stage. The notice is supposed to trigger an investigation, not obviate the need for one. Here, there is enough information to distinguish between jewelry with lead and other products that Petitioners sell, such as jewelry without lead, shoes, clothing, and other accessories that are not jewelry. (See *Kintetsu II*, 150 Cal.App.4th at p. 970 [upholding notice where "[t]he recipient of the notice may distinguish cigars from other products it sold"].) The 60-

day notice alleges that the jewelry with lead requires a warning. It makes no allegation concerning the other products. Upon receiving such a notice, it would be reasonable for Petitioners to request additional information about their jewelry from suppliers, or take samples from their shelves for testing. They also could glean information about likely sources of lead in jewelry from California's ban on lead-containing jewelry. (§§ 25214.1 *et seq.*)[4] While CEH ultimately will have to prove that Petitioner "knowingly and intentionally" caused each exposure to lead without a warning (§ 25249.6), that does not place the burden on CEH to identify every alleged violation without the alleged violator having to conducts its own investigation.

The notice to Petitioners stands in marked contrast to the 60-day notices that the Court rejected in *Rental Housing, supra*, 137 Cal.App.4th 1185. *Rental Housing* involved settlements between a "front corporation prosecuting the private enforcement action on behalf of a law firm who consist of self-proclaimed bounty hunters" and a trade group representing apartment owners and managers. (*Id.* at p. 1189.) The *Rental Housing* settlements purported to resolve and to release the defendants for alleged Proposition 65 violations occurring at over 1,000 apartment complexes from exposures to dozens of chemicals, where some of the exposures were "'so unlikely as to be virtually imaginary.'" (*Id.* at pp. 1190, 1211 [quoting the Attorney General].) The 60-day notices targeted exposures to chemicals found in second-hand smoke, combustion materials, hobby-related materials, construction materials, potable water systems, paints, finishes, coatings, furniture, furnishings, window treatments, brass hardware, metal surfaces, electrical wiring, natural gas, liquid fuel, and fuel oil combustion, automobile parking facilities, designated loading/unloading locations, transportation services, apartment cleaning and maintenance, exterior and common areas cleaning and maintenance, landscaping maintenance and pesticides, electronic equipment and associated cables, and office supplies and equipment. (*Id.* at 1192-97.) The exposures were alleged to occur in or around swimming pools, jacuzzis, hot tubs, exercise facilities, indoor clubhouses, meeting rooms and other indoor common areas, laundry rooms, public restrooms, food and beverage service operations, areas with alcoholic beverages, salons, areas around emergency generators, maintenance shops or areas, and dry-clean facilities. (*Id.* at 1197-99.) In the Court's view, these allegations were "so broad as to be, literally meaningless." (*Id.* at p. 1211.) The notices "utterly fail[ed] the requirement that they identify each facility or source of exposure in a manner sufficient to *distinguish* those facilities or sources from others for which no violation is alleged." (*Id.* (emphasis in original).)

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[4]California enacted a ban on lead-containing jewelry a month before Petitioners received the 60-day notice. (Assem. Bill No. 1681 (2005-2006 Reg. Sess.) [Health & Saf. Code, §§ 25214.1 *et seq.*].) The statute defines jewelry as "[a]ny of the following ornaments worn by a person," and any "bead, chain, link, pendant, or other component" of such an ornament. (§ 25214.1, subd. (j).) The listed ornaments are an anklet, arm cuff, bracelet, brooch, chain, crown, cuff link, decorated hair accessories, earring, necklace, pin, ring, and body piercing jewelry. (*Id.*) The statute sets standards for the amount of lead that can be in certain materials used to make jewelry. (§§ 25214.1, 25214.2.) As companies doing business in California, Petitioners are presumed to know the law. (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1506.)

The *Rental Housing* Court invited readers to put themselves into the shoes of the public prosecutor charged with reviewing whether to commence litigation based on these notices: "[i]f all the notice conveys is that-well, it's a building with paint, furniture and a parking lot – or if the notice is so much shotgun boilerplate covering every carcinogenic molecule currently known – then meaningful review is impossible." (*Id.* at p. 1212.) In the Court's view, the notices did not differentiate the subject properties "from pretty much everything else in the world." (*Id.* at p. 1213.)

The *Rental Housing* Court's rejection of the 60-day notices sheds light on why CEH's notice to Petitioners about lead in jewelry is valid. The notice lists a single product category (jewelry), it provides a list of 23 examples of jewelry subject to the notice, it alleges exposure to a single chemical (lead), and it explains where the lead is found. (Petition, Exh. 7, pp. 163-68 (Notice of Violation).) Unlike the "fact-bereft boilerplate" in the *Rental Housing* notices (*Rental Housing*, 137 Cal.App.4th at p. 1211 (quoting *Miramar*, 88 Cal.App.4th at p. 750)), the information in the jewelry notice allows the public prosecutor, and the company, to investigate further. Equipped with the information in the notice, a reasonable notice recipient can identify in Petitioners' stores or catalogues the type of product that the notice targets and obtain samples for testing, or request additional information from suppliers and manufacturers to help determine which jewelry contains lead and thus, according to the notice, requires a warning.

In sum, the information in CEH's 60-day notice allows Petitioners, and public prosecutors reasonably to determine which jewelry sold by Petitioners allegedly requires a warning to comply with Proposition 65. The fact that they may need to conduct an additional investigation does not render the 60-day notice invalid.

E. Whether CEH Has Sufficient Evidence to Support the 60-Day Notice Is a Separate Issue From Whether the Notice, on its Face, Makes Reasonably Clear What Types of Product it Covers.

Petitioners correctly observe that "a Proposition 65 Plaintiff cannot serve a broad Notice of Violation in the hopes of finding some alleged violation that might 'turn up' in discovery." (Petition, p. 41.) It is true that courts do not allow "a sweeping notice to be based on 'conjectures' or 'unverified probabilities' rather than 'hard evidence.'" (*Id.* p. 37 (citing *Rental Housing*, 137 Cal.App.4th at pp. 1211-12).) But that does not mean that the private plaintiff must identify every item that fits within a properly-described product category before serving the 60-day notice. Whether the notice adequately describes the product that allegedly requires a warning, and whether there is sufficient evidence to support the allegation, are distinct issues. (See *Kintetsu II*, *supra*, 150 Cal.App.4th at p. 967 ["[t]he adequacy of the notice and of the investigation are separate issues].)

The certificate of merit that accompanies a private enforcer's 60-day notice must state that

> the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure . . . and

> that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action.

(§ 25249.7, subd. (d)(1).) Factual information sufficient to establish "the basis of the certificate of merit" must be attached to the copy of the certificate of merit that is served on the Attorney General. (*Id.*) The certifier must have a basis to conclude that there is merit "to each element of the action on which the plaintiff will have the burden of proof." (Cal. Code Regs., tit. 11, § 3101.) The factual information must include sufficient "facts, studies, or other data" to support the alleged violation. (*Id.*, § 3102, subd. (c)(1).)

This requirement ensures that a private enforcer has enough evidence to provide a basis for the belief that there is a reasonable and meritorious case. It does not require the plaintiff to have all of the evidence ahead of time. The discussion in *Rental Housing* about "unverified probabilities" that Petitioners cite is thus distinguishable. (Petition, p. 37) The allegations in the *Rental Housing* notices covered such a vast array of alleged violations, the Court concluded that the private plaintiff could not possibly have gathered evidentiary support for each allegation:

> For example, [the notices] allege no facts that any specific tenants are engaged in arts and crafts using ceramic glazes made by specific manufacturers, or any specific apartments have roofs that are known, for certain, to contain asbestos, or have water fixtures made of brass, or are painted with certain brands of aerosol primers, or contain carpets which are known for certain to include certain "foams," or are cleaned with certain brands of carpet steam cleaner or have tile polished with floor polishes containing silica, or have their grounds maintained with mineral-based fertilizers or even have photocopy machines that use toner containing "carbon black respirable sized aerosols." No, it's all a matter of probabilities – the theory is that somewhere among [plaintiff's] targets there's just gotta be an apartment that fits one of those descriptions.

(*Rental Housing*, 137 Cal.App.4th at p. 1212.)

Petitioners equate these unsupported contentions to CEH's purported belief that "just because one piece of jewelry (an earring) may contain lead, another different piece of jewelry (a hair accessory) must also contain lead," but they are different. (Petition, p. 39.) On the face of CEH's jewelry notices, it is clear that CEH did more than simply "go to the internet and find some common objects (e.g., furniture, paper, carpeting) which *may* 'contain' a substance on the regulatory carcinogen list," which is how the Court characterized the plaintiff's investigation in *Rental Housing*. (*Rental Housing*, 137 Cal.App.4th at p. 1215 (emphasis in original).) At a minimum, CEH obtained and found lead in 23 different pieces of jewelry, made with many different materials. In fact, as Petitioners note, CEH has sued more than 200 companies for selling lead-containing

jewelry without a warning. (Petition, p. 19.) In 60-day notices to each company, CEH identified specific examples of jewelry with lead, indicating that CEH has tested literally hundreds of different pieces of jewelry.[5] While CEH only may have confirmed with testing that there is lead in one piece of jewelry that Petitioners sell, its extensive work in this area appears to provide a reasonable basis for concluding that other jewelry Petitioners sell also contains lead.

While a private plaintiff does not need to have evidence for each item that falls within a properly-described and supported category when it send the 60-day notice, that is not to say that it needs *no* evidence. A private plaintiff's evidentiary support for a 60-day notice is subject to review throughout the course of the litigation. It falls to the Attorney General to evaluate in the first instance whether there is sufficient evidentiary support for the notice. (§ 25249.7, subd. (d)(1).) If the Attorney General concludes that there is not sufficient evidence, then it may contact the noticing party, although, with limited exceptions, the Attorney General must keep the information confidential. (§ 25249.7, subd. (i); Cal. Code Regs., tit. 11, § 3103, subd. (b).)[6] Thus, if CEH had sent only one jewelry notice, to one company, alleging that jewelry with lead requires a warning, and submitted to the Attorney General test results of only one ring, the Attorney General might have concluded that the evidence did not provide a reasonable basis for the broad product description. In that case, the Attorney General could have informed CEH not to commence an action. (Cal. Code Regs., tit. 11, § 3103, subd. (a).) As the Court recognized in *Isuzu Motors*, *supra*, requiring would-be private enforcers to provide evidence to the Attorney General in support of the allegations in the 60-day notice "increases the Attorney General's understanding of the claim's likelihood of success, allowing that office to focus its efforts to discourage filing of the truly frivolous." (*DiPirro v. American Isuzu Motors, Inc.*, 119 Cal.App. 4th at p. 792.)

Once litigation commences, the defendants will have an opportunity through discovery to determine what evidence supports the plaintiff's contentions, and to challenge the sufficiency of the evidence at trial or through motion practice.

The courts also have an opportunity to review the private plaintiff's evidence. Upon the conclusion of an action where the court determines there was no actual or threatened exposure to a listed chemical, the court can review the factual basis for the certificate of merit and, if appropriate, order sanctions. (§ 25249.7, subd. (h)(2).) Or if a case settles, the court can (and should) review the evidence of the alleged violations to determine whether the award of attorney's fees and the penalty amount are reasonable, as it must to approve a private settlement. (§ 25249.7, subd. (f)(4).) If it appears that the private plaintiff sent a notice about a broad category for which it had insufficient evidence, or if there is scant evidence to demonstrate that the proposed settlement resolves actual violations, then there would be little or no public benefit justifying a fee award. (See Cal. Code

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[5]Sixty-day notices are posted on the Attorney General's website, at www.caag.state.ca.us/prop65/.

[6]No inferences shall be drawn where the Attorney General makes no response concerning a certificate of merit. (*Id.*, § 3103, subd. (c).)

Regs., tit. 11, § 3201, subd. (b)(1) ["[i]f there is no evidence of an exposure for which a warning plausibly is required, there is no public benefit, even if a warning is given"].) The court could instruct the parties to limit the scope of the relief, including attorneys fees, if the only public benefit has been to remedy violations based upon sales of the Skull Ring.

F. Any Discussion About the Requirements for a 60-Day Notice, or the Relationship Between 60-Day Notices and Subsequent Litigation, Should Distinguish Between Private and a Public Actions to Enforce Proposition 65, Because Public Enforcers Are Not Required to Send a 60-Day Notice.

Our last point is an important one if the Court rules on the scope of CEH's notice, or on the relationship between the notice and discovery. Enforcement actions may be brought under Proposition 65 "in the name of the people of the State of California" only by the Attorney General, by District Attorneys, and by certain city attorneys. (§ 25249.7, subd. (c).) Public enforcers do not need to send a 60-day notice before initiating an enforcement action. (*Id.*) Therefore, when a public enforcer files an action to enforce Proposition 65, it must satisfy the mandate of due process to provide "formal notice of potential liability," but the public enforcer is not required to comply with the statutory and regulatory requirements for a 60-day notice. (See *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826.)

By contrast, private enforcers bring Proposition 65 actions "in the public interest," not "in the name of the people." (§ 25249.7, subd. (d).) In order to assume of mantle of suing in the public interest, the private enforcer must send a 60-day notice that complies with the regulatory requirements for the notice. (Cal. Code Regs., § 25903, subd. (a); *Miramar, supra*, 88 Cal.App.4th 738, 748, fn. 8.) Applying these procedural requirements to private plaintiffs is important to address the concern noted by our Supreme Court that private rights of action not result in "an explosion of assertedly unwarranted or unduly burdensome individual lawsuits brought by professional plaintiffs and bounty-hunting attorneys against business establishments." (*Angelucci v. Century City Supper Club* (2007) 40 Cal.4th 160, 178, fn. 10 [specifically noting such concerns about Proposition 65, and noting limitations on private Unfair Competition Law actions adopted by the voters].)

Therefore, any discussion about the requirements for a 60-day notice, and the implications of the 60-day notice on the rest of the litigation, would apply only to a Proposition 65 action that a private enforcer brings. We ask the Court to make this distinction if it reaches the issue of the adequacy, or effect of, CEH's 60-day notice to Petitioners.

III. CONCLUSION

In sum, the product description in a 60-day notice is sufficiently clear if it informs a reasonable person what specific types of a product allegedly require a warning to comply with Proposition 65. The 60-day notice in this case potentially encompasses a broad spectrum of jewelry

with lead, but information in the notice allows the recipients to assess the allegations and, if necessary, to cure the alleged violations. Whether CEH has sufficient evidence to establish the basis for its allegations is a separate inquiry.

Respectfully submitted,

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