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State of California
DEPARTMENT OF JUSTICE

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June 26, 2002

Shawn Khorrami
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RE: The Working Group on Carcinogens and Immune Suppressing Chemicals
v. The Clorox Company, et al.
San Francisco Superior Court No. 315127

Dear Mr. Khorrami:

Pursuant to the provisions of SB 471, you have provided us with the proposed settlement in this matter, as well as all papers supporting the motion for judicial approval of the settlement. Specifically the new provisions of Health and Safety Code section 25249.7(f)(4) require that any settlement in a private Proposition 65 enforcement action be submitted to the court by noticed motion, and that the settlement may not be approved unless the court finds that: (A) any warning that is required by the settlement comply with Proposition 65; (B) Any award of attorney's fees is reasonable under California law; and (C) Any penalty is reasonable based on specific criteria set forth in the penalty provision of the statute. (See Stats. 2001, c. 578 (S.B. 471, § 1.).) The statute also requires that the settlement and all supporting materials be provided to the Attorney General, "who may appear and participate in any proceeding without intervening in the case." (Health and Safety Code § 25249.7(f)(5).) Pursuant to existing regulations at 11 CCR section 3008(b), including the Emergency Regulation adopted on May 1, 2002, any comments by the Attorney General must be provided to the court prior to the hearing on the motion.

A. Warning Language

As we understand it, the products in question do not contain any listed chemicals, but instead are alleged to create listed chemicals (primarily, but not exclusively, chloroform)–through their intended use. While we agree that this provides the basis for an "exposure" under Proposition 65, the safe-harbor language under the regulations is specifically limited to "consumer products that *contain* a chemical known to the state to cause cancer[.]" (22 CCR § 12601(b)(4)(A).) The safe-harbor warning language states that "this product contains a chemical known to the state of California to cause cancer." (*Id*.) Thus, the use of the safe-harbor language allowed in Paragraph 3.2(b)(1) of the Consent Judgment appears to be both unauthorized and inaccurate.

B. Attorney's Fees

1. Entitlement to Fees

In reviewing this settlement, we think it may be necessary to provide additional information in order to determine whether the attorney's fees are reasonable under California law, because, based on the information provided, we cannot determine whether the plaintiff is a "successful party" or whether the action "has resulted in the enforcement of an important right affecting the public interest," as those terms are used in Code of Civil Procedure section 1021.5.

As we understand the settlement it provides that a "Subject Bleach Product" does not require a warning if it contains 10% or less sodium hypochlorite, or if it contains 9.5% or less "Available Chlorine." (Consent Judgment, Paragraph 3.3.) If the product exceeds those thresholds, then a defendant still may attempt to establish that the products results in less than 40 micrograms per day exposure to chloroform. (Paragraph 3.4.)[1]

Certainly, if a significant number of the products at issue exceed these thresholds, and therefore either will provide warnings or reformulate the product, the plaintiff may be deemed to be a successful party, at least in part. The moving papers, however, contain no information indicating whether, in fact, any of the Subject Bleach Products will require a warning or reformulation. In our brief research concerning the contents of these products, we found no Subject Bleach Product that contained more than 5.25% sodium hypochlorite. Thus, we have some concern that, despite the lengthy terms of the agreement, in essence, the plaintiff has not obtained any relief benefitting the public.

In addition, the warning "requirements" include only "Subject Bleach Products," which are defined as those of the Bleach Products that are not registered under FIFRA, although the claims purportedly resolved by the consent judgment include all "Bleach Products." (Consent Judgment, Par. 1.12.) As you know, Proposition 65 is not preempted by FIFRA. (See *Chemical Specialties Manufacturers Association v. Allenby* (9th Cir. 1992) 958 F.2d 941, affirming 744 F.Supp. 934; *D-Con Company, Inc. v. Allenby* (N.D.Calif. 1980) 728 F.Supp. 605.) In addition, U.S. EPA has approved the inclusion of Proposition 65 warnings on the labels of FIFRA-registered products. Accordingly, from the documentation provided, we can discern no basis upon which FIFRA-registered products should be excluded from the warning provisions (to the extent that any of them actually would fall above the warning thresholds).

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[1]Under this latter procedure, we are concerned that the language does not clearly set forth which party has the burden of proof on the issue. We also are concerned that the determination could be made simply by virtue of the plaintiff failing to respond to the defendant's notification of a determination that no warning is required.

2. Amount of Fees

The consent judgment provides for a payment of $150,000 in attorney's fees and costs. (Consent Judgment, Par. 5.1(b).) Mr. Khorrami's declaration asserts only that he has worked "countless hours" on this case. (Khorrami Declaration, par. 14.) The moving papers provide no documentation, even in a summary fashion, of the number of hours worked by Mr. Khorrami or his associates. While contemporaneous records have not been required to support a fee award in every case, the courts have expressed a clear preference for such records as the most accurate method to determine the amount of a requested fee. (*PLCM Group , Inc. v. Drexler*) (2000) 22 Cal.4th 1084, 1095; see discussion in Pearl, *California Attorney's Fee Awards* (CEB 2001) at § 12.23.) Under any standard, however, the assertion than an attorney has spent "countless hours" on a case falls far short of the documentation necessary to enable the court to find that the fee award is reasonable.

The award also states that it includes costs. The attorney's fee award provision of Code of Civil Procedure section 1021.5 has been interpreted to permit award of costs (*Beasley v. Wells Fargo Bank* (1992) 235 Cal.App.3d 1407, 1422), at least where they are the type of expense that ordinarily would be billed to a client. (*City of Oakland v. Vernolia McCullough* (1996) 46 Cal.App.4th 1, 6.) Accordingly, costs may be awarded as part of the attorney's fee award, but must be awarded consistently with California law. In this instance, however, the motion provides no information supporting the basis for the award of costs, or the amount of the award that is attributable to costs, and therefore we cannot support it.

Accordingly, you may wish to provide additional documentation to the court, with a copy to the Office of the Attorney General, in support of the fee and costs awards.

C. Penalties

In lieu of a penalty, the consent judgment provides that $50,000 shall be paid to plaintiff "to reduce harm from the Listed Chemicals and other toxic chemicals and pollutants or to increase consumer, worker and community awareness of health hazards posed by the Listed Chemicals, and other cancer-causing chemicals." (Consent Judgment, Par. 5.1(b).) As you may know, the Attorney General recently proposed regulations establishing settlement guidelines under which such payments would be analyzed as payments in lieu of penalties. These guidelines would provide that such payments must address the same public harm as that allegedly caused by the defendant in the particular case, and must be provided to an entity that is accountable for the manner in which they are spent. Although these guidelines have not yet been adopted, we are concerned that the criteria provided in the consent judgment are too vague to assure that the funds are used in a manner that has an appropriate nexus to the violations at issue here, or for which the plaintiff could be held accountable.

D. Scope of Claims Covered

We also are concerned about the scope of the "claims covered" language of Paragraph 6.2. This language includes not only chloroform and bromodichloromethane, which were the subject of sixty-day notices dated September 7, 2000, February 13, 2001. On December 27, 2001, additional notices were served in which it was alleged that the products also create exposure to bromoform, carbon tetrachloride, dichoromethane and dichloracectic acid. As you know, in many instances in which notices were served immediately prior to the January 1, 2002 effective date of statutory changes requiring the inclusion of a Certificate of Merit and supporting evidence with sixty-day notices alleging violations of the warning requirement, we have been skeptical of whether the notices were supported by sound factual investigation.

Subsequently, on January 7, 2002, plaintiff served a self-denominated "errata" to the December notices, in which the list of "Bleach Products" subject to the suit was dramatically expanded. Without commenting on whether it would be permissible to make minor corrections to a notice, in this instance, the January 7, 2002 greatly expanded the scope of the alleged violations. Accordingly, it constituted a new sixty-day notice, and was subject to the Certificate of Merit requirement, which took effect on January 1, 2002. This notice did not comply with those requirements.

Sincerely,

EDWARD G. WEIL
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc:
Michele Corash
Jim Mattesich
Stanley Landfair
Trenton H. Norris