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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, PH.D., P.E.,

Plaintiff,

v.

KISS NAIL PRODUCTS, INC., *et al.*,

Defendants.

Case No. CIV-1101576

PLAINTIFF ANTHONY E. HELD, PH.D., P.E.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE/EXCLUDE DEFENDANTS' EVIDENCE IN SUPPORT OF THEIR REPLY RE MOTION FOR SUMMARY JUDGMENT

Date: May 9, 2012
Time: 8:30 a.m.
Judge: Hon. Roy O. Chernus
Dept.: B

Action Filed: March 25, 2011
Trial Date: Not Set

Plaintiff Anthony E. Held, Ph.D., P.E., hereby moves to strike or, in the alternative, exclude, a highly prejudicial, unauthenticated, and untrustworthy item of hearsay in the form of an April 4, 2012 letter, by Deputy Attorney General Harrison Pollak (the so-called "AG Letter"), which Defendants Kiss Nail Products, Inc. and Kiss Products, Inc. (collectively "Kiss") rely on extensively, in their attempt to rebut plaintiff's Opposition to Kiss's Motion for Summary Judgment. The AG Letter is attached as Exhibit A to Kiss's Reply in Support of Their Motion for Summary Judgment ("Reply"), and is also attached as Exhibit A to the Declaration of Malcolm Weiss in Support of Kiss's Reply. Kiss refers to the inadmissible AG Letter—either directly or indirectly, by referring to the AG Letter, the Attorney General, the California Department of Justice, and the Second Supplemental Notice not yet at issue—more than twenty times in its Reply, and nearly half of the references appear on the first page of the Reply. Moreover, as discussed in plaintiff's objections to Kiss's Reply evidence, the unauthenticated AG Letter consisting of hearsay is not evidence, and Kiss's extensive reliance on such letter in its Reply further reinforces the fact that there are triable issues of material fact remaining in this case.

Plaintiff moves to strike and/or to exclude the AG Letter because it was proffered with the Reply, in violation of both the rule that all evidence in support of the motion must be set forth in the separate statement, and of due process since plaintiff had no notice of the AG Letter when he prepared his opposition. Plaintiff also moves to strike the AG Letter pursuant to Evidence Code § 352 because any probative value of this unauthenticated letter is substantially outweighed by the substantial danger of undue prejudice, confusing the issues in this case, and misleading the trier of fact. The letter is also inadmissible because it is unauthenticated and hearsay. Finally, plaintiff moves to strike those portions of the Reply and supporting papers that either directly or indirectly cite or rely on the AG Letter.

I. BACKGROUND

On Thursday, March 29, 2012, based on plaintiff's ongoing Proposition 65 investigation of Kiss's products, plaintiff served a document entitled "Second Supplemental 60-Day Notice of Violation," ("Second Supplemental Notice") together with the requisite certificate of merit, on

Kiss, the California Attorney General, and various public prosecutors, as required by Health & Safety Code § 25249.7(d). (Declaration of Clifford Chanler ("Chanler Decl."), ¶2.) Plaintiff submitted confidential factual information supporting the certificate of merit for the Second Supplemental Notice to the Attorney General, as required by section 25249.7(d)(1). (Chanler Decl., ¶2.) Plaintiff served the Second Supplemental Notice and factual information supporting the certificate of merit upon the Attorney General by Second-Day FedEx Air Service. (*Id.*) Because plaintiff served the Second Supplemental Notice and supporting facts on the Attorney General by Second-Day FedEx Air Service, and based on the online tracking information, the Attorney General's Office did not receive the Second Supplemental Notice until Monday, April 2, 2012, at 9:05 a.m. (*Id.*, Exh. 1) The sixty-day notice period for the Second Supplemental Notice, plus 10 days for service by certified mail on Kiss and the potential defendants—all of whom have their principal places of business outside California— expires on or about June 8, 2012. (*Id.*, ¶3) The Second Supplemental Notice is not at issue in this action. (*Id.*)

On Wednesday, April 4, 2012, at 5:24 p.m., six calendar days (and only four business days) after plaintiff served the Second Supplemental Notice—and only two days after the Attorney General's Office received the Second Supplemental Notice—plaintiff received a copy of the AG Letter, by Deputy Attorney General Harrison Pollak, which Kiss relies on in its attempt to rebut plaintiff's Opposition to Kiss's Motion for Summary Judgment. (Chanler Decl., ¶4.) Defense counsel was copied on the AG Letter. (*Id.*)

Interestingly, defense counsel received a courtesy copy of the AG Letter, via email, in sufficient time to attach the letter as an exhibit to both Kiss's Reply and a declaration in support, and to reference the letter extensively in its Reply. (*Id.*, ¶5) Kiss relied on the AG Letter as primary support for arguments in its reply, despite the fact that the first sentence of the letter states that it concerns the Second Supplemental 60-Day Notice of Violation dated March 29, 2012, which is not yet at issue in this case. (*Id.*) The AG Letter is also critical of plaintiff's expert's use of a document titled, "Technical Report: Screening-level hazard assessment for six phthalates under AB 1108 and Proposition 65." Prepared for the Office of the Attorney General, California Department of Justice (referred to as the "AG Report"). (*Id.*)

The timing of the AG Letter, sent after plaintiff had already filed his opposition to summary judgment and supporting papers, but still in time for Kiss's Reply, effectively deprives plaintiff of the ability to object to the fact that the letter is a highly prejudicial, unauthenticated, and untrustworthy item of hearsay. Moreover, Kiss's reliance on such letter in its Reply, without setting forth the letter in its separate statement of undisputed facts, or referencing the letter in its opening brief, violates plaintiff's due process rights on summary judgment.

Although plaintiff has set forth the chronology related to his receipt of the AG Letter, he stands by his previous objections to Kiss's proffer of the letter as an exhibit, because such letter is hearsay and has not been authenticated by a witness competent to do so. Moreover, the undue prejudice arising from the AG Letter becomes apparent given some additional history between the Attorney General's Office and plaintiff's counsel, which is summarized as follows:

- On July 23, 2009, in two separate e-mails, Supervising Deputy Attorney General Edward G. Weil: (1) offered plaintiff's counsel a copy of the AG Report stating "I would like to give you a copy, which you can do whatever you like with," and thereafter, (2) e-mailed a copy of the AG Report to plaintiff's counsel, stating, "You may use the report in whatever manner you choose…." (Chanler Decl., ¶6.)
- In April 2010, Deputy Attorney General Harrison Pollak e-mailed plaintiff's counsel a letter similar to the April 4, 2012, AG Letter, however Mr. Pollak marked the April 2010 letter as privileged and confidential pursuant to Health & Safety Code § 25249.7(i) and Evidence Code § 1040, sent it only to plaintiff's counsel, and did not copy any defense counsel. (Chanler Decl., ¶7.)
- In May 2010, plaintiff's counsel responded to the April 2010 letter with a confidential five-page letter addressing each concern. Plaintiff never received a written response to his May 2010 letter, and the assertions contained therein have remained dormant for two years, during which time, through Proposition 65 settlements, scores of manufacturers have agreed to comply with a 1,000 parts per million (ppm) (0.1%) standard for DEHP and other phthalates in adult products. The 1,000 ppm DEHP standard in Proposition 65 settlements parallels the

standard set by federal and state laws for DEHP in children's toys and child care articles. (15 U.S.C. § 2057c(a); Health & Safety Code § 108937.) (Chanler Decl., ¶8.)

- On or about October 28, 2011, Kiss filed its summary judgment motion, supported by the Declaration of Dr. Robert Scofield. In its motion, and in Dr. Scofield's declaration, Kiss was the first party to reference the AG Report. (Chanler Decl., ¶9.) Kiss and Dr. Scofield thus opened the door to referencing the AG Report in the summary judgment proceedings.
- On March 2, 2012, plaintiff filed his opposition to summary judgment.
- On March 29, 2012, plaintiff served the Second Supplemental Notice, not yet at issue in this action, on Kiss, the Attorney General, and various public prosecutors. (Chanler Decl., ¶¶2-3.)
- On April 4, 2012, two days prior to Kiss's deadline to file its Reply, Deputy Attorney General Harrison Pollak sent the AG Letter to plaintiff and copied defense counsel. Contrary to Health & Safety Code § 25249.7 (i), requiring the Attorney General to maintain the confidentiality of information supporting a certificate of merit for a sixty-day notice, Mr. Pollak made the letter—in which he contended the Second Supplemental Notice, as well as plaintiff's opposition to summary judgment, were both insufficient—available to the public, and provided it to defense counsel in time for Kiss to use the letter in support of its Reply. Mr. Pollak also chose not to file an amicus brief, participate at the hearing pursuant to Health & Safety Code § 25249.7(f)(5), or move to intervene. (Chanler Decl., ¶4-5.)

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II. LEGAL ARGUMENT

A. The AG Letter Should Be Stricken Because It Was Filed On Reply, In Violation of Both the Golden Rule Of Summary Judgment And Due Process

Under the longstanding "Golden Rule" of summary judgment: **"*All* material facts must be set forth in the separate statement. 'This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist.* Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement.*'"** *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App. 4th 454, 472 (a leading Proposition 65 opinion) (emphasis added.) As the Court of Appeal has explained: "Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316. Moreover, a court has *no discretion* to consider facts not tendered at all in the opening brief; to do so violates the opposing party's due process rights. *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 946-47.

Because the AG Letter constitutes evidence—although it is unauthenticated hearsay evidence—not set forth in Kiss's separate statement, nor referenced in Kiss's opening brief, and was submitted after plaintiff's opposition was filed, it would violate plaintiff's due process rights for the Court to consider it. Plaintiff moves to strike the AG Letter, proffered by Kiss in violation of both the "Golden Rule" of summary judgment, since it was not set forth in the separate statement, and due process, since plaintiff was not given adequate notice of facts he must rebut in order to defeat summary judgment.

B. The AG Letter is Unauthenticated and Constitutes Hearsay

Evidence Code § 1401 provides, "Authentication of a writing is required before it may be received in evidence." Pursuant to Evidence Code § 1400, "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." Here, Kiss has offered no evidence to authenticate the AG Letter.

Moreover, the AG Letter is hearsay. Under the hearsay rule, evidence of a statement made other than by a witness while testifying at a hearing and that is offered to prove the truth of the matter stated is hearsay evidence, and is inadmissible. Evid. Code § 1200. By this definition, the AG Letter is hearsay. In fact, the AG Letter is double-hearsay as it contains one person's summaries and paraphrases of statements attributed to other individuals. On any level, the hearsay statements of the AG Letter are proffered by Kiss to prove the truth of the matter asserted: that "Plaintiff's 'assessment is significantly flawed and demonstrates that [Plaintiff does] not have a valid basis for the March 2012 notice as to the category of cosmetic bags containing DEHP.'" Kiss Reply at 1:14-15. Out-of-court statements of a public employee are considered untrustworthy when such statements reflect the non-expert opinions of the employee. *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1479.

A public record containing an opinion should be the sort of conclusion that would be formed by most trained observers of the same data, and not an intensely subjective one that in all fairness should be tested by cross-examination. Statements in the AG Letter are unduly prejudicial because plaintiff does not have the ability to cross-examine the author of the AG Letter, Mr. Pollak, or his colleagues who assisted in its preparation, regarding the substance of the letter and the opinions contained therein. Moreover, plaintiff does not have the ability to cross-examine the AG Letter's authors regarding foundational issues such as who prepared it, when it was prepared, and why it was prepared.

C. The April 4, 2012 AG Letter Is Unduly Prejudicial To Plaintiff

Evidence Code § 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Prejudice," as that term is used in section 352, means: "evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." *People v. Rivera* (2011) 201 Cal.App.4th 353, 362 (citations and internal punctuation omitted). Section 352 uses "prejudice" in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. *Id.*

In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the trier of fact, motivating the trier of fact to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of an emotional reaction. *Id.* In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the trier of fact will use it for an illegitimate purpose.

Here, any potential probative value of the AG Letter—a letter which constitutes hearsay, and concerns only the Second Supplemental Notice, a notice not at issue on summary judgment—is clearly outweighed by the substantial danger of undue prejudice. Kiss is attempting to use the analysis in the AG Letter, drawn from Mr. Pollak's review of the papers in support of and opposition to Kiss's summary judgment motion, and which analysis is directed only to the Second Supplemental Notice, to attack plaintiff's original 60-Day Notice served on Kiss on December 21, 2010. The December 21, 2010 notice is the only notice at issue in Kiss's motion for summary judgment. Kiss's use of the unauthenticated AG Letter can be for no other purpose than to attempt to conflate the AG's apparent opinion that the Second Supplemental Notice is "not adequate" with Kiss's flawed argument, regarding the allegations of the complaint based on the December 21, 2010 notice, that it has "established the exposure exemption defense and plaintiff has not met its burden of showing a triable issue of material fact." Kiss is thus attempting to use the AG Letter not for the point for which it may be relevant, *i.e.*, the Second Supplemental Notice, but rather to inflame the emotions of the Court by invoking the weight of the apparent opinion of a Deputy Attorney General, to prejudge plaintiff, in rebutting plaintiff's opposition to summary judgment.

The Court is well within its discretion to strike or exclude the AG Letter as unduly prejudicial under Evidence Code § 352. *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 171-72 (evidence of 43 persons bitten by a sheriff's department dog used by a particular deputy who was not a defendant was properly excluded because it was likely to confuse and mislead trier of fact regarding conduct of a person not part of the case).

D. Use of The AG Letter Intrudes Upon the Court's Independence Under Article III of The California Constitution

As an alternative argument, plaintiff contends that the AG Letter , which the Attorney General's Office has made public, contrary to the confidentiality provisions in Health & Safety Code § 25249.7(i), appears to attempt to usurp the Court's constitutional role of independently evaluating Kiss's summary judgment motion, and instead have a Deputy Attorney General "adjudicate" the motion and impose his analysis upon the Court.

Article III, section 3 of the California Constitution provides: "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." (Emphasis added.) Accordingly, "Judicial power is in the courts and their function is to declare the law and determine the rights of parties to a controversy before the court. **Executive or administrative officers cannot exercise or interfere with judicial powers**." *In re Danielle W.* (1999) 207 Cal.App.3d 1227, 1235 (emphasis added, citations omitted).

Although the AG Letter purports to be addressed to the Second Supplemental Notice, it is, in fact, directed to the motion for summary judgment, and by simply substituted "plaintiff's opposition" for the term "March 2012 notice" in the AG Letter, the impropriety of the letter becomes apparent. The AG Letter thus improperly finds: that plaintiff's opposition is "significantly flawed"; demonstrates that plaintiff does "not have a valid basis" for his opposition; plaintiff "incorrectly argue[s] that a defendant must use actual data to determine who are 'average users' of the product"; that unless plaintiff has "evidence to show that average users of the pedicure bags are children, or that people handle the bags for more than 15 minutes a day," the Attorney General's Offfice does "not agree that the absence of actual data on Kiss's part, alone, is a basis to reject its exposure estimate"; and that "it appears that [plaintiff's opposition] concerning cosmetic bags containing DEHP is based on an improper use of the Bogen report, and on flawed and erroneous assumptions . . . ."

The attempt to introduce the highly prejudicial, unauthenticated AG Letter into the summary judgment proceedings, after the letter was made public contrary to the strict confidentiality provisions imposed on the Attorney General by Health & Safety Code § 25249.7(i), when neither the Attorney General nor the People of the State of California are

parties to this action or arguing through an amicus brief, is an improper imposition of the views of the executive branch upon the judicial branch. In the words of the U.S. Supreme Court, such an intrusion by a division of the executive branch is contrary to "the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will* (1980) 449 U.S. 200, 217-18.

E. Plaintiff Requests That The AG Letter, and all References and Statements Related to the AG Letter, Be Stricken

Plaintiff requests that the AG Letter, attached to both the Reply and the Weiss Declaration, be stricken. Plaintiff also requests that all statements in the Reply and supporting papers related to the AG Letter, which amounts to "Fruit of the Poisonous Tree," also be stricken. Thus, plaintiff requests that the Court strike the following documents and statements from the Reply:

- Exhibit A to the Reply
- Exhibit A to the Weiss Declaration
- "The California Attorney General agrees." (Reply at 1:3.)
- "This is forcefully echoed by the California Department of Justice . . . ." (Reply at 1:12.)
- "In a letter dated April 4, 2012, to the Chanler Group, the Attorney General states that Plainiff's 'assessment is significantly flawed and demonstrates that [Plainitff does] not have a valid basis for the March 2012 notice as to the category of cosmetic bags containing DEHP'" (Reply at 1:13-16.)
- "She also requests that Plaintiff withdraw his notice. *See* 'AG's Letter' attached as Exhibit A to the Reply and the Weiss Declaration." (Reply at 1:16-17.)
- "Plaintiff's March 2012 notice covers the same category of Cosmetic Cases/Bags as the original notice issued by Plaintiff. (Weiss Decl. Exhibit F.)" (Reply at 1:17-19.)
- "By extension, that original notice (and the first supplemental notice) should also be withdrawn as they are based on flawed claims." (Reply at 1:19-20.)

- "As the AG Letter makes clear, Plaintiff's Second Supplemental 60-day notice 'is based on an improper use of the [AG's Report], and on flawed and erroneous assumptions (including that the risk assessment must be based on a dermal rather than the oral MADL, that it should apply the 20 ug/day MADL for an infant . . . and that it must utilize actual data to determine who are the "average users" of the products).' AG Letter, pp. 4." (Reply at 2:4-8.)

- "Kiss is not required to conduct a survey to establish the average users of the product. See AG Letter, pp. 4." (Reply at 5:8-9.)

- "Plaintiff's reading of and reliance on the report prepared for the Attorney General ('AG Report') are misplaced. See AG Letter, pp. 2-3." (Reply at 7:6-7.)

- "First, the AG Report is explicit that it is 'not intended to identify a Proposition 65 labeling requirement for any particular product,' and it cannot be relied upon for that purpose." (Reply at 7:8-10.)

- "Second, the items at issue in the AG Report, unlike here, were 'toys' and 'child care articles,' intended for use by children." (Reply at 7:20-21.)

- "Fundamentally, toys and child care items are handled more vigorously than Kiss' products at issue. (Weiss Decl., Exh. A at 3.)" (Reply at 7:21-22.)

- "The uptake rate presented in the AG Report and used by Dr. Xenaki-Petreas, simply does not apply here. AG Letter, pp. 2-3." (Reply at 7:24-8:1.)

III. CONCLUSION

Based on all the foregoing reasons, plaintiff respectfully requests that the Court strike the AG Letter and any references to it in Kiss's Reply and supporting papers, including those enumerated above, in support of its motion for summary judgment. Should the Court find that the AG Letter is admissible evidence, plaintiff, without waiving any objections, respectfully requests that the hearing be continued, leave to conduct discovery into the opinions contained in the AG Letter be permitted, and leave to file a supplemental opposition and separate statement be granted to plaintiff.

Respectfully submitted,

Dated: April 18, 2012

THE CHANLER GROUP

By: _____
Clifford A. Chanler
Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.