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DEPARTMENT OF JUSTICE



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December 21, 2017

William Verick
Klamath Environmental Law Center
1125 – 16th Street, Ste. 204
Arcata, CA 95501

RE: Proposition 65 Notice of Violation, AG No. 2017-02436

Dear Mr. Verick:

This letter provides notice of deficiencies in the above 60-day Notice/Certificate of Merit under Health and Safety Code section 25249.5 et seq. (“Proposition 65”):

Based on our review of the notice and the supporting information, we have concluded that the above notice is invalid as to occupational exposures. In our opinion, any lawsuit alleging occupational violations of Proposition 65 based on this notice would have no legal basis.

In order to bring an action to enforce Proposition 65’s warning requirements in the public interest, the plaintiff must, among other things, include a Certificate of Merit demonstrating that a sufficient basis exists for the claim. (Health & Saf. Code, §25249.7, subd. (d).) The copy of the Certificate of Merit served on the Attorney General’s Office must include “factual information sufficient to establish the basis for th[e] certificate” (*id.*, subd. (d)(1)), including the “facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action’ sufficient to establish . . . that there is merit to each element of the claim on which the plaintiff will have the burden of proof. . . .” (Cal. Code Regs., tit. 11, § 3102, subd. (c).) For occupational exposures, “sufficient facts, studies, or other data shall be submitted for each occupational exposure set forth in the notice, whether described by location of the employees, type of task performed, or product used by the employees.” (*Id.*, subd. (c)(2).) Where a 60-day Notice “does not attach a copy of the Certificate of Merit meeting the requirements of subsection 3101(b), the noticing party has no authority to commence an action pursuant to Health and Safety Code section 25249.7(d).” (*Id.*, § 3103, subd. (a).)

Our office is required to maintain the information provided in support of a Certificate of Merit in confidence. (Health & Saf. Code, § 25249.7, subd. (i).) Therefore, we will not disclose any of the supporting information you provided for the Certificate of Merit. However, nothing prevents our office from disclosing the absence of evidence to support an allegation in the 60-

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day notice, or from disclosing our opinion that the supporting information you provided concerning occupational exposures is not adequate. We have concluded that the allegations of occupational exposures in the above notice are not adequately supported, and that you therefore have no authority to commence an action based on the occupational allegations in this notice.

In a letter you sent me yesterday, which you were going to share with one of the alleged violators, Whole Foods Market, Inc., you wrote that "Mateel has no plan at this time to enforce [the alleged occupational] violations." That does not change the fact that you should not have made the occupational allegations in a 60-Day Notice in the first place, without submitting facts, studies, or other data to support the allegations. We express no opinion on any other aspect of the 60-Day Notice, or on the other issues raised in your December 20 letter.

Sincerely,



HARRISON M. POLLAK
Deputy Attorney General

For XAVIER BECERRA
Attorney General

Louis Kimball, President, KNB Restaurants, Inc.
John Mackey, CEO, Whole Foods Market, Inc.