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February 1, 2018

Clifford A. Chanler
The Chanler Group
2560 Ninth Street, Suite 214
Berkeley, CA 94710-2565

RE: Proposition 65 Notices of Violation for Lead in Tea
AGO Notice Nos. 2017-02499, 2017-02505

Dear Mr. Chanler:

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 60-day notices of violation and accompanying certificates of merit your office issued on behalf of Whitney R. Leeman against R.C. Bigelow, Inc. (2017-02499) and The Hain Celestial Group, Inc. (2017-02505) on November 20 and 21, 2017, and concluded that there is no merit to the action. We ask that you withdraw the notices immediately.

Proposition 65 requires companies with 10 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 60 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. (Health & Saf. Code, § 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 her attorney must execute a certificate of merit ("COM") 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 COM factual information sufficient to establish its basis, which the Attorney General is required to maintain in confidence. (*Id.*, subds. (d)(1), (i).) 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 to the noticing party and the alleged violator stating this position and make the letter available to the public. (Health & Saf. Code, §§ 25249.7, subds. (e)(1), (g).)

The referenced 60-day notices you sent to Bigelow and Hain Celestial on behalf of Dr. Leeman last November allege knowing and intentional exposures to lead in herbal and non-herbal tea without a warning. The COMs are signed by you and dated November 20 (Bigelow) and November 21 (Hain Celestial), 2017. We are not able to disclose the contents of the supporting information for the COMs. However, based on our review, we have concluded that certain statements in the COM are not supported. As a result, any private action premised on these 60-day notices has no merit. (See *DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal. App.4th 966, 969 [failure to comply with prelitigation COM requirement mandates dismissal of private Proposition 65 causes of action].)

While we are not able to discuss the contents of the supporting information, it may be helpful to you and to other private enforcers to understand the reasoning behind our decision. The paragraph of the COM with which we take issue is Paragraph 4, in which you state:

> Based on the information obtained through [ ] consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.

When we evaluated these statements, we considered all of the information in your possession that we are aware of, and not only the supporting information you chose to attach to the COM. Of particular significance here is the consent judgment Dr. Leeman recently entered into and the Court approved in *Leeman v. Starbucks et al.* (Judgment Pursuant to Terms of Proposition 65 Settlement and Consent Judgment, S.F. Super. Ct., Case No. CGC-16-55322, Nov. 1, 2017 ("Consent Judgment" or "CJ").) The Consent Judgment establishes a concentration-based standard for determining the level at which lead in the settling defendants' brewed herbal and non-herbal tea requires a Proposition 65 warning. The "Brewed Tea Standard" is 10 parts per billion. (CJ ¶ 2.2.) According to the Consent Judgment, covered products require a Proposition 65 warning only if they do not meet the Brewed Tea Standard. (CJ ¶ 2.3.)

Of particular significance here is the declaration in the Consent Judgment, which your client agreed to and your firm presented to the Court as accurate, that companies that comply with the terms of the Consent Judgment are in compliance with the law. The Consent Judgment states that "[c]ompliance with the terms of this Consent Judgment by a Settling Defendant constitutes compliance with Proposition 65 with respect to exposures to lead in that Settling

Defendant's Covered Products after the Effective Date." (CJ ¶ 5.1.) In support, your papers to the Court state that "the levels[1] agreed upon meet the statutory criteria and will adequately protect the public and provide a significant public benefit...." (Mem. Ps & As. in Support of Consent Judgment, June 23, 2017, at p. 7; see also Declaration of Clifford A. Chanler, June 23, 2017 [same].) In other words, you and your clients have gone on record supporting, and the Court has approved, the proposition that herbal and non-herbal tea tested according to the protocol in the Consent Judgment does not require a Proposition 65 warning unless the lead concentration is greater than 10 parts per billion.

We considered this when we evaluated the COMs and supporting information for the 60-day notices your firm issued after entering into the Consent Judgment. Like the Consent Judgment, the new notices address the duty to provide Proposition 65 warnings for lead in herbal and non-herbal tea. In order to evaluate your certification in the COMs that there is a "reasonable and meritorious case for the private action," we thus considered what concentration of lead in herbal and non-herbal tea your client and law firm previously agreed triggers the duty to warn. A private enforcer cannot tell a court, on the one hand, that establishing a particular warning standard "meet[s] the statutory criteria and will adequately protect the public," and then threaten to sue companies that meet the same standard.

Accordingly, when our office evaluates a 60-day notice and the accompanying COM and certificate of merit, we look to other settlements and consent judgments by the same enforcer or law firm to determine if they previously have agreed to a warning threshold for the same kind of products and chemicals. If they have, then we will evaluate the COM and supporting information in light of the previous agreements. If the new alleged violations appear to comply with a standard the noticing party or its counsel has agreed to in the past, then we will ask the noticing party for the scientific basis for alleging a violation notwithstanding the prior agreement, which we will consider when we evaluate the merits of the COM. If we conclude that the COM and the related threatened action do not have merit in light of the prior standards and any other information the enforcer provides, then we will share our conclusion with the enforcer and, if it refuses to withdraw the 60-day notice, with the alleged violator and the public. (Health & Saf. Code, § 25249.7, subd. (e)(1)(A).)

In this case, we have reviewed the 60-day notices to Bigelow and Hain Celestial and their COMs in light of the Consent Judgment in *Leeman v. Starbucks*, and we have concluded that there is no merit to the action. In our view, the two notices do not give Dr. Leeman authority to enforce the alleged violations in the public interest. We express no opinion on any other aspect of the 60-day notices, or on any 60-day notices you issued before entering into the Consent Judgment. Further, we express no view on whether a standard in one private enforcer's settlement would preclude a different enforcer or its counsel from signing a COM for similar

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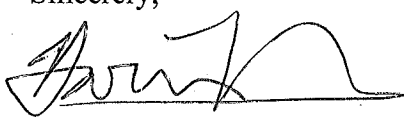
[1] The statement refers to more than one agreed-upon level because initially there was a Brewed Tea Standard and a separate Dried Tea Standard. The parties retained only the 10 parts per billion Brewed Tea Standard in the Consent Judgment.

products that satisfy the standard, although in such cases we typically ask the second enforcer to explain why it believes the prior enforcer's standard does not result in compliance.

Because the two referenced 60-day notices are not supported, you should withdraw them. They do not give Dr. Leeman authority to file suit in the public interest over the violations alleged in the notices, or to settle claims based on the alleged violations.

Sincerely,



HARRISON M. POLLAK
Deputy Attorney General

For XAVIER BECERRA
Attorney General

cc: Sarah Esmaili, Esq.
Counsel for R.C. Bigelow, Inc. and Hain Celestial Group, Inc.

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