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January 10, 2012

Proposition 65 Private Plaintiffs and Counsel
(See attached list of addressees)

RE: Releases in Proposition 65 cases

Dear Counsel:

We are writing to you in your capacity as a representative of a party that has brought and settled private party Proposition 65 cases or as counsel for such an entity. We intend to share the letter with members of the private defense bar as well and to post it on the Attorney General's Proposition 65 website.

In our capacity as reviewers of Proposition 65 settlements, we are concerned with the form of the release that the private parties purport to give "in the public interest." These releases, which often attempt to combine the public interest release with the private party release, have become more and more convoluted and, in many cases, are either overbroad, meaningless, or affirmatively misleading. We understand that the problematic language often comes from the defendants, whose interest is to maximize protection against future lawsuits. We therefore offer the following example of a release that is succinct and offers the maximum protection a private party suing in the public interest is authorized to give. We intend to scrutinize the language of future settlements carefully. To the extent that the release language of a settlement is ambiguous or purports to give a broader release than the private plaintiff suing in the public interest is entitled to give, we will consider filing an objection.

First, we note that under Proposition 65, a private plaintiff lawsuit is brought "in the public interest" (Health & Saf. Code, § 125249.7, subd. (d)), not "on behalf of the general public" or "the People." The complaint and settlement should use the statutory terminology. Once the suit is settled, the release by the private party in the public interest can only be for the violations of Proposition 65 based on the allegations in the Notice of Violation. The clearest way to provide this release is in a separate paragraph. We suggest that the following release language be used:

> Plaintiff acting on its own behalf and in the public interest releases Defendant [and other specified entities] from all claims for violations of Proposition 65 up through the Effective Date based on exposure to [Covered Chemicals] from [Covered Products or Covered Facilities] as set forth in the Notice(s) of Violation.

> Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to [Covered Chemicals] from [Covered Products or Covered Facilities] as set forth in the Notice(s) of Violations.

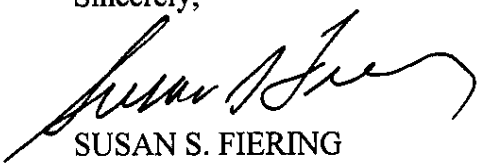
The terms "Effective Date," "Covered Chemicals," "Covered Products," and "Covered Facilities" should either be defined terms in the agreement, or the release should list the actual chemicals, products, and facilities included in the release. The Consent Judgment also should identify which Notices of Violation are at issue.

This release paragraph provides the full extent of the release that can be given by the plaintiff acting in the public interest. It gives the defendant full protection for past violations and precludes private parties from maintaining actions in the future based on conduct sanctioned in the judgment to the extent that the agreement constitutes res judicata.

The private plaintiff acting solely on its own behalf can then provide whatever additional release it deems appropriate as negotiated with the defendants. This additional release should be stated in a separate paragraph or section so as not to confuse it with the public interest release. The Attorney General's Office takes no position on the proper scope of the private entity releases.

Please feel free to call me or Harrison Pollak if you have any questions.

Sincerely,



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For KAMALA D. HARRIS
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