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Sent via U.S. Mail or E-Mail
See distribution list, attached

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Dear Counsel:

We write to you in your capacity as a private enforcer or as counsel for a private enforcer that has sent a Proposition 65 sixty-day notice of violation during the last four months. As you know, on March 4, 2020, Governor Newsom proclaimed a State of Emergency in California resulting from the COVID-19 global pandemic. Since then, most businesses have been shut down or operating on a restricted basis, and individuals have been instructed to stay home except as needed to maintain continuity of operations of certain critical infrastructure sectors. The State of Emergency and related events may significantly affect the handling of any sixty-day notices that you have recently filed, or that you may file during the coming weeks, pursuant to Health and Safety Code section 25249.5 et seq. ("Proposition 65"), alleging violations based on exposures to chemicals in consumer products, including food. Among other things:

- Public Prosecutors. Proposition 65 provides the Attorney General, District Attorneys, and certain City Attorneys a sixty-day period in which to evaluate these notices and, if warranted, commence their own enforcement actions to enforce the alleged violations. It may be difficult for Public Prosecutors, including our office, to effectively perform this function within the 60-day window because (i) their own staff may be assigned to matters related to the State of Emergency; and (ii) on receipt of a sixty-day notice, the Public Prosecutors often purchase the product that is allegedly causing the violation and conduct an independent analysis to determine whether it is causing persons to be exposed to a listed chemical at levels that require a warning. Under the current circumstances, the Public Prosecutors cannot necessarily complete this important work because (a) some products may be unavailable for purchase, and (b) the laboratories that would perform the chemical analysis may be closed, or may not be operating at full capacity.
- Courts. While the Public Prosecutors have the authority to prosecute the violation by filing a complaint within the sixty-day period, some courts have been closed during the emergency. Further, the California Judicial Council has issued Emergency Rule 9, which tolls the applicable statute of limitations from April 6, 2020, to October 1, 2020. (Cal. Rules of Court, Emergency Rule 9(a).)

- Businesses. Since businesses have been required to instruct non-critical employees to shelter at home, it can be difficult for these companies to do the work necessary to investigate these notices and provide you with a meaningful response. Moreover, many of the notices target companies that make or sell food, who should be focusing on maintaining the supply chain during this emergency.

Based on these considerations, 60-day notices issued during, or shortly before, the emergency proclamation risk not serving the dual purposes of the notice requirement: affording the noticed party an opportunity to forestall litigation by showing that there has not been a violation, curing any violation, or settling with the plaintiff; and allowing the Public Prosecutor the means to assess whether to intervene on behalf of the public. (See *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2007) 150 Cal.App.4th 953, 963–964.) We therefore ask for your cooperation if you receive a request from a Public Prosecutor or from an alleged violator to wait for more than the statutory 60 days after sending a notice to initiate an action. If you receive such a request and you are inclined not to grant the extension, we ask that you contact our office first to discuss your reasoning, by e-mailing me at Harrison.Pollak@doj.ca.gov.

We express no view on the merits or the significance of the violations alleged in any particular sixty-day notice. Proposition 65 remains an essential tool for ensuring that consumers receive important information about toxic chemicals to which they are exposed. Moreover, we recognize that extensions may not be warranted in every case, particularly where a notice identifies a violation that presents an immediate threat of harm beyond the failure to warn – such as the presence of a chemical in food at a level that renders the food adulterated.

We appreciate your consideration under these unprecedented circumstances.

Sincerely,

/s/ Harrison Pollak

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