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January 28, 2011

VIA U.S. MAIL AND FACSIMILE AT 510-622-2270

Sue Fiering, Esq.
Deputy Attorney General
Office of the Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612

Re: Response to the Attorney General's Letter of December 22, 2010
On behalf of: Consumer Advocacy Group, Inc.

Dear Ms. Fiering:

In response to the letter we received from your office on December 22, 2010, I would like to submit this response in my capacity as a representative of Consumer Advocacy Group, Inc. ("CAG"), as well as based on my experiences in litigating Proposition 65 cases for the last decade or so.

The Attorney General expresses the concern that payments in lieu of civil penalties in Proposition 65 settlements be allocated in a manner that the payments are reasonable, so that the OEHHA is not "deprived of its full share of the civil penalty" as contemplated by § 25249.12. The Attorney General suggests, by way of example, that the payments in lieu of civil penalties not exceed the actual civil penalties.

I would like to demonstrate, for the reasons below, that the allocation of settlement monies as payments in lieu of civil penalties, even in substantial part, is often necessary for the prosecution of future Proposition 65 cases. In my opinion, increasing Private Enforcer accountability is sufficient to address the Attorney General's main concern.

a. The Necessity of the Allocation

Having litigated these matters for several years, I can assure you that Prop 65 cases are very expensive to bring and maintain because they often involve various costs, including but not limited to the costs of hiring experts, investigative costs, the costs of product testing etc. Although our office has in many instances fronted all or a substantial part of these costs – not to mention that we represent CAG on a contingency basis – in many instances it is necessary for us to require our client to cover them. The reason why Prop 65 cases are especially susceptible to the use of experts is twofold: first, before bringing suit, any Private Enforcer must consult with an expert, who has to rely on "facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action" § 25249.7, subd.(d)(1). Second, § 25249.10 provides that if the alleged violator shows that "the exposure poses no significant risk," then it is exempt from Prop 65's warning requirements. Many Proposition 65 defendants are multinational corporations with almost unlimited funds who rely on this defense in a substantial number of cases. When this happens, the Private Enforcer must pay its own expert to ascertain the validity of the defense. It bears noting, at this point, that *Code of Civil Procedure* § 685.070 (*"CCP"*), pursuant to which a prevailing party files its Memorandum of Costs after trial, does not allow for Expert Fees, except to the extent permitted by *CCP* § 998. The California Supreme Court has even held that expert fees are not recoverable even when a motion for attorneys fees is filed under the private attorney-general doctrine, as codified in *CCP* § 1021.5. *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1156. Moreover, the Office of the Attorney General has not expressed a favorable view towards multipliers under *CCP* § 1021.5 except in extraordinary circumstance.

As an aside, the example contemplated by the Attorney General in the Letter involves a situation where the total payments are $700,000, in which case the Private Enforcer's share would be $100,000. But from personal experience we can attest that in reality, most settlements fall in the range of $20,000 to $50,000. In such cases, 25% of the civil penalties that are assessed – assuming that civil penalties are proper under factors of § 25249.7, subd.(b)(2) – would not be nearly enough to make the prosecution of future Prop 65 cases a realistic undertaking. Moreover, all of our Prop 65 cases are taken on contingency, and we are not compensated for our costs and fees when the cases are not successful. Hence, a major overhead in *addition to expert fees* are cases that do not turn out to be successful. In fact, we had one instance where we prevailed at the trial level, received most of our fees, but were not able to recover any of our expert fees and costs of investigation.

To the foregoing, one might suggest that the Private Enforcer make a *CCP* 998 Offer and recover its expert fees that way. However, such as an approach does not fully compensate the Private Enforcer because the statute only allows, at the Court's discretion, recovery of the plaintiff's **post-offer** expert fees. *CCP* § 998, subd(d). Because it is necessary to determine the merit of the case *before* the Complaint is even filed, most of the private enforcer's expert fees will have been incurred before the § 998 offer is even made.

More significantly, forcing Private Enforcers to bear their own expert fees would be defeating of the underlying purpose of the "certificate of merit" requirement of § 25249.7, subd.(d)(1), which is to deter weak cases. It would simply be a disincentive for private enforcers

to hire *qualified* experts for the purpose of evaluating the merit of each case if the private enforcer knows that the expert fees will eventually be a substantial part of its overhead. In addition, requiring a large amount of civil penalties for settlement purposes could impede settlement discussions and negotiations.

Also, in light of CAG's *raison d'être,* which is to benefit the public, in many cases CAG agrees to either forego or reduce its financial recovery in exchange for a complete elimination of harmful chemicals, or significant change in the alleged violator's business practices that would reduce the exposure to the public and/or its employees. Fortunately, this extraordinary result has been reached in many occasions throughout CAG's history as a private enforcer. However, a rule that has the consequence of forcing private enforcers to bear the brunt of their expert fees would prove to be a hurdle to this goal, as the private enforcers, whose resources are often limited, would not be financially in viable position to make such offers.

b. CAG's Alternative

Rather, CAG respectfully submits that the proper channel of addressing the Attorney General's concerns is by doing what the Attorney General requires in the second part of letter: increasing the accountability of the entity receiving the funds, by virtue of a more extensive implementation of 11 *Cal. Code Regs.* § 3203, subd.(b). In other words, CAG's suggestion is that the "accountable organization" in question *be made more accountable* by requiring a more detailed and specific showing that the fees that were were used for activities having a "nexus to the basis of the litigation." *Id.*, at subd.(b)(1). Perhaps monitoring the expenditures of these funds is also warranted.

We strongly believe that foregoing approach strikes a sensible balance between not making Proposition 65 cases cost-prohibitive on the one hand, and increasing Private Enforcer accountability on the other. Through this approach, the public continues to benefit from meritorious cases that are brought to safeguard their health.

Needless to say, we appreciate the opportunity to offer feedback to the Office of the Attorney General concerning this important issue. Please feel free to contact me if you have any questions or concerns. Thank you.

Very truly yours,

YEROUSHALMI & ASSOCIATES

Reuben Yeroushalmi

February 15, 2011

VIA EMAIL AND U.S. MAIL

Susan Fiering
Tim Sullivan
Office of the Attorney General
State of California
1515 Clay Street, 20th Floor
Oakland, CA 94612

Dear Ms. Fiering and Mr. Sullivan:

The undersigned are representatives of organizations that have prosecuted Proposition 65 cases and/or attorneys who have served as counsel for such organizations. We write in response to Harrison Pollak's December 22, 2010 letter to Proposition 65 Private Plaintiffs and Counsel (the "December 22 letter"). We appreciate the opportunity to provide input as the Attorney General's office reviews the issue of civil penalties and payments in lieu of penalties in Proposition 65 settlements and we look forward to further discussing these issues with you.

Many of us have included payments in lieu of penalties in our Proposition 65 settlements in a manner consistent with all statutory requirements as well as the Attorney General's Settlement Guidelines (set forth at Cal. Code Regs., title 11, §3200 et seq.). These settlements were approved by the courts and without objection from your office. We believe that such payments, if consistent with the Attorney General's guidelines for private settlements, play an important role in furthering the purposes of the statute: to protect Californians from exposure to chemicals known to cause cancer or reproductive harm. Indeed, many of us have used payments in lieu of penalties from our successful Proposition 65 work to help fund groups that achieve real public health advances, including:

- Protecting millions of Californians by significantly reducing toxic emissions from dozens of polluting facilities;
- Protecting millions of California children and families by eliminating health threats from lead, arsenic, cadmium, phthalates and other toxic chemicals in toys, baby bibs, diaper bags, vinyl gloves, backpacks, water filters, jewelry and many other products;
- Education and monitoring efforts with respect to many products that were subject of Proposition 65 lawsuits, funded in some cases by payments in lieu of penalties from settlements of those lawsuits; and
- Making grants to other environmental health and justice and community-based organizations to help fund their work in educating California residents and to protect them from toxic products and pollution.

We respectfully submit that, rather than seeking a standardized formula for allocation of settlement funds among civil penalties and payments in lieu of penalties, we engage in a discussion of further guidelines regarding the groups to which such payments may be directed and how such funds should be used and accounted for.

We look forward to further discussing these matters with you.

Center for Environmental Health

By: R. Franco
Richard Franco

Environmental Law Foundation

By: R. Franco, for
James Wheaton

Mateel Environmental Justice Foundation

By: R. Franco, for
William Verick

Law Offices of Michael Freund

By: R. Franco, for
Michael Freund

As You Sow

By: R. Franco, for
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BUILDING A SAFE, JUST, AND SUSTAINABLE WORLD SINCE 1992

January 31, 2011

Ms. Susan Fiering
Senior Deputy Attorney General
State of California
Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA, 94612-0550

Re: Response to Harrison Pollak letter of 12/22/10
Proposition 65 settlement guidelines

Dear Sue,

This is in response to the letter from Deputy Attorney General Harrison Pollak in your office, dated December 22, 2010, sent to most of the Proposition Plaintiffs' Bar and many of the private enforcers, relating to Prop 65 settlement issues, and possible reform.

First I want to thank you for taking my call last week, and acknowledging that the February 1, 2011 date is not a hard deadline, and that we might have some additional time to formulate and provide you with more substantive feedback. Thanks also for providing all of us with your collective thoughts and the heads up that proposed settlement guidelines might be forthcoming from your office.

Please be advised that the entire team at As You Sow has great concern about these issues. We share many of the concerns that prompted Harrison's letter including insufficient tracking as to where some of the settlement monies are going or how they are being used; inequitable portions of settlements allocated to fees, etc. We have long been aware of these issues, as well as some others. We look forward to a constructive dialogue and to working alongside your office in helping formulate some substantive solutions.

We appreciate the additional time to consult with our staff, board and outside counsel, so as to develop constructive feedback, and perhaps some helpful suggestions.

As a preliminary matter, I would like to share my personal concern that you appear to be attempting to create a comprehensive, "one-size-fits-all mandate" with respect to settlement allocations, as suggested in the approach outlined at the bottom of page 3 in Harrison's letter. This could be problematic on several levels.

As you, and Harrison, and the other deputies working on these cases well know, each case is different. Each Defendant is different, as is each enforcement group or individual. We are currently experiencing many cases, for example, where the Defendant's business is in trouble; layoffs, declining revenues, annual losses piling up, some even near bankruptcy. They profess they cannot afford to pay penalties, let alone

the sometimes sizable costs and fees incurred by the Plaintiff to bring the enforcement action. As you also know some Defendants in our settlement agreements, as well as yours and those brought by others, are making very sizable internal investments in new testing protocols, purchasing expensive new equipment, investing in R & D and/or product reformulation so as to reduce the incidence of exposure to Proposition 65 listed chemicals. These commitments by Defendants are sometimes mentioned, but never accounted for in the AG office's chart of settlement allocations. There should be a way for those kinds of expenditures to be acknowledged and credited in the AG's numbers, and in the settlement process more generally.

Another issue that Harrison's letter raises involves the question of how the payments in lieu of civil penalties are being used by the Plaintiff(s) to further the intent of the statute. This question is often complicated by the fact that, due to the economic conditions mentioned above, these payments by various Defendants are often made over time, with monthly installment payments, sometimes over a period of 3 or 4 years. In our case at As You Sow, much of the in lieu funds are re-granted to other 501 (c) (3) organizations, who submit detailed grant proposals, with program descriptions, budgets, organizational charts, histories, etc. Our Board makes grants depending on program need, nexus of the program work to the toxics issues raised in the underlying action, nexus to California, and other factors. Our recipient groups are mostly small, and doing some extraordinary work in the field(s) of toxics prevention, remediation, clean-up or education. They can be seen, along with our grantmaking guidelines at our website www.asyousow.org/grantmaking . We dedicate two Board meetings per year, Spring and Fall, to review grant applications and decide which ones to fund. If a case has settled with an "in lieu" component but those funds will not be received for sometimes 3-4 years into the future, it is often impossible to explain in advance to the AG, or the court, in detail exactly how the monies will be spent. We do ask for and receive subsequent reports, one year later, explaining the progress of the program work and how the funds were used.

These are just a few of the complications that need consideration when your office goes forward in its effort to finalize guidelines for more equitable and appropriate Proposition 65 settlements.

We look forward getting you some additional comments and feedback within the next month, and to continuing a dialogue with your office about the best way forward.

Thanks again.

Larry
Cc: Harrison Pollak
Timothy Sullivan
As You Sow Board of Directors

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