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14 CALIFORNIA CHAMBER OF COMMERCE

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF SAN DIEGO

17 CALIFORNIA CHAMBER OF COMMERCE, a
18 not-for-profit trade association,

19 Plaintiff/Petitioner,

20 v.

21 ARNOLD SCHWARZENEGGER, Governor of
22 the State of California; LINDA S. ADAMS,
23 Secretary of the California Environmental
24 Protection Agency; and DR. JOAN E. DENTON,
25 Director of the Office of Environmental Health
26 Hazard Assessment.

27 Defendants/Respondents.

Case No. 37-2008-00096549-CU-WM-CTL

UNLIMITED JURISDICTION

**VERIFIED PETITION FOR WRIT
OF MANDATE AND
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

28 Plaintiff and Petitioner California Chamber of Commerce ("CalChamber"), by
its undersigned attorneys, makes and files this Complaint and Petition against
Defendants- Respondents Arnold Schwarzenegger, Linda S. Adams, and Dr. Joan E.
Denton (collectively "Defendants") and alleges as follows:

1 NATURE OF ACTION

2 1. This is a petition for a writ of mandate pursuant to California Civil
3 Procedure Code section 1088.5 and a complaint for declaratory and injunctive
4 relief under statutory and common law of California to reverse certain quasi-
5 legislative actions by Defendants in excess of their authority under the California
6 Safe Drinking Water and Toxic Substance Control Act of 1986, Cal. Health &
7 Safety Code § 25249.5 *et seq.* ("Proposition 65") resulting in the unlawful
8 addition of chemicals to the list of substances regulated by the statute (the
9 "Proposition 65 List") without the requisite participation of the State's qualified
10 panel of scientific experts, to declare such actions unlawful, and to enjoin
11 Defendants from taking such action in the future.

12 2. Specifically, as set forth below, Defendants have improperly added and
13 intend to continue to add to the Proposition 65 List chemicals that were not
14 included in the initial Proposition List finalized following final judgment in *AFL-
15 CIO v. Deukmejian*, 212 Cal. App. 3d 425 (1989) (the "Initial List") but are
16 identified by reference in Labor Code Section 6382(b)(1) and in Labor Code
17 Section 6382(d). Such chemicals are hereinafter referred to collectively as the
18 "Labor Code Chemicals."

19 3. Accordingly, as set forth below, pursuant to California Civil Procedure
20 Code section 1060, CalChamber seeks a declaration from this Court that
21 Proposition 65 neither mandates nor authorizes ongoing automatic placement of
22 any Labor Code Chemical on the Proposition 65 List, except through the processes
23 set forth in section 25249.8(b), each of which requires the judgment of the state's
24 qualified experts or adoption of formal labeling requirements by a state or federal
25 agency. CalChamber further seeks an order enjoining Defendants from engaging
26 in future listing activities inconsistent with the declaration described above.

27 4. Finally, CalChamber seeks a writ of mandate from this Court under
28 California Civil Procedure Code section 1085 ordering Defendants to remove all

1 Labor Code Chemicals that have been improperly added to the Proposition 65 List
2 after completion of the Initial List based solely on their status as Labor Code
3 Chemicals and without consultation with the State's qualified experts,
4 identification by an authoritative body, or adoption of formal labeling
5 requirements by a state or federal government agency as required by section
6 25249.8(b). Such chemicals are hereinafter referred to collectively as the
7 "Improperly Listed Chemicals."

8 **PARTIES**

9 5 Plaintiff Petitioner CalChamber is a voluntary non-profit membership
10 based trade association organized and existing under the laws of the State of
11 California and having its headquarters in Sacramento, California. CalChamber
12 brings this action on behalf of itself and its members.

13 6. CalChamber's nearly 16,000 members provide over 3 million jobs,
14 representing 25 percent of California's private sector workforce. CalChamber
15 members manufacture, distribute, and sell foods, beverages, over-the-counter
16 medications, personal care products, toys, electronics, industrial equipment,
17 machinery, vehicles and virtually every other type of product sold in every county
18 in California, including San Diego County.

19 7. At least one CalChamber member manufactures, distributes, and/or sells
20 products in San Diego County containing an Improperly Listed Chemical.

21 8. At least one CalChamber member manufactures, distributes, and/or sells
22 in San Diego County products containing a Labor Code Chemical that is not yet
23 included on the Proposition 65 List, but is subject to addition to the Proposition
24 65 List under improper interpretation of the statute by the California Office of
25 Environmental Health Hazard Assessment ("OEHHA").

26 9. For more than 100 years, CalChamber has been an advocate for making
27 California a better place to live, work and do business. Among CalChamber's
28 primary purposes is to promote California businesses by protecting the private

1 sector from unauthorized government mandates. Accordingly, CalChamber
2 regularly participates in both the legislative process and litigation on behalf of its
3 members concerning legal issues that could adversely affect these goals.

4 10. Areas of CalChamber interest include statutes or regulations that limit,
5 ban, or impose labeling requirements or restrictions on the use of chemicals in
6 products sold and used in California. CalChamber's members have a clear right
7 and beneficial interest in assuring that Proposition 65's warning requirements are
8 applied only to chemicals that have been identified for listing after careful review,
9 in accordance with the requirements of Proposition 65 and its implementing
10 regulations.

11 11. In addition, CalChamber shares the interest of the general public in
12 assuring that (1) government officials and agencies are properly implementing and
13 applying the laws of the State and are not exceeding their authority under
14 Proposition 65, (2) assuring that health warnings on consumer products are based
15 on current valid scientific evidence about actual risks that are relevant to
16 consumers.

17 12. These interests have been, are, and will continue to be injured by
18 Defendants' automatic addition of Labor Code Chemicals to the Proposition 65
19 List. The consequence of Defendants' actions is that scientists and members of
20 the public, including CalChamber's members, have been and will be deprived of
21 the opportunity to present OEIHA with scientific evidence that a Labor Code
22 Chemical does not satisfy Proposition 65 listing criteria. Moreover, OEIHA's
23 misinterpretation of section 25249.8(a) would preclude OEIHA from considering
24 scientific evidence, regardless of the source, in making a listing decision. The
25 result of OEIHA's position is to make science irrelevant to the listing decisions.

26 13. Defendant-Respondent Arnold Schwarzenegger is sued in his official
27 capacity as the Governor of the State of California. Proposition 65 requires the
28 Governor to "identify and consult with the state's qualified experts as necessary"

1 to create and maintain a list of chemicals known to the State of California to cause
2 cancer or reproductive toxicity. Cal. Health & Safety Code §§ 25249.8(a), (d).

3 14. Defendant/Respondent Linda Adams is sued in her official capacity as
4 the Secretary of California's Environmental Protection Agency ("CalEPA").
5 Secretary Adams has oversight authority over OEHHA, the State agency charged
6 with implementing Proposition 65.

7 15. Defendant/Respondent Dr. Joan E. Denton is sued in her official
8 capacity as Director of OEHHA. OEHHA is the agency charged with carrying out
9 the Governor's duties under Proposition 65, including identifying and listing, in
10 accordance with the statutory criteria, chemicals to be governed under Proposition
11 65 and adopting regulations implementing the statute.

12 JURISDICTION AND VENUE

13 16. This Court has jurisdiction over this action pursuant to Article VI,
14 Section 10 of the California Constitution because this case is a cause not given by
15 statute to other trial courts.

16 17. Venue is proper in this Court under California Civil Procedure Code
17 section 401 because the California Attorney General has an office in San Diego,
18 California, and under California Civil Procedure Code section 389 because
19 CalChamber's members manufacture, distribute, or sell products containing Labor
20 Code Chemicals in San Diego County.

21 BACKGROUND AND GENERAL ALLEGATIONS

22 Proposition 65 and its Implementing Regulations

23 18. The California Safe Drinking Water and Toxic Enforcement Act of
24 1986, California Health and Safety Code §§25249.5 *et seq.*, better known as
25 "Proposition 65," was an initiative measure adopted by the voters of the State of
26 California on November 4, 1986.

27 19. Section 25249.8(a) required the Governor to publish an Initial List of
28 chemicals "known to the state to cause cancer or reproductive toxicity" on or

1 before March 1, 1987, less than three months after Proposition 65 was passed.
2 Cal. Health & Saf. Code § 25249.8(a) "Such list" was to include "at a minimum
3 those substances identified by reference in Labor Code Section 6382(b)(1) and those
4 substances identified additionally by reference in Labor Code Section 6382(d)."
5 The Governor was further required to revise and republish the Proposition 65 List at
6 least once per year thereafter. *Id.*

7 20. According to Section 25249.8(b) a chemical is "known to the state to
8 cause cancer or reproductive toxicity" within the meaning of Proposition 65 only
9 if it meets one of the following three criteria:

10 if in the opinion of the state's qualified experts it has been
11 clearly shown through scientifically valid testing according
12 to generally accepted principles to cause cancer or
reproductive toxicity, or

13 if a body considered to be authoritative by such experts has
14 formally identified it as causing cancer or reproductive
toxicity, or

15 if an agency of the state or federal government has
16 formally required it to be labeled or identified as causing
cancer or reproductive toxicity.

17 Cal. Health & Saf. Code § 25249.8(b) (reformatted for clarity).

18 21. In the voter pamphlet published prior to the election, advocates for the
19 passage of Proposition 65 assured voters that chemicals would be added to the
20 Proposition 65 List only after consultation with the state's qualified experts:

21 Proposition 65's new civil offenses focus only on
22 chemicals that are *known to the state* to cause cancer or
23 reproductive disorders. Chemicals that are only suspect
are not included. The Governor must list these chemicals,
after full consultation with the state's qualified experts.

24 Voter Pamphlet, at 54 (emphasis added).

25 22. Accordingly, section 25249.8 further mandates that the Governor
26 "shall . . . consult with the state's qualified experts as necessary to carry out his
27 duties" under the listing provision. Cal. Health & Saf. Code § 25249.8(d)
28 (emphasis added).

1 23. Labor Code Chemicals include chemicals identified as known or
2 probable carcinogens by the International Agency for Research on Cancer
3 ("IARC"), substances identified as known or probable carcinogens by the National
4 Toxicology Program ("NTP"), and a few chemicals listed pursuant to the federal
5 Occupational Safety and Health Act ("OSHA"). OEHHA has also concluded that
6 chemicals identified by the American Conference of Government Industrial
7 Hygienists ("ACGIH") as a carcinogen or reproductive toxicant must also be
8 automatically listed under section 25249.8(a), not only on the Initial List, but on
9 every Proposition 65 List published thereafter, regardless of whether they meet
10 any of the section 25249.8(b) criteria of "known to the State of California to cause
11 cancer or reproductive toxicity."

12 24. Proposition 65's implementing regulations provide a streamlined
13 process for listing chemicals identified as carcinogens or reproductive toxicants
14 by agencies or other entities that have been identified by the state's qualified
15 experts as "authoritative bodies." Cal. Code Regs., tit. 27, § 25306.

16 25. IARC and NTP have been identified by the state's qualified experts as
17 "authoritative bodies" pursuant to section 25249.8(b). Accordingly, any IARC or
18 NTP chemicals can be -- and such chemicals have been -- listed pursuant to the
19 streamlined procedure established by regulation for so-called "authoritative
20 bodies" chemicals. Cal. Code Regs., tit. 27, § 25306(*l*). The state's qualified
21 experts considered, but rejected, designation of ACGIH as an authoritative body.

22 26. The Proposition 65 List, which is currently maintained and republished
23 annually by OEHHA, now includes nearly 800 chemicals. Cal. Code Regs., tit. 27,
24 §§ 25705, 25805. Some of the listed chemicals are widely found in nature and/or
25 ubiquitous in the environment; as a result, one or more Proposition 65 chemicals
26 exist in trace quantities in virtually every home and workplace, indoors and
27 outside, and in hundreds of thousands of consumer and industrial products ranging
28 from foods to clothing to heavy equipment.

1 Arcca Nut listing. In response to these comments, OEHHA stated the view that
2 section 25249.8(a) created a mandatory, continuing, and non-discretionary duty to
3 automatically add Labor Code Chemicals to the Proposition 65 List.

4 31. On June 15, 2007, OEHHA proposed to add four new
5 chemicals – gallium arsenide, hexafluoroacetone, nitrous oxide and vinyl
6 cyclohexene dioxide – to the Proposition 65 List based solely on their status as
7 Labor Code Chemicals. On August 15, 2007, along with several other interested
8 parties, CalChamber submitted written comments objecting to OEHHA’s
9 interpretation of section 25249.8(a) as basis to list nitrous oxide.

10 32. On May 16, 2008, OEHHA published a call for public participation in
11 a June 17, 2008 workshop to discuss a conceptual regulation setting forth and
12 implementing OEHHA’s interpretation that section 25249.8(a) created an ongoing,
13 mandatory, and non-discretionary duty to automatically add Labor Code Chemicals
14 to the Proposition 65 List.

15 33. The conceptual regulation published by OEHHA would bypass the
16 state’s qualified experts altogether and automatically list Labor Code Chemicals.
17 This means that there would be no process for taking into account scientific
18 information on the chemical, no matter how compelling, demonstrating that the
19 chemical does not meet the criteria for carcinogenicity or reproductive toxicity set
20 forth in the statute.

21 34. Thus, the conceptual regulation would prevent OEHHA from deciding
22 not to list a chemical for which even well-known scientific evidence *disproving*
23 *carcinogenicity or reproductive toxicity* was developed after the chemical was
24 designated as a Labor Code Chemical. Furthermore, once the chemical was added
25 to the Proposition 65 List pursuant to the conceptual regulation, it could not be
26 removed unless and until the chemical was also delisted by the entity (IARC, NTP,
27 or ACGIH) whose designation had resulted in the chemical’s status as a Labor
28 Code Chemical.

1 35. Following the workshop, numerous interested parties submitted written
2 comments to OEHHA, objecting to the conceptual regulation and OEHHA's
3 interpretation of section 25249.8(a) as creating an ongoing, mandatory, and non-
4 discretionary duty to automatically add Labor Code Chemicals to the Proposition
5 65 List.

6 36. On August 1, 2008, notwithstanding these public objections, OEHHA
7 published a notice that it had added gallium arsenide, hexafluoroacetone, nitrous
8 oxide and vinyl cyclohexene dioxide to the Proposition 65 List, based solely on
9 their status as Labor Code Chemicals. According to the notice, OEHHA's listing
10 of gallium arsenide was based on IARC'S designation of the chemical as a
11 carcinogen, while the listing of hexafluoroacetone, nitrous oxide and vinyl
12 cyclohexene dioxide were based on "Threshold Limit Values" by ACGIH.

13 37. As a result of OEHHA's misinterpretation of section 25249.8(a), these
14 Improperly Listed Chemicals were not reviewed by either of the Governor's two
15 panels of qualified experts - the Committee for the Identification of Carcinogens
16 ("CIC") or the Developmental and Reproductive Toxicant Identification
17 Committee ("DARTIC") - prior to listing. Nor were they subject to any other
18 safeguard, such as those provided in Proposition 65's implementing regulations
19 governing listing by the "authoritative bodies" mechanism, that would have
20 allowed the Director to determine that review by OEHHA staff or by either panel
21 was necessary based on information provided by the public during the listing
22 process. Cal. Code Regs., tit. 27, § 25306(l).

23 38. As of August 1, 2009, CalChamber's members who manufacture,
24 distribute, or sell products in California that contain even trace amounts of the
25 Improperly Listed Chemicals will be subject to enforcement actions by public or
26 private enforcers. Cal. Health & Saf. Code §§ 25249.6, 25249.7, 25249.10(b).

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1 **Impact of Proposition 65 Enforcement Actions on California Businesses**

2 39. According to documents maintained by the Office of the California
3 Attorney General, there were over 1,400 reported settlements resolving
4 enforcement actions under Proposition 65 between 2000 through 2007, resulting in
5 payment of over \$90 million dollars in settlement payments and massive legal fees
6 and burdens on companies doing business in California. This figure does not
7 account for additional costs to businesses associated with retaining counsel and/or
8 responding to the nearly 10,000 notices of intent to file Proposition 65
9 enforcement actions issued by private plaintiffs during the same period but that
10 did not end in published settlement or further litigation.

11 40. Should OEHHA act on its stated intent to continue to list Labor Code
12 Chemicals, CalChamber members will have to choose between putting a defensive
13 warning on any product or in any workspace containing any detectable amount of
14 such chemicals— even if the chemical should not have been listed at all or the
15 exposure poses a risk below the warning threshold— or face the risk of protracted
16 litigation of enforcement actions. In addition to placing unreasonable burdens on
17 CalChamber members and other affected businesses in California, such warnings
18 would be misleading to the consumer and contrary to the “clear and reasonable
19 warning” provision of the statute. Cal. Health & Saf. Code § 25249.6.

20 **NECESSITY OF DECLARATORY RELIEF**

21 41. An actual controversy has arisen and now exists in that Defendants
22 have added the Improperly Listed Chemicals to the Proposition 65 list based solely
23 on their status as Labor Code Chemicals. Moreover, while OEHHA has not yet
24 proceeded with promulgation of its conceptual regulation, it has publicly
25 expressed its intent to continue listing Labor Code Chemicals pursuant to the
26 belief that it is compelled to do so under its erroneous interpretation of section
27 25249.8(a)

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1 whether further review of a chemical by the state's qualified experts is necessary
2 in order to add it to the Proposition 65 List of chemicals "known to the state to
3 cause cancer or reproductive toxicity," and to consult with either the CIC or the
4 DARTIC where it determines that such consultation is necessary.

5 49. Cal Chamber contends and Defendants dispute that any future action
6 by Defendants to automatically add Labor Code Chemicals to the Proposition 65
7 List as carcinogens or reproductive toxicants without making such a determination
8 exceeds Defendants' authority under section 25249.8.

9 50. CalChamber is therefore entitled to and requests a declaratory
10 judgment as set forth below.

11 **SECOND CAUSE OF ACTION**

12 **(Petition for Writ of Mandamus)**

13 51. CalChamber re-alleges and incorporates the allegations of paragraphs
14 1 through 48 as if fully set forth herein.

15 52. CalChamber contends and the defendants dispute that the mandatory
16 duty to list Labor Code Chemicals set forth in section 25249.8(a) applied only to
17 the Initial List that the Governor was obligated to compile prior to March 1, 1987.

18 53. CalChamber contends and the defendants dispute that at all relevant
19 times, Defendants had a mandatory duty under Section 25249.8(d) to scrutinize
20 each chemical under consideration for listing to determine whether further review
21 of a chemical by the state's qualified experts is necessary in order to add it to the
22 Proposition 65 List of chemicals "known to the state to cause cancer or
23 reproductive toxicity," and to consult with either the CIC or the DARTIC where it
24 determines that such consultation is necessary or required by Proposition 65.

25 54. CalChamber contends and the defendants dispute that by failing to
26 utilize the state's qualified experts or to make a determination that such review
27 was unnecessary as to the Improperly Listed Chemicals, Defendants exceeded their
28 authority under section 25249.8 of Proposition 65.

1 55. CalChamber is therefore entitled to and requests a writ of mandamus as
2 set forth below.

3 **PRAYER FOR RELIEF**

4 Plaintiff CalChamber prays for the following relief:

5 1. That the Court enter a judgment declaring that Defendants may not
6 automatically list chemicals as "known to the state to cause cancer or reproductive
7 toxicity" based solely on their status as Labor Code Chemicals without first
8 determining whether review by or further consultation with the CIC or the
9 DARTIC is necessary to fulfill Defendants' mandatory duty under Section
10 25249.8(d).

11 2. That the Court issue a writ of mandate ordering Defendants to withdraw
12 from the Proposition 65 List all Improperly Listed Chemicals and not re-list such
13 chemicals on the Proposition 65 List until such time that they have satisfied their
14 obligations under section 25249.8.

15 3. That the Court issues an injunction preventing Defendants from further
16 listings that are inconsistent with the declaratory judgment ordered herein.

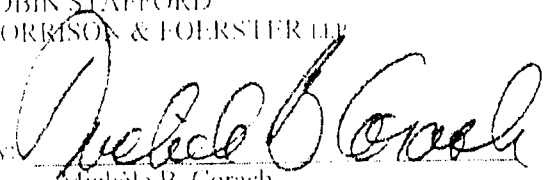
17 4. That the Court awards such other and further relief as the Court deems
18 just and proper.

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Respectfully submitted, this 20th day of November, 2008.

Dated: November 20, 2008

MICHELE B. CORASH
MARK ZEMBROWSKI
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By: 
Michèle B. Corash

Attorneys for Plaintiff/Petitioner
CALIFORNIA CHAMBER OF
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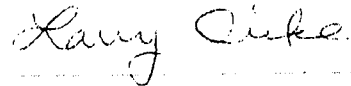
VERIFICATION

I, Larry Dicke, declare as follows:

I am Executive Vice President and Chief Financial Officer of Plaintiff/Petitioner California Chamber of Commerce and am authorized to execute this verification on its behalf. I have read the foregoing Complaint for Injunctive and Declaratory Relief and Verified Petition for Writ of Mandate and know its contents. The matters stated in the Complaint and Petition are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of November 2008 at Sacramento, California.



Larry Dicke