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State of California
DEPARTMENT OF JUSTICE



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May 20, 2020

Gregory Sheffer
The Sheffer Law Firm
81 Throckmorton Ave Ste 202
Mill Valley, CA 94941

RE: Proposition 65 Notices Nos. 2020-642 and 2020-643

Dear Mr. Sheffer:

We write to you pursuant to the Attorney General's authority under Health and Safety Code section 25249.7, subdivision (e)(1)(A), which is part of the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as "Proposition 65." We have reviewed the above 60-day notices of violation and accompanying certificates of merit that Susan Davia sent to Batteries Plus LLC/Ascent Battery Supply, LLC (No. 642) and to Momentum Brands, Inc. and Van De Pol Enterprises (No. 643) on March 12, 2020. The notices allege that the companies sell products that expose persons to the phthalates DEHP and/or DINP without providing a clear and reasonable warning. After reviewing the notices and supporting information, we believe you have not submitted factual information sufficient to establish the basis for the certificates of merit, and we therefore request that you withdraw the notices.

Proposition 65 requires companies with ten or more employees to provide clear and reasonable warnings to persons prior to knowingly and intentionally exposing them to chemicals known to cause cancer or reproductive toxicity. (Health & Saf. Code, § 25249.6.) Persons acting in the public interest can bring a private action to enforce Proposition 65 at least sixty days after sending a 60-day notice to the alleged violators and public enforcers, unless the Attorney General or other public enforcer is diligently prosecuting an action against the violation. (*Id.*, § 25249.7, subd. (d).)

Before sending a 60-day notice alleging a failure to warn, the private enforcer must consult with an expert who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical. Based on the consultation, the person sending the notice or his or her attorney must execute a certificate of merit stating his or her belief that, based on the consultation, "there is a reasonable and meritorious case for the private action." (*Id.*, subd. (d)(1).) The enforcer must attach to the Attorney General's copy of the certificate of merit factual information sufficient to establish its basis, which the Attorney General is required to maintain in confidence. (*Id.*, subds. (d)(1), (i).) The certificate of merit must document both exposure to the chemical and that there "is merit to each element of the action on which the plaintiff will have the burden of proof." Further, the certifier must certify that "the information

relied upon does not prove that any affirmative defense has merit.” (Cal. Code Regs., tit. 11, §3101, subd. (a).) If the Attorney General believes there is no merit to the action after reviewing the certificate of merit and meeting and conferring with the private enforcer, the Attorney General must serve a letter on the noticing party and the alleged violator stating this position and make the letter available to the public. (Health & Saf. Code, § 25249.7 subd. (e)(1).)

The referenced 60-day notices allege that the companies expose persons to the phthalates DEHP and/or DINP in certain products without providing the required warning. We are not able to disclose the contents of the supporting information for the certificate of merit. (Health & Saf. Code, § 25249.7, subd. (i).) However, based on our review, we have concluded that you have failed to provide sufficient information to demonstrate a credible basis to conclude that there is merit to each element of the action on which plaintiff will have the burden of proof. Accordingly, the 60-day notices do not give Susan Davia authority to file suit in the public interest, or to settle claims based on the alleged violations. We ask that you withdraw the notices immediately. Failure to do so could result in a court finding that an action based on the notices is frivolous within the meaning of Code of Civil Procedure Section 128.5. (*Id.*, § 25249.7, subd. (h)(2).)

Sincerely,

/s/ Susan Fiering

SUSAN S. FIERING
Deputy Attorney General

For XAVIER BECERRA
Attorney General

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