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State of California
DEPARTMENT OF JUSTICE



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May 13, 2014

RE: 2013 Annual Summary of Proposition 65 Settlements

Dear Counsel:

We write to you today in your capacity as an attorney who has represented one or more private enforcers of Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act of 1986, or represented businesses sued under Proposition 65. As you know, the Attorney General's Office is tasked, under section 25249.7, subdivision (f) of the Health and Safety Code, with reviewing private party settlements to ensure that they are consistent with the statute and with protecting the public interest. After each calendar year, we prepare a report compiling that year's settlement data, including penalties and attorney's fees collected. Enclosed with this letter is a summary of the Attorney General's report on Proposition 65 settlements for the year 2013, which we are releasing today. The full report is available on our website, at www.oag.ca.gov/prop65. In addition to demonstrating that Proposition 65 continues to be a powerful tool for informing individuals about exposure to dangerous chemicals, the report also shines a light on some of the aspects of private enforcement of Proposition 65 that result in unnecessary burdens for businesses and are cause for public concern.

Specifically, the 2013 report reveals a continuation in the disturbing trend in private settlements of designating significant amounts of money as payments in-lieu-of penalties ("PILPs") instead of as civil penalties. For more than a decade, Proposition 65 enforcers have substituted PILPs for penalty payments. Under the statute, 75 percent of penalty payments must be paid to the State, to offset the cost of Proposition 65 regulatory activities. PILPs, however, are paid to the enforcer or to a third party of its choosing, with virtually no oversight of how the money is spent, and often with only the most tenuous connection to the alleged violation. We have grown increasingly concerned with the PILP recoveries in private settlements, both because of their diversion of funds intended for the State, and their adverse effect on the transparency of settlements.

In 2010, this Office first publicly raised concerns with the large amounts of penalties being diverted to PILPs. We have been encouraged to note that the percentage of penalty payments allocated to PILPs has decreased some over the last four years. But, as the current report demonstrates, problems persist. Settlements in 2013 that contained a PILP continued to treat the majority of non-attorney's fee payments as PILPs, not civil penalties: \$2.0 million in these settlements were allocated as PILPs, compared to \$1.2 million in penalty payments. This

allocation diverted significant funds away from the Office of Environmental Health Hazard Assessment (“OEHHA”), which uses the State’s share of civil penalties to fund its Proposition 65 implementation work, and is inconsistent with the 25/75 split in penalties that voters intended when they adopted Proposition 65. And while enforcers now provide somewhat more information about how PILPs will be spent, the descriptions in settlements and their supporting papers continue to be vague, difficult to evaluate, and hard to enforce. The potential for abuse is even higher for PILPs in out-of-court settlements, because they are not subject to judicial review or oversight.

The Attorney General’s current Proposition 65 guidelines, when first adopted in 2003, recognized that PILPs may be appropriate in some cases. (Cal. Code Regs., tit. 11, § 3203, subd. (b)). At the time the guidelines were issued, however, the problem with widespread diversion of penalty money to PILPs was not readily apparent. We intend to propose modifications to the guidelines that will provide specific guidance for the assessment of PILPs in private settlement agreements. Specifically, we will consider guideline changes to address three principal areas of concern: (1) the allocation of payments between civil penalties and PILPs, and the consequent diversion of resources away from the public sector; (2) the potential use of PILPs for activities unrelated to the violations; and (3) the lack of accountability for how PILPs are spent. We look forward to your input in the regulatory process once we have made our specific draft proposals public.

In addition, this year’s report demonstrates, as in previous years, that most of the collections in Proposition 65 enforcement cases were paid as attorney’s fees. In 2013, \$12.7 million – or a full 73 percent of all payments made in private settlements – were for the enforcers’ attorney’s fees and costs. These amounts do not include the millions of dollars alleged violators undoubtedly paid to their own attorneys. Clearly, the high transaction costs for resolving Proposition 65 cases continue to be cause for concern. They are the reason we have been redoubling our efforts to evaluate attorney’s fee awards in the private party settlements submitted to us. We also intend to review our regulations to consider whether it is appropriate to presume that every settlement that provides for a warning or reformulation automatically provides a significant public benefit.

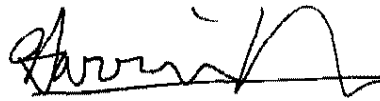
In closing, reflecting on the 2013 settlement report, there are aspects of Proposition 65 implementation that need our continuing attention to avoid placing unnecessary hardships on businesses operating in California. At the same time, we are mindful of the accomplishments of Proposition 65 and the valuable role its citizen-enforcers play. Many of the 352 settlements reached in 2013 represent a tremendous effort by the enforcers and the regulated community to reduce public exposures to chemicals that are known to cause cancer, reproductive toxicity, or both. In these settlements, companies agreed to remove or to reduce harmful chemicals in thousands of products, or to provide warnings so that consumers are fully informed. Moreover, the \$2.7 million in civil penalties collected resulted in a \$1.9 million payment (75% by statute) to OEHHA to continue Proposition 65 implementation work. Proposition 65 has made, and continues to make, significant contributions toward protecting the health and safety of residents of California.

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In 2001, when the Legislature amended Proposition 65, it vested this Office with a significant role in reviewing and overseeing private-plaintiff Proposition 65 enforcement. We take that role seriously. We are committed to addressing the challenges in a manner that both protects businesses from needless litigation, and insures that the law operates to protect public health and safety as intended by the voters.

Sincerely,

A handwritten signature in black ink, appearing to read "Harrison M. Pollak". The signature is fluid and cursive, with a long horizontal stroke at the end.

HARRISON M. POLLAK
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Enclosure

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Proposition 65 Settlement Summary -- 2013

All Reported Settlements

Plaintiff	No. of Settlements	Total Settlement Payments	Non-Contingent Civil Penalty*	% of Total	Attorney's Fees and Costs	% of Total	Payment in-lieu-of Penalty (PILP)	% of Total	% of PILP to Civil Penalty + PILP
AFS Enterprise, LLC	1	\$5,250	\$0	0%	\$5,250	100%	\$0	0%	n/a
As You Sow	5	\$256,500	\$26,000	10%	\$166,500	65%	\$64,000	25%	71%
Bonilla, John	1	\$8,500	\$2,000	24%	\$6,500	76%	\$0	0%	0%
Brimer, Russell	60	\$2,430,101	\$391,230	16%	\$2,004,871	83%	\$34,000	1%	8%
Caceres, Jacqueline	1	\$5,000	\$800	16%	\$4,200	84%	\$0	0%	0%
Center for Environmental Health	62	\$3,351,500	\$424,258	13%	\$2,293,803	68%	\$633,439	19%	60%
Consumer Advocacy Group, Inc.	25	\$1,364,000	\$102,750	8%	\$1,153,000	85%	\$108,250	8%	51%
Delgado, Rafael, Jr.	4	\$18,750	\$2,750	15%	\$16,000	85%	\$0	0%	0%
Englander, Peter	46	\$1,614,850	\$318,500	20%	\$1,277,350	79%	\$19,000	1%	6%
Environmental Research Center	34	\$2,817,095	\$390,921	14%	\$1,369,678	49%	\$1,056,496	38%	73%
Garcia, Reina	1	\$8,000	\$3,000	38%	\$5,000	63%	\$0	0%	0%
Garrett, Jesse	4	\$22,000	\$2,700	12%	\$19,300	88%	\$0	0%	0%
Held, Anthony E., Ph.D., PE	18	\$551,000	\$66,000	12%	\$485,000	88%	\$0	0%	0%
Leeman, Whitney R., Ph.D.	18	\$742,400	\$213,250	29%	\$529,150	71%	\$0	0%	0%
Mateel Env. Justice Foundation	4	\$1,040,000	\$45,750	4%	\$953,500	92%	\$40,750	4%	47%
Moore, John	41	\$2,059,000	\$325,500	16%	\$1,698,000	82%	\$35,500	2%	10%
Parker, Maureen	3	\$64,000	\$6,000	9%	\$58,000	91%	\$0	0%	0%
Public Interest Alliance, LLC	9	\$92,000	\$2,000	2%	\$90,000	98%	\$0	0%	0%
Shefa LMV, LLC	1	\$7,000	\$2,000	29%	\$5,000	71%	\$0	0%	0%
Sing, Danny	2	\$12,000	\$2,000	17%	\$10,000	83%	\$0	0%	0%
Vinocur, Laurence	9	\$318,450	\$59,500	19%	\$251,950	79%	\$7,000	2%	11%
Wimberley, Evelyn	1	\$25,000	\$1,000	4%	\$24,000	96%	\$0	0%	0%
Attorney General/District Attorneys	2	\$597,360	292,150**	49%			\$0	0%	
Attorney General					\$152,605	26%	\$0	0%	0%
District Attorneys					\$152,605	26%	\$0	0%	0%
Grand Total:	352	\$17,409,756	2,680,059**	15%	\$12,731,262	73%	\$1,998,435	11%	

* A non-contingent penalty is the civil penalty that must be paid pursuant to the settlement, regardless of future events or actions of the
If a settlement includes a contingent penalty, the plaintiff should report the additional penalty amount when it becomes due.

** \$97,383 of the civil penalties were assessed under Business and Professions Code section 17206 for violations of the Unfair Competition Law.

Settlements often contain injunctive relief and monetary payments that cannot be presented in summary form and that require reference to the actual settlement documents to accurately assess. Copies of Proposition 65 settlements are available on the Attorney General's website, at <http://oag.ca.gov/prop65>. This report should not be used by itself to evaluate Proposition 65 settlements.

Proposition 65 Settlement Summary -- 2013

Settlements with a Payment In Lieu of Penalty ("PILP")

Plaintiff	No. of Settlements	Total Settlement Payments	Non-Contingent Civil Penalty*	% of Total	Attorney's Fees and Costs	% of Total	Payment in-lieu-of Penalty (PILP)	% of Total	% of PILP to Civil Penalty + PILP
As You Sow	3	\$203,000	\$21,000	10%	\$118,000	58%	\$64,000	32%	75%
Brimer, Russell	5	\$376,000	\$53,500	14%	\$288,500	77%	\$34,000	9%	39%
Center for Environmental Health	62	\$3,351,500	\$424,258	13%	\$2,293,803	68%	\$633,439	19%	60%
Consumer Advocacy Group, Inc.	25	\$1,364,000	\$102,750	8%	\$1,153,000	85%	\$108,250	8%	51%
Englander, Peter	2	\$157,500	\$42,500	27%	\$96,000	61%	\$19,000	12%	31%
Environmental Research Center	26	\$2,515,500	\$382,568	15%	\$1,076,436	43%	\$1,056,496	42%	73%
Mateel Env. Justice Foundation	4	\$1,040,000	\$45,750	4%	\$953,500	92%	\$40,750	4%	47%
Moore, John	4	\$530,000	\$87,000	16%	\$407,500	77%	\$35,500	7%	29%
Vinocur, Laurence	2	\$77,000	\$14,000	18%	\$56,000	73%	\$7,000	9%	33%
Total:	133	\$9,614,500	\$1,173,326	12%	\$6,442,739	67%	\$1,998,435	21%	63%

* A non-contingent penalty is the civil penalty that must be paid pursuant to the settlement, regardless of future events or actions of the defendant.

Settlements often contain injunctive relief and monetary payments that cannot be presented in summary form and that require reference to the actual settlement documents to accurately assess. Copies of Proposition 65 settlements are available on the Attorney General's website, at <http://oag.ca.gov/prop65>. This report should not be used by itself to evaluate Proposition 65 settlements.