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State of California
DEPARTMENT OF JUSTICE



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Via Electronic Mail

April 30, 2020

Benjamin D. Weston, Esq.
Agency D & L
1968 South Coast Highway, Suite 1200
Laguna Beach, CA 92651
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RE: Amended Letter: Proposition 65 Notice Nos. 2019-2265, 2266, 2417

Dear Mr. Weston:

I write to you concerning the above 60-day notices of violation alleging violations of Proposition 65 based on the sale of laboratory chemicals without a clear and reasonable warning.

In 2017, Proposition 65 was amended to require our office to serve a letter on the noticing party and alleged violator when, after reviewing the confidential factual information served on the Attorney General's Office and meeting and conferring with the noticing party regarding the basis for the certificate of merit, the Attorney General believes there is no merit to the proposed action. (Health & Saf. Code, § 25249.7, subd. (e)(1)(A).) Based on our review of the notices, certificates of merit and supporting information, and on information you have submitted as part of our discussions about the certificates of merit, we have determined that the information you submitted does not demonstrate a reasonable basis for concluding that "all elements of the plaintiff's case can be established." (Cf. Cal. Code Regs., tit. 11, § 3101, subds. (a) and (b).) Accordingly, we write to inform you of the Attorney General's belief that there is no merit to the action.

In reaching this conclusion, we note that the exposures you allege are to students who use the chemicals in academic laboratories, and not to laboratory employees who may be receiving occupational warnings pursuant to the Hazard Communication Standard. Specifically, the notices state:

Student use of the Covered Products in academic laboratories results in human exposure to toxic chemicals via dermal contact, eye contact, ingestion, inhalation, and accidental injection. No clear and reasonable warning of toxicity is provided by the Noticed Parties in connection with the Covered Products.

The “Noticed Parties” in the allegations do not operate the academic laboratories where the exposures allegedly occurred. Rather, our understanding is that they sell the chemicals to the institutions and companies that operate the academic laboratories.

We reviewed the information you provided for evidence to support the allegation that students in academic laboratories have been exposed to listed chemicals sold by the noticed parties without being provided a clear and reasonable warning. We cannot disclose the nature of the evidence you provided. (Health & Saf. Code, § 25249.7, subd. (i)). However, it does not reveal confidential information to state that the evidence you submitted does not demonstrate that there have been exposures to students in California within the relevant statute of limitations time period. In particular we note that the academic institutions likely follow safety procedures to prevent or minimize the risk of exposures occurring.¹ Further, even if your allegation is correct that students in California have been exposed within the relevant time period, and the noticed parties (chemical manufacturers) did not provide clear and reasonable warnings that would comply with Proposition 65,² the students may nevertheless receive a warning from the academic institution prior to any exposure.

Because the supporting information does not provide a credible basis that all elements of the plaintiff’s case can be established, we urge you to withdraw the notices. Failure to do so could result in a court finding that an action based on the notices is frivolous within the meaning of Code of Civil Procedure section 128.5. (Health & Saf. Code, § 25249.7, subd. (h)(2).)

¹ For example, UCLA’s Personal Protective Equipment Policy requires all “principal investigators, lab supervisors, staff, students, volunteers, and visitors entering and/or working in a UCLA research or teaching laboratory” where Proposition 65 listed chemicals are used to utilize Personal Protective Equipment at all times. (UCLA PPE Policy 905, <https://www.ehs.ucla.edu/research/lab/ppe-policy>, last visited April 8, 2020.)

² We express no view on the adequacy for purposes of Proposition 65 of any warnings or other hazard communication materials the noticed parties provide.

Benjamin D. Weston

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Please contact me if you wish to discuss this further.

Sincerely,

/s/ Susan Fiering

SUSAN S. FIERING
Deputy Attorney General

For XAVIER BECERRA
Attorney General

cc: Ann Grimaldi, Esq.
Will Wagner, Esq.

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