Clifford A. Chanler, State Bar No. 135534
Laurence D. Haveson, State Bar No. 152631
THE CHANLER GROUP
81 Throckmorton Avenue, Suite 203
Mill Valley, CA 94941
Telephone: (415) 388-1128
Facsimile: (415) 388-1135

Attorneys for Plaintiffs
ANTHONY E. HELD, PH.D., P.E.,
RUSSELL BRIMER, and JOHN MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, PH.D., P.E.; RUSSELL BRIMER; and JOHN MOORE,

Plaintiffs,

v.

KAMALA D. HARRIS, in her official capacity as the Attorney General of the State of California; THE DEPARTMENT OF JUSTICE OF THE STATE OF CALIFORNIA; and DOES 1-20, inclusive,

Defendants.

Case No. 34-2012-00130566

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Date:	April 24, 2013
Time:	2:00 p.m.
Dept.	53
Judge:	Hon. David I. Brown
Action Filed:	August 23, 2012

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PERTINENT STATUTORY AND REGULATORY BACKGROUND 3

A. Code of Civil Procedure § 1005 3

B. Proposition 65 3

C. 1999 Amendment to Proposition 65 (SB 1269) 4

D. Attorney General Adopts Regulations Based on SB 1269 5

E. 2001 Amendment to Proposition 65 (SB 471) Sponsored by Attorney General 6

F. Attorney General Adopts Amended Regulations Based on SB 471 6

III. LEGAL DISCUSSION 7

A. Standards for Judgment on The Pleadings 7

B. Plaintiffs are "Interested Persons" Under Government Code Section 11350 8

C. 11 CCR § 3003 Violates Separation of Powers Doctrine and is Not Authorized by Health and Safety Code § 25249.7(F) 8

1. 11 CCR § 3003 Violates The Separation of Powers Doctrine 8

2. 11 CCR § 3003 is Not Authorized by Enabling Legislation 9

D. 11 CCR § 3003 Clearly Conflicts with CCP § 1005(B) and is Therefore Invalid 12

E. The Attorney General Erroneously Attempts to Impose a Burden on Plaintiffs That Does Not Apply Under Government Code § 11350 13

F. Plaintiffs' Action is Not Time-Barred as 11 CCR § 3003's Conflict with CCP § 1005(B) Continuously Accrues 14

IV. CONCLUSION 15

CASES AND AUTHORITIES

Cases

Aryeh v. Canon Bus. Solutions, Inc.
(2013) 55 Cal.4th 1185 (2013).....14

Bettencourt v. Hennessy Indus., Inc.
(2012) 205 Cal.App.4th 1103 (2012).....7

California Ass'n of Psychology Providers v. Rank
(1990) 51 Cal.3d 1 .....9, 11, 13

Environmental Prot. Info. Ctr. v. Department of Forestry & Fire Prot.
(1996) 43 Cal.App.4th 1011 8

Hopp v. City of Los Angeles
(2010) 183 Cal.App.4th 713 7

Howard v. County of San Diego
(2010) 184 Cal.App.4th 1422 .....7, 14

Jarvis Taxpayers Assn. v. City of La Habra
(2001) 25 Cal.4th 809 14

Lukens v. Nye
(1909) 156 Cal. 498 9

McClung v. Employment Dev. Dept.
(2004) 34 Cal.4th 467 8

Morris v. Williams
(1967) 67 Cal.2d 733 .....9, 11

People ex rel. Lungren v. Superior Court
(1996) 14 Cal.4th 294 4

People v. Beaumont Inv., Ltd.
(2003) 111 Cal.App.4th 102 9

Robin J. v. Superior Court
(2004) 124 Cal.App.4th 414 12

St. John's Well Child and Family Center v. Schwarzenegger
(2010) 50 Cal.4th 960 9

State of California ex rel. Nee v. Unumprovident Corp.
(2006) 140 Cal.App.4th 442 13

T.H. v. San Diego Unified Sch. Dist.
(2004) 122 Cal.App.4th 1267 13

Tobe v. City of Santa Ana
(1995) 9 Cal.4th 1069 .....13, 14

Travis v. County of Santa Cruz
(2004) 33 Cal.4th 757 13

Velez v. Smith
(2006)142 Cal.App.4th 1154 7

Statutes

California Code of Civil Procedure § 438(d) 7
California Code of Civil Procedure § 1005 3
California Code of Civil Procedure § 1005(b) ..... passim
California Government Code § 15000 9
California Government Code § 11350 ..... 1, 8, 13
Health and Safety Code § 25249.5 ..... 3, 4, 15
Health and Safety Code § 25249.6 ..... 1, 4
Health and Safety Code § 25249.7 ..... passim
Health and Safety Code § 25249.7(d) 4
Health and Safety Code § 25249.7(f) ..... passim
Health and Safety Code § 25249.12(a) 4
Health and Safety Code § 25249.13 3

Regulations

11 California Code of Regulations § 3003 ..... passim
11 California Code of Regulations § 3000 10
27 California Code of Regulations § 25102(o) 4

Constitutional Provisions

California Constitution Article III § 3 ..... 8, 9
California Constitution Article IV § 1 8
California Constitution Article V § 13 8

I. INTRODUCTION

Plaintiffs Anthony E. Held, Ph.D., P.E., Russell Brimer, and John Moore (collectively "Plaintiffs") are citizen enforcers of California's Proposition 65 who bring actions in the public interest against businesses that offer products for sale in California that contain chemicals known to the State to cause cancer and reproductive harm without first providing a clear and reasonable warning, as required by California Health and Safety Code § 25249.6. Plaintiffs brought this declaratory relief action pursuant to California Government Code § 11350 to challenge the validity of 11 California Code of Regulations § 3003[1] ("11 CCR § 3003"), a regulation adopted by the Attorney General of the State of California and the State of California Department of Justice (collectively "Attorney General") that requires that citizen enforcers of Proposition 65 file and serve motions to approve settlements on the Attorney General no later than 45 days in advance of the hearing on such motions. Plaintiffs seek to enforce their right to file and serve motions to approve proposed Proposition 65 settlements in accordance with California Code of Civil Procedure ("CCP") § 1005(b), 16 court days before the hearing, rather than *at least 45 days* prior to the date of the hearing on such motions, as now required by 11 CCR § 3003.

Plaintiffs hereby oppose the Attorney General's motion for judgment on the pleadings and respectfully request that the Court deny the motion. The Attorney General's motion is without merit for several reasons: the Attorney General's imposition of a 45-day notice period for motions to approve settlements by regulation is a constitutional violation of the Separation of Powers doctrine; 11 CCR § 3003 is not authorized by the enabling statute, Health and Safety Code § 25249.7(f); the 45-day notice requirement of 11 CCR § 3003, a regulation adopted by a state agency, clearly conflicts with the 16-court-day notice provision of CCP § 1005(b), a statute enacted by the Legislature; the Attorney General contends, erroneously, that plaintiffs must meet a heavy burden under Government Code § 11350 that does not apply here; and, because 11 CCR § 3003's conflict with CCP § 1005(b) continuously accrues, plaintiffs' action is not time-barred.

[1] At this time, Plaintiffs are only challenging the validity of that part of 11 CCR § 3003(a) that requires them to serve a motion to approve a Proposition 65 settlement at least 45 days before the hearing date.

Moreover, contrary to the assertion in the introduction to Defendants' Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings (the "Attorney General's brief") implying that plaintiffs have waited "more than a decade" to challenge 11 CCR § 3003, plaintiffs' counsel expressed concerns over the adoption of this regulation from the beginning. Plaintiffs' Request for Judicial Notice ("RJN"), Exh. 1, Letter from Chanler Law Group, Feb. 20, 2001. Plaintiffs—none of whom were citizen enforcers of Proposition 65 at the time 11 CCR § 3003 was adopted—bring this action now for several reasons. The State's ongoing budget crisis has adversely affected both the judicial and executive branches of state government. Courts and clerks' offices are short on staff and impaired in their ability to expeditiously process court filings and motions, which when added to the challenged 45-day notice period for motions to approve Proposition 65 settlements, creates further delay to the approval of settlements that are in the public interest.[2] This delay, in turn, postpones the collection of millions of dollars in civil penalties payable to the State of California and extends injunctive relief deadlines—which most often require defendants to reformulate their products to virtually eliminate the presence of chemicals known to the State of California to cause cancer and reproductive harm—that are often tied to the date of court approval.

Reduced budgets and the prolonged 45-day notice period for motions to approve Proposition 65 settlements not only tie up funds earmarked for the State and delay positive changes in consumer goods that benefit the public, they further clog the courts by causing cases to linger on trial court dockets. The extended delay between filing the motion to approve and the hearing date can lead to further litigation of the case and additional court appearances for ex parte applications, motions, or even case management conferences, all of which congest court calendars unnecessarily.

[2] Countless California courts have declared a strong public policy in favor of settlements of disputes at the earliest opportunity. *See, e.g., Zhou v. Unisource Worldwide, Inc.,* 157 Cal.App.4th 1471, 1475 (2007) (public policy in favor of settlement of disputes without litigation); *Osumi v. Sutton,* 151 Cal.App.4th 1355, 1357 (2007) (strong public policy in favor of the settlement of civil cases); C*ity of Orange v. San Diego County Employees Retirement Assn.*,103 Cal.App.4th 45, 55 (2002) (well-established public policy that settlements are favored and should be encouraged); *Wilson v. Wal-Mart Stores, Inc.*,72 Cal.App.4th 382, 390 (1999) (public policy in favor of settlement intended to reduce the burden on the limited resources of the trial courts).

II. PERTINENT STATUTORY AND REGULATORY BACKGROUND

A. Code of Civil Procedure § 1005

Under California statutory law, noticed motions are governed by CCP §1005. In June 1999, the California Legislature amended CCP § 1005(b) through Assembly Bill 1132 ("AB 1132") to change the notice and filing deadlines for motions from 15 calendar days before the hearing to 21 calendar days before the hearing; deadlines for oppositions were changed from five days to 10 days before the hearing, and replies from two days to five days before the hearing. The Assembly Committee on the Judiciary commented on AB 1132 that the additional six days required for noticing a motion "appear[ed] to be a reasonable balance between the desires of the court to have additional time to research motions before it, and the desires of moving parties to have their motions heard in a timely manner." RJN, Exh. 2 at 3.

In July 2004, the California Legislature again amended CCP § 1005(b) through Assembly Bill 3078 ("AB 3078"), to change the notice and filing deadline for motions from 21 calendar days before the hearing to 16 court days before the hearing. The Assembly Committee on the Judiciary commented on AB 3078 that it was intended to remedy ambiguity about deadlines that fell on weekends or holidays, and that it also "would preserve the longer overall time period for civil motions that was recently added by the Legislature (AB 1132, Stats. 1999, ch. 43) . . . ." RJN, Exh. 3 at 2.

The amendment enacted by AB 3078 is found in the current version of CCP § 1005(b), which provides in part that "all moving and supporting papers shall be served and filed at least 16 court days before the hearing." Accordingly, under California law, parties have the right to file motions on notice consisting of at least 16 court days.

B. Proposition 65

On November 4, 1986, an overwhelming majority of California voters passed Proposition 65, a ballot initiative more formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986. According to the California Attorney General's website, Proposition 65 passed with 63% of the popular vote. (http://oag.ca.gov/prop65/faq#.) Proposition 65 is codified at California Health and Safety Code §§ 25249.5 through 25249.13. The preamble to Proposition 65 states, "The people of

California find that hazardous chemicals pose a serious potential threat to their health and well-being, that state government agencies have failed to provide them with adequate protection, and that these failures have been serious enough to lead to investigations by federal agencies of the administration of California's toxic protection programs." Historical & Statutory Notes following Health & Safety Code § 25249.5 (West 2006). Further, California voters passed Proposition 65, "To secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public health and safety." *Id.* The preamble explicitly states that to further its purpose, Proposition 65 may only be amended by a two-thirds vote of both houses of the Legislature. *Id.*

Proposition 65 authorizes any California citizen who has provided sixty days' notice and a certificate of merit to an alleged violator and various public prosecutors to bring an enforcement action in the public interest so long as no public prosecutor has commenced prosecution of the violation. Health & Safety Code § 25249.7(d). Plaintiffs commence citizen enforcement actions pursuant to Health and Safety Code § 25249.6, which provides in pertinent part: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual."

Proposition 65 requires the Governor to designate a lead agency to issue regulations to further the purposes of the Act. Health & Safety Code § 25249.12(a). The Governor has designated the Office of Environmental Health Hazard Assessment ("OEHHA") as the lead agency. 27 Cal. Code Regs. § 25102(o); Executive Order W-15-91 (July 17, 1991); *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 310 & n. 6. Health and Safety Code § 25249.12(a) authorizes only those agencies designated by the Governor to "adopt and modify regulations, standards, and permits as necessary to conform with and implement" Proposition 65. As far as plaintiffs are aware, the Governor has only designated OEHHA to adopt and modify regulations to implement Proposition 65.

C. 1999 Amendment to Proposition 65 (SB 1269)

In October 1999, the California Legislature amended Proposition 65 through Senate Bill 1269 ("SB 1269"). SB 1269 amended Health and Safety Code § 25249.7 to require, among other things, that:

> [A]ny person bringing an action in the public interest to notify the Attorney General that such an action has been filed, and would require such a person, after the action is either subject to a settlement or a judgment, to submit to the Attorney General a reporting form that includes the results of that settlement or judgment and the final disposition of the case.

Historical & Statutory Notes following Health & Safety Code § 25249.7 (West 2006). Intending to limit the new responsibilities provided to the Attorney General, Senator Dede Alpert, the author of SB 1269, included the following text as part of the legislative history of the amendment:

> As the author of SB 1269, I wish to clarify the issue of the Attorney General responsibilities under this bill. SB 1269 amends Health and Safety Code §25249.7 to provide for reporting to, and maintaining a record by, the Attorney General . . . .
>
> SB 1269 does not amend Health and Safety Code §25249.12. . . . Nothing in SB 1269 should be interpreted as altering or enlarging the regulatory authority to implement the provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986 that is established by Health and Safety Code §25249.12, and nothing in this bill should be interpreted as creating any authority for the Attorney General to adopt or modify regulations, standards, or permits with respect to any provision of the Safe Drinking Water and Toxic Enforcement Act of 1986.

Id. RJN, Exh. 8.

D. Attorney General Adopts Regulations Based on SB 1269

On June 1, 2001, the California Attorney General adopted regulations to implement the new reporting and record-keeping requirements of SB 1269, and, despite the admonition of Senator Alpert, also adopted the original version of 11 California Code of Regulations ("CCR") § 3003, which provided in pertinent part:

> A Private Enforcer who agrees to a settlement of a Private Enforcement Matter shall serve the settlement upon the Attorney General. . . . The Attorney General shall have thirty days after actual receipt to review the settlement. During the thirty-day period, the settlement shall not be submitted to the court, unless required by court order or rule or the Attorney General has stated in writing that he does not object to entry of the settlement.

RJN, Exh. 4 at SB1269_0130-SB1269_0131. The Attorney General issued an Initial Statement of Reasons regarding the proposed regulations, including 11 CCR § 3003, wherein the Attorney General stated in part:

> The purpose of the submission is . . . to provide a time period between submission to the Attorney General and submission to the court. Thirty days has been selected in order to allow sufficient time for the Attorney General to provide a thorough response where he deems it appropriate.

RJN, Exh. 5 at SB1269_0019-0020.

E. 2001 Amendment to Proposition 65 (SB 471) Sponsored by Attorney General

In October 2001, the California Legislature amended Proposition 65 through Senate Bill 471 ("SB 471"). According to a press release on the Attorney General's website, SB 471 was sponsored by then-Attorney General Bill Lockyer. RJN, Exh. 6. SB 471 amended Health and Safety Code § 25249.7 to add subdivision (f)(4) and (5), which require in part:

> (4) If there is a settlement of an action brought by a person in the public interest under subdivision (d), the plaintiff shall submit the settlement, other than a voluntary dismissal in which no consideration is received from the defendant, to the court for approval upon noticed motion . . . .
>
> (5) . . . The plaintiff shall serve the motion and all supporting papers on the Attorney General, who may appear and participate in any proceeding without intervening in the case.

Through SB 471, for the first time, citizen enforcers were required by statute to file a noticed motion with the court seeking approval of a Proposition 65 settlement, and to serve the motion and supporting papers on the Attorney General.[3]

F. Attorney General Adopts Amended Regulations Based on SB 471

Based on SB 471, the Attorney General adopted an amended version of 11 CCR § 3003—in the same form as it exists today— which provides in pertinent part:

> The Private Enforcer shall serve the Settlement on the Attorney General with a Report of Settlement in the form set forth in Appendix B within five days after the action is Subject to a Settlement, or concurrently with service of the motion for judicial approval of settlement pursuant to Health and Safety Code section 25249.7(f)(4), whichever is sooner. The motion and all supporting papers and exhibits shall be served on the Attorney General no later than forty-five days prior to the date of the hearing of the motion.

11 CCR § 3003 cites for its authority Health and Safety Code § 25249.7(f).[4] The Attorney General issued a Final Statement of Reasons regarding amendments to the regulations, including 11 CCR § 3003, wherein the Attorney General stated in part:

---

[3] As a leading commentator on Proposition 65 explains, the clear motivation for the changes in SB 471 "was to permit the Attorney General to be informed and to influence active judicial supervision of private Prop. 65 enforcer's settlements, vastly increasing his power to interfere with private Prop. 65 enforcement actions. [¶] Notwithstanding Senator Alpert's admonition in her legislative history letter in 1999, the Attorney General leaped at this new opportunity to expand his legal empire and began adopting a wide-ranging set of regulations to 'implement' Senate Bill 471 before the bill even passed." Roger Lane Carrick, The Proposition 65 Handbook 36 (Prop. 65 News 2005).

[4] It is unclear to plaintiffs why the then-Attorney General, who claimed credit for sponsoring the amendments to Health and Safety Code § 25249.7, did not include a provision in SB 471 modifying the notice period for motions to approve Proposition 65 settlements, rather than arrogating to himself the authority to enlarge the amount of pre-hearing notice required under CCP § 1005(b) by adopting 11 CCR § 3003, a regulation. Moreover, as it is apparent that the Attorney

> [T]he Final Regulation dispenses with the requirement of submitting the settlement to the Attorney General thirty days before submission to the court, and replaces it with a provision that the settlement and all materials supporting the motion for approval of the settlement be submitted to the Attorney General forty-five days before the hearing. This provides the Attorney General with sufficient time to conduct the proper review, and has been retained in the final regulation.

RJN, Exh. 7 at 0787.

For the reasons set forth herein, 11 CCR § 3303 should be deemed unenforceable and defendants' motion should be denied.

III. LEGAL DISCUSSION

A. Standards for Judgment on The Pleadings

A motion for judgment on the pleadings is governed by Code of Civil Procedure § 438(d), which provides: "The grounds for motion provided for in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." A motion for judgment on the pleadings is the equivalent of a general demurrer, and courts treat all properly pleaded material facts in the complaint as true. *Hopp v. City of Los Angeles*, 183 Cal.App.4th 713, 717 (2010). On a motion for judgment on the pleadings, even if the facts alleged in the complaint do not support any valid cause of action against a defendant, courts must ask whether the complaint could reasonably be amended to do so, and "leave to amend is liberally allowed." *Bettencourt v. Hennessy Indus., Inc.*, 205 Cal.App.4th 1103, 1111 (2012). The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified. *Howard v. County of San Diego*, 184 Cal.App.4th 1422, 1428 (2010). A trial court abuses its discretion if it denies leave to amend when there is a reasonable possibility the defect in the pleading could be cured by amendment, as the drastic step of denial of the opportunity to correct the curable defect effectively terminates the action. *Bettencourt*, 205 Cal.App.4th at 1111; *Velez v. Smith*, 142 Cal.App.4th 1154, 1175 (2006).

(Footnote continued from previous page)

General's Office only rarely objects to motions to approve, it is unclear why it must require 45 days' notice in every instance. There is no reason why the Attorney General cannot simply request a later hearing date from the settling parties to allow time for review, or apply ex parte to the Court to continue the hearing, in those instances when additional time is needed. In contrast to the Attorney General's options, however, 11 CCR § 3003 forbids plaintiffs from requesting an order shortening time for a motion to approve a settlement.

B. Plaintiffs are "Interested Persons" Under Government Code Section 11350

Plaintiffs brought this action pursuant to California Government Code § 11350, which provides in pertinent part: "Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure." A party is an "interested person" for purposes of Government Code § 11350 if it "is or may well be impacted by a challenged regulation." *Environmental Prot. Info. Ctr. v. Department of Forestry & Fire Prot.*, 43 Cal.App.4th 1011, 1017-18 (1996). Plaintiffs are citizens who have brought, and will continue to bring, Proposition 65 actions in the public interest. Plaintiffs have obtained, and expect to continue to obtain, settlements in the public interest resulting in the payment of millions of dollars in civil penalties to the State of California and reformulation of products to reduce or eliminate chemicals known to cause cancer and reproductive harm. For every Proposition 65 settlement that plaintiffs have sought, or will seek, judicial approval, plaintiffs must comply with 11 CCR § 3003's requirement of serving the motion to approve the settlement *at least* 45 days prior to the date of the hearing. Plaintiffs are and will continue to be impacted by 11 CCR § 3003 and are thus "interested persons" under Government Code § 11350.

C. 11 CCR § 3003 Violates Separation of Powers Doctrine and is Not Authorized By Health and Safety Code § 25249.7(F)

1. 11 CCR § 3003 Violates the Separation of Powers Doctrine

The Separation of Powers doctrine is expressly set forth in the California Constitution: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const. art. III, § 3 (emphasis added). "The legislative power of this State is vested in the California Legislature." Cal. Const. art . IV, § 1. Except in instances where the public acts through a referendum or initiative, the authority to enact laws rests with the Legislature. *McClung v. Employment Dev. Dept*., 34 Cal.4th 467, 472 (2004). The California Attorney General, however, is an executive officer of state government. Cal. Const. art. V, § 13. The California Department of

Justice is a state agency that is also part of the executive branch and is under the direction and control of the Attorney General. Gov't Code § 15000.

Under the California Constitution, as an executive officer, the Attorney General is forbidden from exercising any legislative power or function except as the Constitution expressly provides. Cal. Const. art. III, § 3*; St. John's Well Child and Family Center v. Schwarzenegger*, 50 Cal.4th 960, 986 (2010); *Lukens v. Nye* 156 Cal. 498, 501 (1909). Moreover, an administrative agency cannot alter or enlarge legislation. *People v. Beaumont Inv., Ltd.*, 111 Cal.App.4th 102, 126 (2003). Plaintiffs are aware of no provision in the state constitution authorizing the Attorney General to amend state statutes or to adopt regulations inconsistent or interfering with state statutes. However, in adopting 11 CCR § 3003 and imposing a 45-day notice requirement for motions to approve Proposition 65 settlements in the public interest, the Attorney General and the Department of Justice have unconstitutionally exercised legislative power by enlarging the time required to file and serve a noticed motion.

Under CCP § 1005(b), any litigant may file and serve a motion exactly 16 days before the hearing. However, when plaintiffs are citizen enforcers seeking approval of Proposition 65 settlement agreements, as required by Health and Safety Code § 25249.7(f)(4), plaintiffs cannot file and serve a motion to approve 16 days before the hearing, and cannot invoke the "reasonable balance" of a 16-day notice for a motion as intended by the Legislature, but instead must provide at least 45 days' notice as required by 11 CCR § 3003.

By adopting 11 CCR § 3003, the Attorney General's Office has unconstitutionally arrogated to itself a legislative function of determining the amount of notice required for filing a motion to approve a Proposition 65 settlement and is thereby clearly interfering with the Legislature's adoption of CCP § 1005(b). The Court should deny the motion for judgment on the pleadings.

2. 11 CCR § 3003 is Not Authorized by Enabling Legislation

The California Supreme Court has long held that, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." *California Ass'n of Psychology Providers v. Rank*, 51 Cal.3d 1, 11 (1990); *Morris v. Williams*, 67 Cal.2d 733, 748 (1967).

In 2002, the Attorney General adopted 11 CCR §§ 3000 and 3003, providing in pertinent part as follows:

> Section 3000: "This chapter sets forth procedures necessary to comply with Health and Safety Code section 25249.7(e) and (f) as amended by Ch.599, statutes of 1999 and Chapter 578, statutes of 2001. Any private person proceeding 'in the public interest' pursuant to Health and Safety Code § 25249.7(d) or bringing any other action (hereinafter 'Private Enforcer'), who alleges the existence of violations of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health and Safety Code sections 25249.5 or 25249.6) (hereinafter 'Proposition 65'), shall comply with the applicable requirements of this chapter."
>
> Section 3003: "The Private Enforcer shall serve the Settlement on the Attorney General with a Report of Settlement in the form set forth in Appendix B within five days after the action is Subject to a Settlement, or concurrently with service of the motion for judicial approval of settlement pursuant to Health and Safety Code section 25249.7(f)(4), whichever is sooner. The motion and all supporting papers and exhibits shall be served on the Attorney General no later than forty-five days prior to the date of the hearing of the motion."

(Emphasis added.)

The Attorney General's note to 11 CCR § 3003 cites for its authority to Health and Safety Code § 25249.7(f), which provides:

> (1) Any person filing an action in the public interest pursuant to subdivision (d), any private person filing any action in which a violation of this chapter is alleged, or any private person settling any violation of this chapter alleged in a notice given pursuant to paragraph (1) of subdivision (d), shall, after the action or violation is subject either to a settlement or to a judgment, submit to the Attorney General a reporting form that includes the results of that settlement or judgment and the final disposition of the case, even if dismissed. At the time of the filing of any judgment pursuant to an action brought in the public interest pursuant to subdivision (d), or any action brought by a private person in which a violation of this chapter is alleged, the plaintiff shall file an affidavit verifying that the report required by this subdivision has been accurately completed and submitted to the Attorney General.
>
> (2) Any person bringing an action in the public interest pursuant to subdivision (d), or any private person bringing an action in which a violation of this chapter is alleged, shall, after the action is either subject to a settlement, with or without court approval, or to a judgment, submit to the Attorney General a report that includes information on any corrective action being taken as a part of the settlement or resolution of the action.
>
> (3) The Attorney General shall develop a reporting form that specifies the information that shall be reported, including, but not limited to, for purposes of subdivision (e), the date the action was filed, the nature of the relief sought, and for purposes of this subdivision, the amount of the settlement or civil penalty assessed, other financial terms of the settlement, and any other information the Attorney General deems appropriate.

> (4) If there is a settlement of an action brought by a person in the public interest under subdivision (d), the plaintiff shall submit the settlement, other than a voluntary dismissal in which no consideration is received from the defendant, to the court for approval upon noticed motion, and the court may approve the settlement only if the court makes all of the following findings:
>
> (A) Any warning that is required by the settlement complies with this chapter.
>
> (B) Any award of attorney's fees is reasonable under California law.
>
> (C) Any penalty amount is reasonable based on the criteria set forth in paragraph (2) of subdivision (b).
>
> (5) The plaintiff subject to paragraph (4) has the burden of producing evidence sufficient to sustain each required finding. The plaintiff shall serve the motion and all supporting papers on the Attorney General, who may appear and participate in any proceeding without intervening in the case.
>
> (6) Neither this subdivision nor the procedures provided in subdivision (e) and subdivisions (g) to (j), inclusive, shall affect the requirements imposed by statute or a court decision in existence on January 1, 2002, concerning whether claims raised by any person or public prosecutor not a party to the action are precluded by a settlement approved by the court.

Health and Safety Code § 25249.7(f) contains no language authorizing the Attorney General to adopt regulations altering the time for notice of a motion to approve a Proposition 65 settlement. The provisions of section 25249.7(f) that govern the Attorney General's authority and the procedures for a private enforcer to obtain court approval of a Proposition 65 settlement are subparts (3), (4), and (5), which confer no authority on the Attorney General other than to develop a reporting form for settlement and to appear and participate in a proceeding without intervening in the case.

Because 11 CCR § 3003 imposes a requirement on citizen enforcer litigants to file and serve a motion to approve a Proposition 65 settlement no later than 45 days prior to the hearing, a requirement that is nowhere authorized within Health and Safety Code § 25249.7(f), 11 CCR § 3003 thus improperly alters and amends section 25249.7(f), enlarging its scope and impairing its purpose of swiftly securing strict enforcement of the laws controlling hazardous chemicals through citizen enforcement, and is void under *California Ass'n of Psychology Providers v. Rank*, 51 Cal.3d 1 and *Morris v. Williams*, 67 Cal.2d 733.

D. 11 CCR § 3003 Clearly Conflicts with CCP § 1005(b) and is Therefore Invalid

A regulation is impermissible if it exceeds the scope granted by the relevant enacting legislation, or if it conflicts with *any* act of the Legislature. *Robin J. v. Superior Court*, 124 Cal.App.4th 414, 423 (2004). CCP § 1005(b), which provides that a motion "shall be served and filed at least 16 court days before the hearing," unquestionably allows a moving party to file and serve a motion *exactly* 16 court days before the hearing. Section 1005(b) requires no leave of court to file and serve a motion *exactly* 16 court days before the hearing.

The Attorney General's regulation, 11 CCR § 3003, requires that a motion to approve a Proposition 65 settlement "shall be served on the Attorney General no later than forty-five days prior to the date of the hearing of the motion." Therefore, under 11 CCR § 3003, a citizen enforcer cannot file and serve a motion to approve a Proposition 65 settlement exactly 16 court days before the hearing. Moreover, even when court rules or orders do not permit a 45-day notice period, 11 CCR § 3003 requires the citizen enforcer to "apply for permission to file the motion with a forty-five day notice period," or "the maximum time permitted by the court." The 45-day notice requirement of 11 CCR § 3003 conflicts with the 16-court-day notice rule of CCP § 1005(b) and also conflicts with the legislative intent that 16 court days represents a "reasonable balance" for moving parties to have their motions heard in a timely manner. By adopting 11 CCR § 3003 and requiring at least 45 days' notice from plaintiffs moving for judicial approval of Proposition 65 settlement agreements, the Attorney General has unconstitutionally encroached on legislative power and effectively amended CCP § 1005(b) for plaintiffs seeking judicial approval of Proposition 65 settlement agreements.

By no stretch of the imagination is 11 CCR § 3003 "consistent" with CCP § 1005(b). The Attorney General's argument that section 1005(b) does not entitle plaintiffs to file a motion *exactly* 16 court days before the hearing is specious. Plaintiffs are not asking the Court to read the words "at least" out of the statute, however, it appears the Attorney General is asking the Court to read the words "16 court days" out of the statute and instead read it as "45 days." Simply put, a state agency such as the Attorney General's Office "does not have the authority to 'alter or amend' a statute, or 'enlarge or impair its scope.' " *State of California ex rel. Nee v. Unumprovident Corp.*, 140 Cal.App.4th 442, 451 (2006) (citations omitted).

E. The Attorney General Erroneously Attempts to Impose a Burden on Plaintiffs That Does Not Apply Under Government Code § 11350

As alleged in the Complaint, plaintiffs have brought this action pursuant to Government Code § 11350, which allows any interested person to obtain a judicial declaration as to the validity of any regulation. As the California Supreme Court has explained:

> When a court inquires into the validity of an administrative regulation to determine whether its adoption was an abuse of discretion, judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law. When, however, a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute. . . . Although in determining whether the regulations are reasonably necessary to effectuate the statutory purpose we will not intervene in the absence of an arbitrary or capricious decision, we need not make such a determination if the regulations transgress statutory power.

California Ass'n of Psychology Providers v. Rank, 51 Cal.3d at 11-12 (internal punctuation and citations omitted).

The Attorney General, ignoring Government Code § 11350 and case law interpreting it, instead attempts to bootstrap cases involving constitutional challenges to *ordinances* and *statutes*, not challenges to administrative regulations conflicting with statutes. The Attorney General's reliance on *Tobe v. City of Santa Ana,* 9 Cal.4th 1069 (1995), is misplaced as *Tobe* involved a constitutional challenge to the validity of a city ordinance, not a challenge to the validity of a regulation adopted by a state agency. The Attorney General's reliance on *Travis v. County of Santa Cruz*, 33 Cal.4th 757 (2004), is similarly misplaced as *Travis* involved a constitutional and statutory challenge to a county ordinance. Finally, the Attorney General's reliance on *T.H. v. San Diego Unified Sch. Dist.*, 122 Cal.App.4th 1267, 1281 (2004), for the proposition that plaintiffs "must establish that no set of circumstances exists under which the [regulation] would be valid" and "must show that the challenged [regulation] inevitably pose[s] a present total and fatal conflict with applicable prohibitions" also misses the mark, as the "prohibitions" referenced in *T.H.* are to the "constitutional prohibitions" in *Tobe*; *T.H.* cites directly to *Tobe*, for the proposition that a facial challenge to a statute must demonstrate that the statute's provisions "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Tobe*, 9 Cal.4th at 1084.

Should the Court find any merit to the Attorney General's argument, however, plaintiffs are prepared to amend the complaint to allege dozens of actual instances where 11 CCR § 3003, as actually applied to plaintiffs, has required plaintiffs to provide 45 days' notice of motions to approve settlements, and precluded plaintiffs' ability to file and serve the motions on 16 court days' notice as allowed under CCP § 1005(b). Plaintiffs are also prepared to amend the complaint to add further allegations regarding how 11 CCR § 3003 violates the Separation of Powers doctrine.

F. Plaintiffs' Action is Not Time-Barred as 11 CCR § 3003's Conflict with CCP § 1005(b) Continuously Accrues

The California Supreme Court has recognized that, under the theory of continuous accrual, "separate, recurring invasions of the same right can each trigger their own statute of limitations." *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 1198 (2013). In general,

> continuous accrual applies whenever there is a continuing or recurring obligation: When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period. Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation—each may be treated as an independently actionable wrong with its own time limit for recovery.

Id. at 1199 (internal punctuation and citations omitted). The *Aryeh* case identified as an example of separate, recurring invasions, a challenge to the validity of a municipal tax in which the limitations period had run on any direct challenge to its validity, "suit was still permissible because the continuing monthly collection of the tax represented an alleged ongoing breach of state law." *Id.*, citing *Howard Jarvis Taxpayers Assn. v. City of La Habra*, 25 Cal.4th 809, 818-22 (2001).

Here, each time one of the plaintiffs commences a Proposition 65 action in the public interest and then obtains a settlement, he must file a noticed motion pursuant to Health and Safety Code § 25249.7(f)(4) to approve the settlement, but must serve the motion on the Attorney General no later than 45 days prior to the hearing as required by 11 CCR § 3003. Each instance that plaintiffs are required to comply with the 45-day notice requirement of 11 CCR § 3003 constitutes a separate, recurring invasion of plaintiffs' entitlement under CCP § 1005(b) to notice a motion exactly 16 court days before the hearing. Just as importantly, each instance that plaintiffs are required to comply with the 45-day notice requirement of 11 CCR § 3003 represents a delay in the vesting of plaintiffs'

authority to enforce a Proposition 65 settlement in which defendants, by means of a consent judgment, agree to pay civil penalties primarily to the State of California and agree to reformulate their products to virtually eliminate the presence of carcinogens or reproductive toxicants and/or provide clear and reasonable health hazard warnings regarding the presence of chemicals in their products. Such delays infringe on the public's right to know of, and be protected from, exposures to carcinogens and reproductive toxicants pursuant to the popularly enacted state ballot initiative, Proposition 65. Historical & Statutory Notes following Health & Safety Code § 25249.5 (West 2006).

Thus, regardless of which statute of limitations the Attorney General contends applies to this action—whether it is a three-year statute or a four-year statute—plaintiffs' cause of action for declaratory relief continuously accrues each time one of the plaintiffs must file and serve a motion to approve a settlement in accordance with 11 CCR § 3003. Accordingly, the statute of limitations has not run.

IV. CONCLUSION

Based on all the foregoing reasons, Plaintiffs Anthony E. Held, Ph.D., P.E., Russell Brimer, and John Moore respectfully request that the Court deny Defendants' motion for judgment on the pleadings.

Respectfully submitted,

Dated: April 5, 2013

THE CHANLER GROUP

By: _____
Clifford A. Chanler
Attorneys for Plaintiffs
ANTHONY E. HELD, PH.D., P.E.;
RUSSELL BRIMER; and JOHN MOORE