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Hon. Edmund G. Brown
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California Attorney General's Office
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Re: *Enforcement of Lead-Painted Glassware and Lead-Contaminated Soda*

Dear Attorney General Brown and Supervising Deputy Attorney General Weil:

I write to address the questions and concerns raised by your May 11, 2007 letter.[1] This response is organized in six sections, as follows:

- Section I provides a summary overview of our clients' approach to Proposition 65 citizen enforcement and their success to date;
- Section II provides an historical perspective on the enforcement efforts against lead-painted products, including a review and analysis of the civil penalties, attorneys' fees and costs, and reformulation commitments obtained through our clients' work;
- Section III details my clients' prosecution of these cases in strict compliance with the statutory and regulatory framework of Proposition 65;
- Section IV responds to each of the pointed questions raised by your office in subsection C(1) of your letter;
- Section V addresses the reasonableness of the attorneys' fees and costs awarded to my firms and its consultants; and
- Section VI is the conclusion to our response.

[1] This letter is identical to the correspondence dated May 31, 2007, except for the additions made to the final paragraph in subsection II(C)(2)(c) at page 6. You indicated at our June 1, 2007 meeting that your office would be interested in this additional information after we volunteered to provide it.

I trust that the following information directly addresses your stated concerns and provides the foundation for an open and productive dialogue between our offices.

I. Overview of Our Clients' Proposition 65 Work

Our clients are among the preeminent citizen enforcers of California's Proposition 65 voter initiative, in which capacity they bring claims to promote the public health by preventing citizens from being unwittingly exposed to carcinogens and reproductive toxicants. They have brought cases resulting in: (a) the reformulation of products containing known toxins to eliminate, or greatly reduce, the level of those toxins; and/or (b) the posting of warnings advising consumers of the health dangers of those products. Among their successes, our clients' efforts have resulted in a virtually lead-free standard in the glassware and ceramicware industries, and are credited with eliminating vast quantities of lead found within carbonated beverages sold in glass bottles.

To convince companies doing business in California to provide reformulated products, our clients investigate whether products manufactured, distributed or sold in this state meet the toxicity standards set by regulation. If, after examination and testing, products are discovered to contain an unsafe level of one or more toxic chemicals, and no warning to consumers is provided or shown along with the product, a notice is sent to the affected companies advising them that the product in question appears to violate Proposition 65. If the affected companies do not work toward creating a modified product or warning consumers as to the product's toxicity during the notice period, our clients bring suit against the offending companies. In most instances, a notice of violation or a lawsuit claiming a violation will be sufficient to change behavior. If not, and the collected evidence bears out all elements of the violation, and no promising affirmative defense appears, our clients utilize available resources to take any case through trial and appeal, if necessary, to bring about reformulation or warning. To the contrary, if at any time during investigation or litigation should the evidence reveal an inability to prove all elements of the violation, or should a company have a likely-successful affirmative defense, enforcement efforts are discontinued.

Our clients' primary focus is on bigger-impact cases brought against manufacturers, distributors and large retailers in an effort to move toward an industry-wide standard limiting or eliminating the toxic chemical at issue. To penetrate the stream of commerce for a given product, our clients sometimes need to bring cases against, and seek the cooperation of, smaller, front-line retailers who interact directly with the public in selling the toxic products. Similarly, once a chemical content standard has circulated throughout an industry, our clients sometimes bring cases against maverick retailers who continue selling toxic products to consumers without warning. As the point of contact with consumers, these retailers are the last, best defense against toxic exposures, without whose compliance all the upstream work would be useless especially if the chemical warnings are not affixed to the product label. Whatever the precise approach, the goal is the same: to eliminate toxic chemicals within consumer products, to reduce those chemicals to under acceptable limits, or, at a minimum, to warn consumers before they purchase or use a product that contains a toxic chemical so they can

make an informed decision whether to buy the item or take precautions to reduce exposure before they use the product.

Prior to initiating a case, and at all times thereafter, our clients endeavor to settle the matter on terms that keep litigation costs manageable while still promoting the health and welfare of California residents. When settlements of our cases are approved by a judge, or verdicts finding violations are rendered, our clients are justifiably proud of the public health improvement created for the people of California. Unlike much civil litigation, which often results in little more than the redistribution of money, the end result of our clients' successful cases is palpable: a cleaner, healthier California, and a citizenry better educated as to health risks in the daily marketplace.

II. Historical Perspective on the Enforcement of Lead-Painted Glassware and Ceramicware and Lead-Contaminated Soda Products

A. Lead is a Well-Documented Toxin Whose Use in Decorated Beverageware is a Matter of Serious Public Concern

As your letter focuses on our lead glassware cases, so will ours, though our clients have maintained other types of cases to their credit as well. Lead is a heavy metal that has been known to be hazardous to human health since at least ancient Roman times. Unlike some other metals, it has no known nutritional value or health benefits. It is a known carcinogen and known reproductive toxin that can cause birth defects, serious developmental disorders in infants and children, and harm to the male and female reproductive systems. (*See Attorney General's Complaint in People v. Coca-Cola (Los Angeles Superior Court Case BC352402) at page 2, utilizing language drafted by our firm at the public enforcers' request.*)

B. State and Federal Governments Have Failed to Enforce Governing Law, Leaving Citizen Enforcers to Fill the Enforcement Gap

Proposition 65 and various federal statutes, including the Federal Hazardous Substances Act, regulate the presence of lead and other toxins contained in consumer products. However, state and federal agencies have not been altogether active in enforcing these laws as the voters in California astutely recognized two decades ago.[2] Recognizing the limited ability of public agencies to address such a deep-seated problem, Proposition 65 encourages citizen enforcers to fill the enforcement gap, motivated, in part, by a civil bounty. The attorneys' fees provision dovetails with the civil bounty incentive to motivate attorneys to represent those private enforcers who might not otherwise undertake an enforcement action in the interest of the residents of California.

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[2] "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." (*Proposition 65 Ballot Pamp., Proposed Stats. with arguments to voters, Gen. Elec. (Nov. 4, 1986) p. 53, as cited in People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 306.*)

For the last six years, our clients have filled this enforcement gap and focused on bringing meaningful reform to the decorated glassware industry by winning an industry-wide commitment to eliminate toxic levels of lead paint used to design everyday household products – from milk bottles to small juice glasses to cartoon mugs to iced tea glasses to certain bottles of Coke, Pepsi and Seven-Up. In broadly alleging that the manner in which these cases were pursued has not been in the public interest and that the financial recoveries and injunctive relief in these cases were not entirely consistent or equitable, your letter regrettably fails to acknowledge the significant public benefit our clients have achieved.

Even apart from ignoring the successes our clients have had in winning widespread reform in the glassware industry – notably, our investigation and notice work leading to your office's successful lead-painted glass bottle prosecutions of the *Pepsico, Inc.*, *Dr Pepper/Seven-Up, Inc.*, and *The Coca Cola Company* companies – your letter also ignores the fact that our clients' efforts have been in complete compliance with Proposition 65's strict requirements and have targeted sophisticated offenders in the vast majority of our enforcement actions. Your letter's depiction of our clients' efforts fails to capture the hard work of our clients, investigators, scientists and lawyers, as well as the changes they have forced and the benefits they have achieved for the people of California. Our clients' efforts have also served as a catalyst for constructive change in places beyond California – primarily in China, where the unregulated manufacture of problematic consumer products is unsurpassed.

C. A Statistical Analysis of Our Clients' Enforcement Activities Persuasively Demonstrates Their Success In Filling the Enforcement Gap

1. Summary of The Attorney General's Annual Reports

Each year, your office creates an annual report of all Proposition 65 settlements, which tracks, among other things, the amount of civil penalties and fees and costs collected by various plaintiffs in a given calendar year. Far from demonstrating poor performance on our clients' part, these reports illustrate and reinforce the success our clients have achieved in enforcing Proposition 65. According to the Attorney General's "Proposition 65 Settlement Summary 2000-2005":

- Between 2000 and 2005, our clients generated $3,013,352 in civil penalties, while all other private enforcers combined generated $2,017,803.
- Between 2000 and 2005, our clients recovered $8,605,206 in fees and costs, while all other private enforces combined recovered $29,240,226.

* * * * *

- Between 2000 and 2005, for every $1.00 of civil penalties generated, our clients collected $2.85 in fees and costs on average.
- Between 2000 and 2005, for every $1.00 of civil penalties generated, all other private enforcers collected $14.49 in fees and costs on average.

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- In 2006 our clients generated $3,338,350 in civil penalties and $6,450,240 in fees and costs. No final data is available for other enforcers. [3]

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- In 2006 for every $1.00 of civil penalties generated, our clients collected only $1.93 in fees and costs.

Simply put, our clients generated more civil penalties (75% of which go directly to California's Office of Environmental Health Hazard Assessment "OEHHA") than all other enforcers combined, *and* recovered *less* fees per dollar of civil penalty collected than the rest of the field, without taking into account reformulation commitments, penalty waivers and penalty credits.

2. Summary of Glassware, Ceramicware and Soda Settlements

a) Total Civil Penalties and Attorneys' Fees and Costs Recovered

In addition to reviewing the annual reports published by your office, we conducted a detailed review of our clients' 334 lead-painted glassware, soda and ceramicware settlements, which are the focus of your letter. To date, our clients have generated $6,103,350 in civil penalties, of which $4,577,512 is payable to OEHHA. In addition to these significant civil penalties, our clients have waived, credited or earmarked as cy pres payments an additional $11,994,300, otherwise payable as civil fines, in exchange for reformulation commitments from settling defendants. In total, $18,097,650 in civil penalties, cy pres payments, reformulation commitment waivers and credits were generated by our clients' enforcement in this industry, while only $13,099,617 in fees and costs were recovered. (*See* Settlement Proceeds Summary Chart, attached as Exhibit A.)

b) Total Reformulation Commitments, Penalty Waivers, Penalty Credits and Cy Pres Payments Made in Lieu of Civil Penalties

Our clients have not only generated more civil penalties for the state of California and its citizens than all other enforcers combined, they have also obtained reformulation commitments from the vast majority of settling defendants in exchange for penalty waivers, credits and cy pres payments in lieu of civil fines, as stated above. While these figures are not easily translated into civil penalties, they serve to motivate companies to remove the toxin from their products on an expedited schedule, rather than simply pay a fine.

Out of 334 settled lead-painted glassware, ceramicware and soda cases, our clients have obtained reformulation commitments from all but three defendants. Of the 331 settlements containing reformulation commitments, more than 85% require defendants to sell at least 80%

[3] Despite numerous requests for the final 2006 annual report made to your office, we did not receive this data for inclusion in my response.

reformulated products in which the level of lead is reduced so as to eliminate detectable human exposures. This is an industry-changing achievement which has reverberated throughout the California marketplace and which, to the best of our knowledge, has resulted in the reformulation of over 98% of items that were previously decorated with lead paint available on store shelves. The public benefit is clear: reformulated products are replacing lead-tainted products throughout the state.

c) Our Clients' Focus on Industry Leaders

As your office is well aware, our clients have traditionally focused primarily on the market leaders causing unknown toxic exposures in any given industry, as illustrated by: toluene in nail polish (Revlon, Maybelline, Max Factor); lead in dishware (Wedgwood, Mikasa, Corning); lead, cadmium and chromium in auto paints (DuPont, PPG and Akzo); PAHs in flame-broiled meats (Burger King, Carl's Jr.); PCBs and dioxins in ground beef (Tyson Foods); lead in soldered motherboards (Intel); toluene in spray paints (Sherwin Williams, Rustoleum); toluene in glues (DAP, Ace Hardware); benzene and toluene in 55-gallon drums (Shell Oil, Elf Oil); various chemicals in laboratory vials (Baxter, Mallincrodt); methylene chloride in paint strippers (3M); nickel and chromium in welding rods (Lincoln Electric); and lead in soda (Pepsi, Coke, Dr Pepper).

The suggestion in your letter that our clients choose to focus on small retailers is wholly inconsistent with the record created over the past 16 years of our Proposition 65 work. In fact, only 3.6% of our clients' lead paint settlements have involved retailers operating fewer than five brick-and-mortar locations. This fraction is remarkably low when considering that, by necessity, each consumer exposure follows a retail purchase, requiring the enforcers to look upstream to larger violators. The record shows that my clients make informed decisions regarding their pursuit of businesses in all investigated industries, and, when appropriate, discontinue enforcement efforts against a particular business or garner a release from a more culpable upstream party. The case statistics demonstrate this convincingly. Since 2004, when our office started keeping such statistics, our clients have elected not to issue notices to 572 investigated entities, of which nearly half (219) were retailers, despite having invested in the purchase and testing of unwarned products sold by these entities. Moreover, 220 recipients of sixty-day notices since 2003 were either: (a) no longer pursued following a reasoned determination that not all of the elements of a Proposition 65 cause of action could be substantiated; or (b) released through the successful prosecution of upstream parties such as manufacturers. Of those 220 entities released or no longer pursued, most (163) were retailers. Thus, far from employing a scattershot approach to enforcement as your letter seems to suggest, the statistics further demonstrate that our clients use considered judgment at every stage of investigation and litigation in determining whether to institute, and to continue to pursue, Proposition 65 cases.

3. The Attorney General's Letter of May 11, 2007 Contained Factual Errors, Misstatements and Omissions

There are several misstatements and omissions in your May 11, 2007 letter which we are compelled to clarify now that the letter is a matter of public record. While it is not our intent to invite a tug-of-war with your office over the facts of our practice for the past five years, we do want to share what we perceive to be false or misleading statements of fact so that they can be corrected.

In your letter, your office states that it received the fee information collected by our law firm from the Attorney General's annual Proposition 65 report, and that our office had a chance to review the statistics for accuracy before the report became final and published by your office. While that may be true, your office makes a serious error by assuming that all of the fees generated in each of my clients' lead paint cases went to our law firm. This assumption is flatly wrong and bears correcting, as would be appropriate.

First, we refer you to the *Leeman v Arc* case that you reference in your letter. In that case, the industry defendants paid a total of $975,000 in attorneys' fees and costs to settle the case. However, the fee paragraph specifically states that one-half of those fees went directly to a wholly independent law firm. That error, alone, overstated the fees that you presume that my firm collected by $487,500.

In another error, your office allocated all of the attorneys' fees that Morrison & Foerster collected in the *Boelter* settlement to our firm. That firm's fees totaled $1,025,000. Just this past week, our firm contacted your office to inform you that it was inappropriate for your office to state publicly that my firm was receiving revenue that was specifically earmarked for one of California's largest defense firms. As has happened before, your office had no choice but to admit that it made a significant error and agreed to "back out" such fees from the fee totals attributed to our firm. We have found similar mistakes in your office's annual accounting, *e.g.*, listing the *Wells* agreement twice, thereby inflating the fees generated by our firm, but will not take further space to do your audit work. While we all are prone to make errors from time to time, these types of mistakes are significant and require correction.

Additionally, the first footnote of your letter states, erroneously, that you had not received our verified 2006 records when, in fact, we had sent them to your office. Notably, you sent a retraction letter dated May 14, 2007; however, we note that your follow-up letter is not posted on your website along with the original.

Your letter further misrepresents the genesis of three seminal lead-in-soda cases: *PepsiCo, Coca-Cola,* and *Dr. Pepper/Seven Up.* Our clients, as you well know, uncovered these violations and brought them to your office's attention. Moreover, your office utilized our client as a consultant, assimilated thousands of pages of our client's laboratory results and investigation materials, and consulted with our experts during your prosecution of these matters. Your letter does not make this clear and instead suggests the contrary.

Similarly, your letter makes note of the fact that our firm was awarded $645,000 in the *PepsiCo* case and $410,000 in the *Dr. Pepper/Seven Up* case. Again, there is no mention of the public benefit obtained, due, in large part, to the efforts of our client, nor is there any mention of the landmark civil penalties collected in these cases. As such, your letter shows only one side of the equation – the fees and costs recovered by our firm – without discussing the other $1,760,000 in settlement funds earmarked in the *Dr. Pepper/Seven Up* agreement or the $9,830,000 in settlement funds in the *PepsiCo* agreement, much of which is waivable and credited. It is not appropriate to cite to the fees and costs paid in these cases, in an effort to inflate the total fees and costs recovered, without reference to both the civil penalties collected and the reformulation agreement reached – both of which promote the public interest.

III. The Manner in Which Our Clients and Their Attorneys Have Pursued Proposition 65 Cases Related to Lead-Decorated Glassware and Ceramicware Strictly Conforms to the Statutory and Regulatory Framework

A. Industry-Wide Reform Achieved Despite Strict Proposition 65 Regulatory Requirements For Private Enforcers

Six years ago, store shelves in California were filled with glassware containing toxic levels of lead paint. California consumers were exposed to risky and even dangerous levels of lead by way of juice glasses, wine glasses, coffee mugs, children's cartoon mugs, soda bottles and other assorted glassware. As your letter acknowledges, lead in such products is a "serious issue," and one that "has been largely unregulated." (*Attorney General letter, 1.*)[4]

Beginning in 2001, our clients launched a multi-year effort to tackle that "serious issue" and have been successful in winning a commitment from more than 98 percent of the decorated glassware market to sell only products containing either no "detectable lead" or a de minimus amount of lead at a level that the State of California recognizes as safe for California consumers. Contrary to your letter's viewpoint, that effort has focused primarily on manufacturers, importers, distributors and large retailers that have sold lead-painted products in California.

Along the way, our office has complied with new, onerous regulations promulgated under Senate Bill ("SB") 471, a measure co-sponsored by your office which has significantly increased the time, cost, effort and expertise required for bringing Proposition 65 actions. That bill mandated that private enforcers, like our clients, follow a litany of regulations before, during and after a Proposition 65 case has been initiated. (*See,* Health & Safety Code §25249.7(e)-(f) and 22 CCR §§3000 *et seq*.) Those new requirements include: accumulating and transmitting a wealth of scientific support with each sixty-day notice; issuing a certificate of merit accompanying such notices; serving copies of complaints, motions and certain other

[4] Your use of the phrase "unregulated" is misplaced. Rather, the rampant use of lead paint on everyday household and children's products including those that are designed to have the lead paint placed directly in the user's mouth is, indeed, regulated. The problem, however, is that those regulations have gone largely "unenforced" by public officials.

filings on your office; recording and serving on your office settlements immediately upon execution; serving copies of all motions to approve and supporting documents on your office at least 45 days in advance of the approval hearing; and submitting the final judgment to your office. (*See* Health & Safety Code §§25249.7(e)-(f); 22 CCR §3102; 22 CCR §§3100-01; 22 CCR §§3002-04.) Our office and our clients have complied with these requirements at every step and in every Proposition 65 action they have undertaken and continue to undertake. Once received, your office possessed near-complete detail as to each and every Proposition 65 action our clients brought and settled, affording your office the opportunity to make fully-informed decisions as to whether, on the one hand, to take over, or, on the other, object to, a given Proposition 65 action.

Set against this regulatory backdrop, our clients moved to prosecute lead paint in glassware cases at the top of the industry chain of commerce by bringing actions against Dansk, a major tableware supplier, and J. C. Penney, a major retailer which operates more than 1,000 stores throughout the United States. Both cases serve as examples of our clients' willingness to take on highly-sophisticated defendants and costly, time-consuming litigation.

B. The *Dansk* Settlement – Reformulation Achieved, Penalties Paid, Clear Standards Created and Court Approval Secured Over Attorney General's Objection

In *DiPirro v. Dansk* (San Francisco Superior Court Case No. CGC-02-406220), filed on April 2, 2002 and settled shortly thereafter, Dansk agreed to cease using pigments containing lead on its dinnerware and settled the case before the litigation became contentious. Dansk and our client decided that reaching a settlement without protracted litigation was in the public interest and in the company's commercial interest. The company agreed to reformulate all of its glassware to immediately remove lead from its decorating pigments.

Dansk was, appropriately, given substantial set-offs against the imposition of civil fines for its cooperation in resolving the dispute and for its commitment to change its manufacturing practices. Our office adhered to the dictates of the newly-effective amendments to Proposition 65 under SB 471 by, among other things, filing a motion to approve. As your office will recall, it objected to our billing rate but was overruled by the trial court. This objection is the sole instance in which your office has objected to any of our clients' Proposition 65 glassware enforcement efforts at any time.

C. *J.C. Penney* Case – Five Years of Litigation, 91 Days of Live Testimony, Years of Appellate Practice, Resulting In Adherence to the Same Standards Established In *Dansk* Six Years Earlier

Your letter fails to consider the inherent risk and investment involved in taking on a Proposition 65 action. A prime example is our first lead paint glassware case, *DiPirro v. J.C. Penney* (San Francisco Superior Court Case No. CGC-02-407150), which was filed on April 25, 2002 after months of investigation and settled on December 7, 2006. *J.C. Penney* took five

years to resolve after a trial involving 91 days of live testimony and six trips to the First District Court of Appeal and Supreme Court.

In contrast to Dansk, J.C. Penney fought our client's allegations vigorously, rather than utilizing its resources to eliminate lead paint from its tableware or to transmit the requisite reproductive toxicity warning to California consumers. J.C. Penney litigated virtually every issue in our client's Proposition 65 action, including the issue of whether it "knowingly" sold lead-painted glassware without warnings in violation of Proposition 65. In the end, a final judgment was entered against the retailer, mandating that it transmit warnings if the lead content of its products were to exceed certain standards. During the entire duration of this important case, your office did not offer any support or even submit its views of the prevailing law – instead leaving enforcement entirely to our client.

D. *Leeman v. Arc* – Major Commitment to Reformulate, Five Months of Negotiations Initially With Attorney General Participation, Settlement Without Attorney General Objection

Once it became apparent to our clients that factories in China were utilizing lead-based paint to decorate glassware and ceramicware in even more massive quantities then originally believed, they decided to expand their research and lead-paint testing to other potential offenders.

In early 2003, after Dansk and a few other major sellers of lead-painted glassware agreed to remove this toxic ingredient, our client continued to focus on the nation's largest manufacturers, importers and retailers of decorated beverageware, such as Libbey Glass, Arc Int'l, Gibson Overseas, Home Essentials and Anchor Hocking (manufacturers); Disney, Big Lots, Crate & Barrel, Macy's, Cost Plus, Mervyn's, Ross Stores and Linens 'N Things.

The litigation process was intensive, and the settlement process spanned many months. Your office was asked to participate in settlement discussions, and did so initially. However, as in *Dansk*, your office ultimately decided to defer to my client and her attorneys in handling the negotiations and resolving the allegations. In an e-mail dated October 23, 2003, Mr. Weil stated:

> I'm sorry to be telling you this after taking so long, but the Office has decided not to propose any lead standard for use in your case. In considering the many different demands on our limited resources, we have decided that offering such a standard, in a case to which we are not a party, would not be appropriate at this time. If the parties reach a settlement, we may review the matter at that time, although the nature of our review of the actual lead standard might be somewhat limited in that context. This type of function might be more appropriate for OEHHA, although we understand that they are unlikely to undertake the task, since they also face

> substantial resource constraints. If we ultimately decide to bring similar cases ourselves, of course, we would need to determine a standard for those cases, but we have no such cases at this time. Again, I apologize for the timing of the decision and any delay it may have caused.

Despite your withdrawal from the discussions, a terrific result was reached in the end: all of the companies agreed to go lead-free as to all products used by children and all products made with new designs, and to reformulate the rest of their products over an agreed-upon schedule. Consistent with *Dansk, J.C. Penney* and a slew of other lead-painted glassware settlements, the warning and reformulation standards contained in the *Arc* agreement mandated that the pigment could not contain more than 0.06% lead by weight or more than 0.02% lead by weight if the decoration appeared in the lip-and-rim area of the glass.

E. Inquiry Dropped as to Complaints Regarding Consistency of Standards

In early 2005, your office stated it received complaints from the regulated community that the standards contained in my clients' lead paint settlements were "inconsistent" with one another. In response, my firm met with your office and transmitted a set of tabbed binders containing 75 spreadsheets illustrating the consistency of our clients' settlements. Your office, in apparent agreement with our view, did not raise the issue again.

F. The *Boelter* Agreement Achieved a Widely Acclaimed Reformulation Commitment

In response to the increasing evidence that lead-painted decorations were being utilized throughout the tableware and glassware industry even after the global *Arc* settlement, and particularly with respect to products intended to be used with food (soy sauce, salt & pepper, salad dressing, honey, mustard, salsa, oil & vinegar, soda, milk, wine and liquor), our client crafted an opt-in settlement agreement by way of his action against The Boelter Companies. Through this agreement, approved by the San Francisco Superior Court in October 2005, our client created a consistent standard for lead in glassware that 205 businesses within the glassware industry have voluntarily adopted.

During *Boelter*, our office provided you with several drafts of the proposed Consent Judgment prior to the trial court's final approval. Your office made suggestions as to the draft Consent Judgment, and we adopted your recommendations. Having been forwarded draft copies of the agreement and having received all documents required under SB 471, your office did not lodge any objection to either the reformulation standards or to the attorney fee structure included in the final document.

1. Summary of Civil Penalties and Attorneys' Fees and Costs

The *Boelter* settlement generated $2,811,500 in civil penalties, of which $2,108,625 was paid directly to OEHHA. A total of $5,355,500 in attorneys' fees and costs was paid to plaintiffs' counsel. As such, for every $1.00 in civil penalties collected under the *Boelter* agreement, defendants paid $1.90 in fees and costs. To put this ratio into perspective: a total of $2,017,803 in civil penalties and $29,240,226 in fees and costs was collected in Proposition 65 settlements between 2000 and 2005 due to actions brought by *other* private enforcers. Therefore, over a five-year period, for every $1.00 of civil penalties collected, $14.49 in fees and costs was recovered, on average, by other private enforcers. Over the same five-year period, for every $1.00 of civil penalties collected, only $2.85 in fees and costs was recovered by our clients. The lesson is clear: our clients have generated, on average, more money in civil penalties, while recovering less fees and costs per dollar of civil penalty recovered, when compared to the penalties and recoveries generated by all other citizen enforcers over the same period. In the process, *Boelter* has become the gold standard for enforcement.

2. Few Small Retailers Participated In *Boelter*

A total of 205 companies executed opt-in stipulations. Eighty-seven manufacturers, constituting 42.44% of the total participants, paid out 46.36% of the settlement funds. Seventy-five distributors/importers, constituting 36.59% of the total participants, paid out 37.45% of the settlement funds. By contrast, 43 retailers, constituting 20.97% of the total participants, paid out 16.19% of the settlement funds. It is clear from these statistics that comparatively few retailers participated in *Boelter*. It is further important to note that:

- 74% of retailer opt-in defendants had 100 or more employees.
- 72% of retailer opt-in defendants exceeded $20 million in estimated annual sales.
- 2.44% of opt-in participants were retailers operating less than five locations.
- 35% of retailer opt-in defendants had prior knowledge from other sixty-day notices.
- 33% of retailer opt-in defendants were publicly-traded companies.

These statistics demonstrate that (1) only a small portion of the opt-in participants were retailers; and (2) most of these retailers were large, sophisticated entities. Put another way: the impact of this litigation against manufacturers, distributors and retailers of glassware, and on the consumers who purchase it, has been both economical and far-reaching.

Boelter is perhaps the premier example of our clients' willingness to undertake costly, time-consuming Proposition 65 enforcement actions against sophisticated defendants at their own personal risk in order to clean up an industry. In successfully settling this action and achieving a commitment from the glassware industry to reformulate products to be lead-free,

our client achieved an enormous public benefit for the people of California. In addition, he enabled an entire industry to resolve their past Proposition 65 violations by the adoption of a uniform lead standard – and did so while avoiding more costly litigation. It is only now, 18 months after the court approved the agreement and well after your office had an opportunity to review and object to the terms of the agreement, that your office is raising questions about the fairness of the agreement. In light of the unquestioned success of the *Boelter* cases, we see little purpose in questioning them at this late date.

G. Enforcement Against Companies That Continue To Violate Proposition 65

In the wake of *Boelter*, there has been a significant shift in the decorated glass industry. Companies have moved away from products that contain hazardous levels of lead. However, some retailers have bucked the trend and resisted this positive change.

1. Retail Outlets Are Where Customers Come Into Contact With Products

Retailers are on the front line of Proposition 65. They are the conduit of products from the manufacturers and distributors to the customers. They not only perform the transaction that sends a product home, but also often serve as the entities who field questions about the product's durability, usefulness – and, most importantly, its safety. The relationship that exists between the retailer and the consumer is so significant that the legislature has devoted a portion of the Civil Code[5] to the duties retailers bear toward their customers. It is counterintuitive to believe that retailers are, or should be, exempt from liability under Proposition 65.

Due to their position in the stream of commerce, retailers play a significant role in disseminating specific product warnings to consumers. As a result, it is our clients' position that vigilance at this level is critical to the statute's successful enforcement. If retailers are not required by state law to be among those responsible for the enforcement of the statute, they will insulate themselves from knowledge of the exposures that may result from the use and consumption of the products they sell. Federal law codified at 16 C.F.R. §1500.230(c)(5), though not binding in a state law context, places a duty on retailers to educate themselves as to lead content in their products. Needless to say, hiding from product safety concerns does not further this federal goal and does a disservice to your constituents.

Those retailers that reject or are dismissive of standards and warnings that their competitors have put in place, often at significant cost, should not be granted immunity – let alone an unfair competitive advantage – for selling toxic products without warnings. This is especially true of retailers that receive warnings from suppliers upstream, yet fail to pass them on to their customers. The intent of Proposition 65 is to ensure that consumers are informed, not that violating businesses are insulated from liability.

[5] The Song-Beverly Consumer Warranty Act, Civil Code §1790 *et. seq.*

a) Retailers are Not Exempt From Proposition 65

Proposition 65 explicitly states that "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 a clear and reasonable warning to such individual, except as provided in Section 25249.10." (*Health & Safety Code §25249.6.*) The exemptions that exist at §25249.10 refer only to exposures that are preempted by other laws, take place less than twelve months after the chemical is added to the state's list, or fall below the identified threshold for a risk of causing cancer, birth defects or reproductive harm. Looking further into the statute for direction, the term "person in the course of doing business" is later defined as not including "any person employing fewer than 10 employees in his or her business. . ." (*Health & Safety Code §25249.11(b).*)

As appropriate, Proposition 65 places a greater duty of compliance on manufacturers, not retailers. "In order to minimize the burden on retail sellers … regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question." (*Health & Safety Code §25249.11(f).*) Nonetheless, it is equally clear that retailers have compliance obligations under Proposition 65. Throughout the five pages that are dedicated to explaining the terms "in the course of doing business" and "employee," great efforts are taken to be more, not less, inclusive of businesses of all types. To wit:

> Although the Act does not define 'business', the definition of 'person in the course of doing business' in Health & Safety Code section 25249.11(b) does exclude governmental entities. The need for such an exclusion implies that the term 'business' was intended to include activities of persons who have ten or more employees without regard to whether those activities are conducted for gain, profit or advantage.
>
> Further, a broad interpretation of business is consistent with the purposes of the Act. Section 1 of Proposition 65 on the November 4, 1986 ballot declared the peoples' rights to protect themselves and the water they drink against chemicals that cause cancer, birth defects and reproductive harm and to be informed about exposures to such chemicals. These rights are *furthered* by including activities of persons who have ten or more employees within those regulated by the Act regardless of whether they are conducted for gain, profit or advantage.
>
> Therefore, *it is appropriate to consider* the activities of persons who have ten or more employees as covered by the prohibitions of the Act unless such persons are specifically excluded by the definition of person in the course of doing business.

(*Final Statement of Reasons for 12 CCR §12201 at pp. 16-17 (emphasis added).*)

Based not only on a literal reading of the statute itself, but also taking into account its interpretation and the intent of its drafters, it is clear that the inclusion of retailers with ten or more employees was fully contemplated at the time that Proposition 65 was enacted, and that the initiative would be sorely lacking in enforcement effect without this inclusion.

The scrutiny of retailers under Proposition 65 is even more necessary and appropriate today. Retailers that once sold items purchased from many manufacturers and distributors now privately label products under their own brand name, directly import products from overseas, and independently distribute products – in many instances occupying nearly all roles (manufacturer, importer, distributor and retailer) in the chain of commerce. There is often no California-based manufacturing plant to seek enforcement from. Today, the idea of a "pure" retailer is increasingly rare in the global marketplace and has given way to a more multifaceted commercial entity, with increased opportunities for profit and increased obligations to the public.

b) Upstream Enforcement Actions Do Not Always Lead to Downstream Consumer Warnings

It is ever more rare to find retailers which will admit to knowledge at the outset of an enforcement action. However, through party and third-party discovery upstream, we often find that such defendants possess and have disregarded knowledge of the presence of lead received from upstream suppliers.

Our case against Fuddruckers, Inc. ("Fuddruckers"), settled just two months ago, illustrates this scenario. Fuddruckers operates 20 family-themed restaurant locations in California. After extensive investigation involving lead-decorated soda bottles, one of our clients issued a sixty-day notice on November 27, 2005. Fuddruckers initially maintained that it had no knowledge of lead in its soda products, yet, through discovery, our client learned that Fuddruckers had received notice of the need to provide Proposition 65 warnings for the presence of lead from its primary supplier of glass soda bottles at least seven months prior to receiving a sixty-day notice from our client. Even after receiving over 100 separate warnings from its supplier, *and* receiving notice from our client, *and* having been given the chance to opt into the *Boelter* Settlement, Fuddruckers still took no action to provide warnings or to remove the offending bottles from its restaurants until March 2006, after our client had filed a complaint.

Despite the evidence gathered during the litigation, Fuddruckers continued to claim a lack of knowledge right up to the eve of trial. Had our client accepted at face value the representation from this retailer that it did not have knowledge, tens of thousands of Californians would continue to be exposed to lead, with impunity for this retailer.

We have discovered a similar pattern of conduct from Fry's Electronics, Inc. ("Fry's"), which is currently in litigation with another of our clients. Discovery has shown that Fry's purchased its products from the same distributor as did Fuddruckers and was put on notice of

lead contamination at the same time as Fuddruckers, yet refused to act until the imminent threat of litigation. In this case, it has become abundantly clear that Fry's has been trying to avoid liability for as long as possible and would not move to solve the lead problem until pressed to do so. This is the very conduct that the drafters of Proposition 65 sought to prevent, and voters chose to punish. The idea of immunizing such conduct is baffling.

2. Excluding Retailers From Liability Would Create An Incentive to Remain Ignorant About Potential Exposures

Giving retailers a free pass, when Proposition 65 never intended one, will degrade the statute and California citizens' overall health. As has been shown in both the *Fuddruckers* and *Fry's* cases, all it takes is for a retailer not to post supplied warnings for the entire system envisioned by the statute to break down. What good does it do to successfully litigate against a manufacturer or distributor and require them to warn for their products if the warning never gets to the consumer, because the retailer's critical role and patent culpability is ignored?

To illustrate by yet another example: in a pending action against Whole Foods Market, California, Inc. ("Whole Foods"), a sixty-day notice was issued on September 9, 2005 to retailer Whole Foods and distributor Broguiere Dairy, alleging the sale and distribution of milk bottles with leaded paint on their exterior. The distributor opted into *Boelter*, thereby providing its customer Whole Foods with a release as to the Broguiere's milk bottles. Thereafter, on August 11, 2006, Whole Foods received a second sixty-day notice alleging the sale and distribution of lead-painted ceramic mugs. In response, Whole Foods alleged that it had removed the exemplar mug from its shelves and was thereby in compliance with the statute and not responsible for any other mugs it sold. We disagreed. On March 30, 2007, our client sent Whole Foods a third sixty-day notice for the same type of product, which identified additional mugs containing lead paint that were offered for sale months after the prior sixty-day notice. In addition, on March 30, 2007, our client sent Whole Foods a fourth notice alleging lead paint on glassware items, including on a glass salad dressing shaker and on wine sold in lead-painted bottles. Whole Foods is now diligently pursuing a resolution of its potential liability for these types of items. We are confident that our client's persistence in the face of Whole Foods' initial "lack of knowledge" defense will result in a resolution of this matter in the public interest.

IV. Retailers Who Lack Knowledge, as Discovered at Any Stage of a Case, are Not Pursued or Are No Longer Pursued

Simply stated, any entity, including a retailer, found not to have knowledge of toxic chemical content faces no liability under the statute, and is not, or no longer, pursued. We respond to each of your questions regarding our treatment of an alleged violator's knowledge as follows:

A. How do you determine whether the alleged violator has knowledge that the products cause an exposure to lead or cadmium?

1. Customarily There is No Strong Evidence of Knowledge at the Notice or Pleading Stage, When Only Good-Faith Belief is Required

Very often at the notice and the pleading stage, plaintiffs rely on a good-faith belief, based on the available circumstantial evidence, that the alleged violator has knowledge that the products they sell cause an exposure to the listed chemical at issue. A plaintiff's reliance on a good-faith belief of knowledge is not unique to Proposition 65 and is common at the pleading stage of all civil and criminal cases. The existence of knowledge, or lack thereof, often remains undetermined through most of a case and may not be conclusively established until sent to a jury or judge to decide. For example, in *J.C. Penney*, a case turning on the presence or absence of knowledge, Judge Robertson ultimately determined that J.C. Penney had knowledge of the exposure to lead from painted glassware but did not have knowledge of the exposure to lead from lipstick and other cosmetic products it was selling to woman of child-bearing age. It simply was not possible to predict this result early in the case. To require any plaintiff to establish actual knowledge at the notice or pleading stage would impose a requirement that does not exist in law, thereby effectively preventing enforcement of Proposition 65 against several culpable parties.

2. Knowledge is Established Through Diligent Investigation and Discovery

Our clients establish an alleged violator's knowledge through both informal and formal discovery. Sometimes, we receive a defendant's admission that it had the requisite knowledge. In other instances, the parties cooperate and exchange information informally under the protections of California Evidence Code §1152, so as to avoid expending significant resources drafting and responding to formal interrogatories and documents requests.

A retailer may have knowledge of the exposure caused by its products, even when they do not manufacture the items, by virtue of having received a warning from the manufacturer and/or distributor which they ignore. Knowledge may also be established by past sixty-day notices of violation, in response to which the retailers take no action. Moreover, many retailers have actual knowledge that certain decorated glass and ceramic items cause exposures to various listed chemicals through their own testing, trade association conferences or publications, media outlets, word-of-mouth in the industry, and/or other publicly-available information related to Proposition 65 enforcement.

3. A Retailer's Duty to Test Products for Lead Under the Consumer Product Safety Commission's Regulations Creates a Duty to Know

Recognizing that comprehensive enforcement includes regulation of parties throughout the distribution chain, the Federal Hazardous Substances Act ("FHSA") imposes requirements on importers, distributors and retailers from which Proposition 65 plaintiffs can draw useful

circumstantial inferences of knowledge. (*See 15 U.S.C. §1263(a),(c).)* The Consumer Product Safety Commission, which enforces the FHSA, states that "under the FHSA, any firm that purchases a product for resale is responsible for determining whether that product contains lead, and, if so, whether it is a 'hazardous substance.' The Commission, therefore, recommends that, prior to the acquisition or distribution of such products, importers, distributors and retailers obtain information relevant to the determination, such as analyses of chemical composition and exposure pathways, from manufacturers, or have such evaluations conducted themselves." (*16 C.F.R. § 1500.230(c)(5).*) Though not binding in a state law context, the federal duty of retailers to educate themselves as to lead content in their products carries weight in examining the knowledge element of similar state regulatory laws.

B. If the alleged violator is a retailer who appears to have had no knowledge that the products cause exposure to lead or cadmium until the notice of violation was received, how does that fact affect your approach to the matter?

If a retailer is discovered to have no knowledge of toxic chemical content, it has no liability for past, unknowing exposures and is not pursued. If a retailer continues not to comply with Proposition 65 following the sixty-day notice period, however, our clients may pursue litigation in order to seek injunctive relief requiring the posting of a clear and reasonable warning or the selling of only reformulated products.

C. Do you make it clear to alleged violators that if they had no knowledge that the product exposed persons to lead or cadmium, they have no liability for any past violation?

Each sixty-day notice of violation cites to California Health & Safety Code §25249.6 *et seq.*, which, in turn, sets forth the knowledge requirement. The notice also provides a contact number at the Office of Environmental Health Hazard Assessment's ("OEHHA") that an alleged violator may call for further clarification. Once a plaintiff has met her good-faith notice and pleading requirement, it is the job of defendants' attorneys, not plaintiffs' attorneys, to further advise as to any lack of knowledge defense. You will be hard-pressed to find a plaintiffs' attorney who assumes the role of legal adviser to a defendant – nor would this be a desirable result against the ethical dictates of zealousness and loyalty to a client.

D. At what point was any initial start-up investment fully recovered?

Broadly speaking, there has not been apportionment of general lead-paint-in-glassware time or costs made to a settled case. However, there has been significant time and expense that has not been recouped from the lead-in-soda cases. Since there are various enforcement actions involving lead-paint-in-soda, including in *Coca-Cola,* that remain unresolved, any

discussion regarding that issue is premature and will be handled by the superior court as part of any CCP §1021.5 application made at the appropriate time. [6]

E. Can you explain how the preparation of template materials requires the number of hours set forth in fee applications?

This question is misleading in that it presumes, mistakenly, that the time included in our declarations is limited to those hours required for the "preparation of template materials."

The use of templates, to the extent feasible, reduces the number of hours required to perform specific tasks such as drafting a notice, complaint, discovery and settlement. As a result, we utilize templates, customized to a particular case, as any responsible law firm or public agency does. Our efficient use of templates may be one of the reasons we, on average, collect cents on the dollar when compared to the rest of the field.

However, compensable work hours set forth in our declarations, which have been approved by the Superior Courts in every case to date, are not limited to "the preparation of template materials." In fact, a very small percentage of time entered in a case is attributable to template work. Rather, a far majority of the time is spent on activities specific and often unique to each case. For example, it is common practice for defendants not to accept a settlement template as written but instead to engage in a negotiation of particular terms and provisions, which requires substantial additional attorney time for negotiating and redrafting.

F. If the alleged violator was willing to comply immediately, and had no back liability, how is your action in the public interest, and how was it "necessary" under the Code of Civil Procedure?

As we understand the hypothetical, Violator X has no past liability, presumably because it did not have knowledge. Once Violator X obtained knowledge, the conduct was immediately corrected, thereby eliminating any future violations.

If, at any point during litigation, these circumstances are discovered to exist, there is no violation of Proposition 65, and the case would not be pursued, as stated above. As a result, under the hypothetical, the issues of "public interest" and "necessity" would not be at issue.

As a practical matter, past liability is often not – and sometimes cannot – be known to the plaintiff at the time of serving a sixty-day notice, and may remain unknown, or at least unsubstantiated, at the time of filing a complaint. Critically, it is difficult, if not impossible, for our clients to know early on whether a noticed company had knowledge of the presence of a

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[6] As your office is aware from the only appellate opinion involving fees in a Proposition 65 case (*As You Sow v. Cotter & Co.*), it is entirely reasonable for a private enforcer's counsel to allocate a reasonable portion of its time and expense spent on an industry-wide enforcement effort so long as the amount has not yet been recouped from any of the regulated community within that industry group.

toxic chemical in the products, as a noticed company is not usually forthcoming in the notice stage, and the company is going to have a strong interest in denying that it knew of the presence of a toxic chemical in its products in order to preserve its "no knowledge" defense and to otherwise avoid liability. That said, if the evidence available to our clients points indisputably to the lack of any prior knowledge by a noticed company, or there is an absence of past liability together with immediate product correction or warnings placement, our clients would, as noted above, decline to file suit.

V. The Fees Incurred in the Enforcement of Proposition 65 Cases Have Been Approved by the Court and Deemed Reasonable Under California Law

A. Steps Are Taken to Reduce Fees and Encourage Settlement at Every Opportunity

Our clients' observed policy is to limit fees and encourage settlement at every opportunity. At our clients' direction, we have done so at all stages of a case in any number of ways.

Once a case is filed, it is standard practice for an initial proposal for injunctive relief – typically in the form of a consent judgment – to be offered relatively early in the case. In the occasional instance in which a noticed company wishes to settle the dispute before a complaint is filed, our clients are willing to enter into an out-of-court settlement, if deemed appropriate. Once settlement negotiations begin, at whatever stage of a case, we have consistently endeavored to complete negotiations regarding civil penalties and injunctive relief before addressing payment of attorneys' fees, so as to avoid any perceived or real conflict of interest between client and lawyer, and to avoid any diminution in civil penalties to be paid as a result of simultaneous consideration of attorneys' fees.

We take additional steps to keep attorneys' fees reasonable and manageable. Our firm routinely offers alternative dispute resolution options when fees cannot be resolved by negotiation. Often, our clients accept a substantial reduction in the fees incurred from the lodestar in the interest of settling a case. Moreover, settling defendants are urged to draft the motion to approve a settlement, thereby further reducing fees incurred by the plaintiff. Additionally, we endeavor during discovery, and at every stage of a case requiring a meet and confer with the defendant, to resolve disputes without resort to costly motion practice.

B. Proposition 65 Plaintiffs' Counsel are Entitled to Recover Reasonable Attorneys' Fees

Following a verdict or settlement enjoining violative behavior, our firm, like all similarly-situated plaintiffs' counsel, merits payment for labor reasonably expended in pursuit of the successful result. Under the standard set forth in Code of Civil Procedure §1021.5, a court may award attorneys' fees if "(a) a significant benefit ... has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private

enforcement ... are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." An injunction requiring a clear and reasonable warning is no less deserving of payment of attorneys' fees than is a product reformulation: "a settlement that provides for the giving of a clear and reasonable warning, where there had been no warning provided prior to the sixty-day notice, for an exposure that appears to require a warning, is presumed to confer a significant benefit on the public." (*11 CCR §3201(b)(1). See also As You Sow v. Crawford* (1996) 50 Cal.App.4th 1859, 1872 (California has an "exceptional interest in regulating the [Proposition 65] subject matter," and seeks "to provide California consumers with appropriate warnings so they could avoid future physical injuries").) There is no question that the "enforcement of well-defined, existing obligations" is a sound basis for an award of fees. (*Press v. Lucky Stores, Inc. (1983) 34 Cal.3d 311, 318*).

1. Significant Benefit Conferred

Our clients' settlements have supported the strong public interest in the enforcement of Proposition 65. Settlements reached have included, at a minimum, a system of Proposition 65-compliant warnings for the products at issue in a case. Routinely, our clients go further and ask for – and many times receive – a commitment to sell only reformulated products within California, thereby bringing companies into compliance with Proposition 65 without the need for warnings and doing that much more to reduce the health risks to Californians. As noted above, these benefits are deemed significant under California law.

2. Necessity of Private Enforcement

With respect to the "the necessity and financial burden of private enforcement" prong of CCP §1021.5, there are two aspects to this requirement: was private enforcement necessary, and did the financial burden of private enforcement warrant an award to the prevailing parties' attorneys? (*Richard M. Pearl, California Attorney Fee Awards §4.31*.)

Private enforcement has been necessary in the cases prosecuted by our clients because no public enforcer chose to act in those cases. In an era of limited public resources, the public enforcers can be expected to take on only a limited number of violations, leaving many more untouched. The gap between the available resources of the public enforcers and the universe of violations was intended to be met by the private enforcement of Proposition 65, as noted by Health & Safety Code §25249.7(d). That a private enforcer might choose to bring a case against a violator that the public enforcer, even were it fully resourced, would not, does not undermine the necessity of the case, as nowhere is it written that it is exclusively for the public enforcer to decide which cases a private enforcer may bring. A public enforcer's judgment as to the necessity of bringing a particular case or class of cases does not control: the judgment of the court does, and a court has yet to find that any of our clients who, through settlement, brought about reformulation or a warning regime, was barred from recovery under the "necessity" prong.

With respect to the "financial burden" of litigation in private enforcement actions, an award of attorneys' fees to the plaintiff "is only appropriate when the cost of the claimant's legal victory transcends his or her personal interest – *i.e.*, when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his or her individual stake in the matter." (*Luck v. Southern Pacific Transportation Co. (1990) 218 Cal.App.3d 1, 29-30.*) The proper inquiry is whether plaintiff "had an individual stake [in the litigation] that was out of proportion to the costs of the litigation." (*Citizens Against Rent Control v. City of Berkeley (1986) 181 Cal.App.3d 213, 231.*) In none of our cases do our clients have an actual or expected financial interest in a case sufficient to outweigh the fees and costs anticipated and incurred during its prosecution. While tens or hundreds of thousands of dollars in investigative and legal costs are often incurred in a case, our clients' interest is in the enforcement of the statutory requirements of Proposition 65. That statute's financial incentive for private enforcers, recovery of 25% of the civil penalty, is less than, and often pales in comparison to, the costs and fees incurred in a given case. It is has thus not been open to serious question that the public interest in achieving Proposition 65 compliance is far greater than any private interest held by our clients. Indeed, the courts have never withheld fees from our clients based on a comparison between public benefit and private interest.

C. Our Specific Fees are Subject to Multiple Layers of Oversight and Scrutiny and are Fully Justified.

1. Multiple Levels of Oversight

With reference to the specific amount of fees sought in settlement by our clients, those fees are fully warranted and justified by existing law, are reasonable in comparison with other firms performing similar work, and are supported by contemporaneous time records.

There are multiple levels of oversight over our fees. Defendants typically negotiate the level of fees at arms length. Your office then has a chance to review the motion to approve the settlement and can challenge the reasonableness of any proposed fees if it so chooses. As earlier noted, your office's one-time challenge to our billing rates was turned away. (*DiPirro v. Dansk International Designs, et al.* (San Francisco Superior Case No. CGC-02-406220).)

Finally, pursuant to *Health & Safety Code* §25249.7(f)(4)(B), a court is required to find our clients' attorneys' fees to be reasonable before approving a settlement. Reported fees are required to be substantiated by the plaintiff pursuant to §25249.7(f)(5). In every settlement of a case brought by our clients since §25249.7(f)(4)(B) went into effect, the courts have awarded the fees proposed within the settlement and approved them as reasonable.

Your office questioned the reasonableness of the awarded fees in *American Environmental Safety Institute v. The Procter & Gamble Distributing Company* (Los Angeles Superior Court No. BC334309), on appeal alleging that the lower court erred in finding that the attorney fees award was reasonable as required by *Health & Safety Code* §25249.7(f)(4)(B). (*See Procter & Gamble*, Second Appellate District, Division Four, unpublished slip opinion at

(*See Procter & Gamble*, Second Appellate District, Division Four, unpublished slip opinion at 18.) Specifically, your office alleged that fees and costs could not be awarded where the court failed to find that the settlement resulted in a significant public benefit. (*Id.*) The appellate court disagreed, stating:

> We do not agree that the private attorney general statute provided the jurisdictional basis for the recovery of attorney fees in this case. Attorney fees are recoverable in an action when authorized by contract, statute, or law. In this case, judgment was entered according to the parties' contractual agreement, which included an attorney fee provision. Thus, the jurisdictional basis for the recovery of attorney fees was not Code of Civil Procedure section 1021.5 or other statute; it was contractual; and the only condition imposed by Proposition 65 upon the recovery of attorney fees by contract is that they must be "reasonable under California Law.

(*Id. (internal citations omitted).*)

The Court of Appeal concluded: "[T]he Attorney General has provided no authority, and we have found none, to justify ruling as a matter of law that a finding of public benefit from the settlement is a prerequisite to the approval of an agreement to pay attorney fees." (*Id.* at 20.) In the face of this decision, albeit unpublished, it is surprising that your letter claims that the basis for an award of attorneys' fees is, invariably, CCP §1021.5, when contractual agreements can dictate otherwise. Even so, a public benefit has invariably been deemed conferred by way of our clients' settlements.

2. The Fees Claimed in the *Archie McPhee* Case are Reasonable

Of the many successful cases we have brought, your letter selects one, *Brimer v. Archie McPhee & Co.* (Alameda Superior Court, Case No. HG 06264912), to call into question, without any apparent context or reason, the reasonableness of the fees requested by our firm.

Archie McPhee is not a small retailer. Rather, it is a sophisticated, 45-person wholesaler which produces its own line of toys, gifts and novelty items under the "Accoutrements" name for sale through its own and third-party retail outlets, including over its website. Over more than 18 months between mid-2005 and late 2006, our client incurred approximately $42,000 in attorneys' fees and costs that are, as in other cases handled by this office, well-supported by contemporaneous time records of the specific actions undertaken in the case. Notably, following investigation and positive testing of lead-tainted shot glasses purchased from Archie McPhee, a notice was issued on July 25, 2005. The *Boelter* opt-in information was sent to counsel for Archie McPhee on March 29, 2006, who elected not to opt-in. A complaint was filed on April 13, 2006, and multiple extensions to respond to the complaint and to discovery requested by the defendant were granted in the interest of

examining the facts and attempting to settle the case expeditiously and affordably. Archie McPhee requested and received a proposed consent judgment in early October 2006. Over the next month, the parties exchanged drafts to come up with injunctive terms acceptable to both plaintiff and defendant. The parties then negotiated the monetary aspects of settlement and came to a mutually-acceptable agreement on December 8, 2006.

In the end, $19,000 in fees and costs was recovered, representing a fraction of the time actually incurred. The civil penalty of $1,000 was negotiated entirely consistently with like penalties imposed under *Boelter*. A review of the time records relied upon and summarized by Aparna L. Reddy in drafting her declaration in support of the motion to approve the consent judgment, supports in detail, by activity, the hours worked as represented to the court. These hours reflect a cost-conscious apportionment of labor derived from a minimum of attorney work when it was not necessary and predominantly junior associate-level rates when it was – to say nothing of the eventual 55% reduction in our fees needed to reach the agreed-upon figure.

3. Our Recovery of Fees *and* Costs Include Legitimate Investigation Expense and are Not Guaranteed Due to the Contingent Nature of Proposition 65 Litigation

Your letter fails to recognize that a significant amount of our firm's recovery includes the investigation costs necessary to identify violations of Proposition 65, and fails to acknowledge the risks associated with the contingent nature of a private enforcement action. Your office is undoubtedly aware of the extensive investigation conducted by our clients prior to issuing a sixty-day notice, based on the extensive product research and laboratory testing shared with your office in the lead-painted soda cases. For example, in *Brimer v. The Memory Company LLC,* the trial court examined the issue of pre-notice investigation expenses and determined that these costs, including the amounts paid to investigators, travel costs, product acquisition costs and other investigation costs, are recoverable under CCP §1021.5 as "expenses ordinarily billed to a client and not covered in the overhead component of counsel's hourly rate." (*See Brimer v. The Memory Company LLC* (Alameda Superior Court, Case No. RG-05-203611), awarding $15,699.28 in investigation expenses separate from attorney fees.)

Your letter also fails to address the risk involved in representing a private enforcer, given that legitimate investigation costs and attorneys' fees may never be recovered. It sometimes happens that a private (or public) enforcer may bring an action in good-faith that results in costly litigation and, in the end, is unsuccessful. (*See, e.g., People v. Tri-Union Seafoods* (San Francisco Superior Court, Case Nos. CGC 01-402975 and CGC-04-432934), and *DiPirro v. Bondo* (Alameda Superior Court Case No. 01-032519).) Even in those cases in which we reach a successful settlement, we often recover less than the full amount of accrued fees pursuant to a fee application or as a matter of compromise during negotiations. Most recently, our average recovery has been 64.86% of the actual fees incurred to date in 2007. Such fee reductions often entail waiving the opportunity to seek a lodestar adjustment in the interest of fair and acceptable resolution. Such settlement accommodations must be factored

into any discussion of the reasonableness of Proposition 65 attorneys' fees. In the end, we, together with our overseers, go to great lengths to keep our fees as reasonable as possible.

VI. Conclusion: Taking Account of the Complete Picture

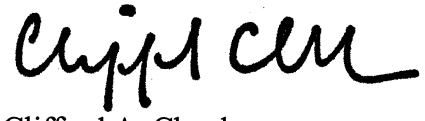
In your letter, you raised concerns regarding the propriety of our clients' settlement agreements and, specifically, the attorneys' fees reached in those agreements. However, your letter fails to acknowledge:

- our clients' strict compliance with the onerous reporting requirements mandated under SB 471;
- your office's rarely-utilized opportunity to comment on our office's notices or to assume responsibility for prosecution of an ensuing case;
- the sophisticated nature of the manufacturers, distributors, importers and retailers whom our clients have targeted;
- the many hours of top-notch investigative, scientific and attorney work which in every case we have substantiated and invariably received fee approval for;
- your office's rarely-utilized opportunity to object to the terms of our office's settlements, and the overruling of the single objection you did file over six years of lead-in-glassware actions; and
- the significant public benefit our clients have achieved, and assisted your office in achieving, in winning large-scale reformulation commitments throughout the glassware industry.

Our achievements on behalf of the People of the State of California are many. The reformulation commitments and new warning regimes negotiated have been significant. The penalties collected have been substantial. The fees have been leanly calculated and always earned. We proudly stand on our record and would compare it, in any regard, against those of other enforcers, both public and private.

We believe that we have fully addressed your concerns in this response, and hope you see the value of our contributions to Proposition 65 enforcement.

Very truly yours,



Clifford A. Chanler

EXHIBIT A

SETTLEMENT PROCEEDS SUMMARY
FOR ALL GLASS, CERAMIC AND SODA ENFORCEMENT ACTIONS
(2002 - PRESENT)

Type of Settlement Proceeds	*Description of Settlement Proceeds*	*Amount*	*Sub-Total*	*% of Proceeds*
CIVIL PENALTY	Defendant Paid Out-of-Pocket	6,103,350.00	**$18,097,650.00**	**53.4%**
	Defendant Paid if Reformulation Commitment Not Met	6,996,300.00		
	Defendant Paid to Other Recipients	844,500.00		
	Defendant Received Penalty Credits	4,153,500.00		
FEES & COSTS	Attorneys' Fees and Costs	13,099,617.00	**$13,099,617.00**	**38.6%**
OTHER FEES	Fees and Costs Paid to Other Parties	2,710,000.00	**$2,710,000.00**	**8.0%**
		TOTAL:	**$33,907,267.00**	

GLASS, CERAMIC AND SODA ENFORCEMENT ACTIONS AGAINST 334 DEFENDANTS
(2002 - PRESENT)

PERCENTAGES OF SETTLEMENT PROCEEDS AND BUSINESS TYPES

Business Type	*No. of Defendants*	*% of Total*	*Civil Penalty*	*Attorneys' Fees & Costs*	*Fees Paid to Other Parties*	*Total*	***% of Total***
Manufacturers	178	53.3%	15,371,900.00	8,002,467.00	2,120,000.00	25,494,367.00	**75.2%**
Distributors/Importers	76	22.8%	1,178,500.00	2,124,000.00	375,000.00	3,677,500.00	**10.8%**
Retailers	80	24.0%	1,547,250.00	2,973,150.00	215,000.00	4,735,400.00	**14.0%**
		Total:	18,097,650.00	13,099,617.00	2,710,000.00	33,907,267.00	

SUBSET OF 205 PARTICIPANTS IN THE BOELTER OPT-IN SETTLEMENT
(2005-2006)

PERCENTAGE OF SETTLEMENT PROCEEDS AND BUSINESS TYPES

Business Type	*No. of Participants*	*% of Total*	*Civil Penalty*	*Attorneys' Fees & Costs*	*Fees Paid to Other Parties*	*Total*	***% of Total***
Manufacturers	87	42.4%	1,370,000.00	2,456,000.00	435,000.00	4,261,000.00	**46.4%**
Distributors/Importers	75	36.6%	1,138,500.00	1,929,000.00	375,000.00	3,442,500.00	**37.5%**
Retailers	43	21.0%	303,000.00	970,500.00	215,000.00	1,488,500.00	**16.2%**
		Total:	2,811,500.00	5,355,500.00	1,025,000.00	9,192,000.00	