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8 *Edmund G. Brown Jr. et al.*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

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13 **SIERRA CLUB, ET AL,**
14
15 Plaintiffs/Petitioners,

16 v.

17 **GOVERNOR EDMUND G. BROWN JR., ET AL,**
18 Defendants/Respondents

19 **CALIFORNIA CHAMBER OF COMMERCE,**
20 Plaintiffs/Petitioners,

21 v.

22 **GOVERNOR EDMUND G. BROWN JR. ET AL,**
23 Defendants/Respondents
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No. RG07356881

Consolidated with San Diego Superior Court
Case No. 37-2008-00096549-CU-WM-CTL

**JOINT NOTICE OF MOTION AND
MOTION FOR JUDICIAL APPROVAL
OF PARTIAL CONSENT JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: August 15, 2013
Time: 2:00 p.m.
Dept: 20
Judge: The Honorable Robert B.
Freedman
Trial Date: None Set
Action Filed: November 19, 2007

Reservation No. R – 1418262

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **INTRODUCTION**

4 Plaintiffs the Sierra Club *et al.* (“Sierra Club”) and Defendants Governor Edmund G.
5 Brown, Jr. *et al.* (“State Parties”) jointly move for judicial approval of the Partial Consent
6 Judgment (“Consent Judgment”), a copy of which is attached to the Declaration of Susan S.
7 Fiering (“Fiering Decl.”). The Consent Judgment resolves all but one of the issues remaining in
8 this case. The parties anticipate that that final issue can be resolved based on a paper trial before
9 the Court or briefing without a trial, as the Court and the parties determine appropriate.

10 **BACKGROUND**

11 In late 2007, the Sierra Club sued the State Parties alleging that the State Parties had failed
12 to consider and list chemicals under Proposition 65, Health and Safety Code section 25249.5 et
13 seq. The parties engaged in litigation over the course of several years, and have been engaged in
14 settlement discussions since February 2011, including several face-to-face meetings between
15 representatives of Plaintiffs and Defendants, and discussions with scientific staff at the Office of
16 Environmental Health Hazard Assessment (“OEHHA”), the lead agency for Proposition 65
17 responsible for evaluating chemicals for potential listing. (Fiering Decl.)

18 **THE PARTIAL CONSENT JUDGMENT**

19 Subject to Court approval, the Partial Consent Judgment requires the State Parties to take
20 the steps below. (To the extent this description or this brief uses different language than the
21 Partial Consent Judgment in an attempt to summarize that document, the parties understand and
22 agree that the language of the Partial Consent Judgment governs.)

23 1.e Within three months after all outstanding legal issues concerning the Labor Codee
24 listing mechanism are fully and finally resolved, including any appeals, OEHHA will initiate a
25 formal regulatory process to propose a regulation describing the procedure for listing chemicals
26 pursuant to the Labor Code Listing Mechanism set forth in Health and Safety Code section
27 25249.8, subdivision (a). (Consent Judgment, ¶ 3.1.1, Exh. A to Fiering Decl.)
28

1 2. OEHHA will initiate a formal regulatory process to propose a regulation establishing
2 educational and scientific qualifications for appointments to the CIC and Developmental and
3 Reproductive Toxicity Identification Committee. (*Id.* at ¶ 3.3.2.)

4 3. For a period of three years from the effective date of the Consent Judgment, OEHHA
5 will eliminate the informal “data call-in” public comment period currently being provided prior to
6 initiating the formal Authoritative Body Listing process. OEHHA will post on its website, a list
7 of all chemicals that OEHHA has identified as meeting the criteria for potential Authoritative
8 Body listing, the date on which each step in the process has been completed and the next step to
9 be completed. (*Id.* at ¶¶ 3.2.1, 3.2.2.)

10 4. OEHHA will decide within six months whether or not to issue a notice of intent to list
11 (“NOIL”) for eleven identified chemicals, and within a year whether to issue an NOIL for an
12 additional four identified chemicals. Unless prevented from doing so by contingencies (as
13 described in 5(e) below), OEHHA will make a decision on whether or not to list the identified
14 chemicals within a year of issuing an NOIL. (*Id.* at ¶¶ 3.2.3.1, 3.2.3.2, 3.2.3.3.)

15 5. The parties disagree as to whether OEHHA has an ongoing duty to decide on whether
16 or not to list chemicals within a certain time period. Notwithstanding that disagreement, and in
17 an effort to resolve the litigation, for a period of three years and six months from the effective
18 date of the Consent Judgment, OEHHA will, consistent with its current policy, diligently and
19 frequently review chemicals that may be subject to the Authoritative Body’s Listing mechanism
20 and promptly request documents from the authoritative body. In addition:

21 (a) For those chemicals for which OEHHA obtains the authoritative body records within
22 six months of the effective date, unless prevented by contingencies from doing so (as described in
23 5(e) below), OEHHA will decide whether or not to issue an NOIL for those chemicals within 18
24 months after the effective date and will decide whether or not to list those chemical within one
25 year after the close of the public comment period on the NOIL.

26 (b) For those chemicals for which OEHHA obtains the authoritative body records after
27 six months from the effective date, OEHHA will decide whether or not to issue the NOIL within
28

1 one year after obtaining the records of the authoritative body and will decide whether to list the
2 chemical within one year after the close of the public comment period on the NOIL.

3 (c)e If OEHHA is unable to comply with the above deadlines, it will provide notice on its
4 website and to the State's Qualified Experts.

5 (d)e OEHHA's obligations under this provision terminate at the end of three years and six
6 months from the effective date of the Consent Judgment.

7 (e)e In the event that OEHHA is unable to meet the time frames due to contingencies such
8 as scientific complexity, voluminous public comments, etc., the parties will meet and confer to
9 agree upon an extension; if the parties are unable to agree on an extension, OEHHA may ask the
10 Court for an extension.

11 (f)e Boron, boric acid, borate salts, and boron oxide are not covered by these requirements.
12 (*Id.* at ¶ 3.2.4.1, 3.2.4.2, 3.2.6.)

13 6.e For those chemicals referred to the Carcinogen Identification Committee ("CIC")
14 for its review, for a period of three years OEHHA will shorten the informal public comment
15 periods to forty-five (45) days and will make a proposal to the CIC at a 2013 meeting regarding
16 steps to streamline the preparation of the Hazard Identification Materials and other procedures.
17 OEHHA will follow-up with the CIC on an annual basis to determine if the streamlined
18 procedures are successful and whether additional procedures are desirable. (*Id.* at ¶¶ 3.3.1, 3.3.3.)

19 7.e The Sierra Club will dismiss all of its claims against the members of the CIC with
20 prejudice. (*Id.* at § 4.)

21 8.e The Court's jurisdiction over the matter terminates at the end of four years and six
22 months from the effective date. (*Id.* at § 14.)

23 9. With certain specified exceptions, the Consent Judgment resolves all claims raised in
24 the Complaint that have arisen as of the effective date or that could have been raised in the
25 complaint as of the effective date based on the allegations of the Complaint. (*Id.* at § 9.)

26 10.e The Sierra Club agrees for a period of three years and six months not to bring a
27 lawsuit raising the claim that the State Parties have violated a mandatory duty and abused their
28 discretion by delaying the listing of chemicals pursuant to the Authoritative Body Listings

1 mechanism, with the exception of the chemical Bisphenol A (“BPA”). The Sierra Club agrees
2 not to bring any claims regarding delay in listing BPA for a period of 6 months from the effective
3 date. (*Id.* at § 9.)

4 11.e The only claim not resolved in the Consent Judgment is whether OEHHA is requirede
5 to list all chemicals identified by the International Agency for Research on Cancer (“IARC”) as
6 IARC Group 3 chemicals, for which IARC finds sufficient evidence of carcinogenicity in animals.
7 The parties have agreed that this issue remains to be resolved by the Court.

8 12.e The Consent Judgment also does not resolve the Sierra Club’s claim for attorney’s se
9 fees and costs, which will be resolved separately by the Court. (*Id.* at §§ 5, 6.)

10 DISCUSSION

11 I.e STANDARD FOR JUDICIAL APPROVAL OF SETTLEMENTS

12 Because the litigation process “is fraught with complexities, uncertainties, delays, and risks
13 of many kinds[,]” public policy in California favors settlement. (*Neary v. Regents of University of*
14 *California* (1992) 3 Cal.4th 273, 280.) As a judgment of the Court, the settlement may be
15 rejected if it is contrary to public policy or incorporates an erroneous rule of law. (*California*
16 *State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664; *Plaza Hollister*
17 *Ltd. Partnership v. County of San Benito* (1999) 72 Cal. App. 4th 1.) Such circumstances are rare,
18 however, and do not exist here. (*Cf. Mary R. v. B & R Corp.* (1983) 149 Cal.App.3d 308, 316-
19 317 [settlement between physician and patient purporting to bar state from access to information
20 relevant to physician's fitness to practice medicine contrary to public policy].)

21 II.e THE PARTIAL CONSENT JUDGMENT IS CONSISTENT WITH LAW AND PUBLIC POLICY 22 AND SHOULD BE APPROVED BY THE COURT

23 The Consent Judgment before the Court resolves all but one of the remaining issues in these
24 case in a manner that is consistent with law and public policy. The Consent Judgment permits
25 OEHHA sufficient time to make decisions on a list of identified chemicals, sets timeframes for
26 the next three years for moving forward with listing decisions, permits OEHHA to adjust those
27 timeframes based on contingencies either through consultation with the Plaintiffs or by seeking a
28 modification from the Court, and requires OEHHA to begin a process to propose amendments to

1 certain listing provisions, and to take certain steps to streamline the listing processes. OEIHA's
2 duties under the Consent Judgment exist for three and a half years and the Court's jurisdiction
3 terminates at the conclusion of four and a half years. In return, the Plaintiffs have agreed to
4 dismiss the members of the CIC with prejudice, to release all claims alleged in the Complaint or
5 that could have been alleged as of the effective date of the Complaint and, for a period of three
6 years and six months, with one exception, to refrain from filing a lawsuit alleging that the State
7 Parties have delayed listing chemicals under the Authoritative Body listing mechanism.

8 Thus, the agreement resolves all but one of the outstanding claims in the lawsuit without
9 further litigation in a manner that is consistent with the law and public policy.

10 CONCLUSION

11 For all the reasons discussed above, the State Parties and the Sierra Club jointly request that
12 the Court enter an Order approving the Partial Consent Judgment.

13 Dated: 7/12/13

Respectfully Submitted,

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23 Dated: July 12, 2017

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