

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

~~FILED~~ KP
~~ENDORSED~~

2013 APR 19 AM 11:14

SACRAMENTO COURTS
DEPT. #54

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

AMERICAN CHEMISTRY COUNCIL,

Plaintiff,

v.

OFFICE OF ENVIRONMENTAL HEALTH
HAZARD ASSESSMENT; GEORGE
ALEXEEFF, in his official capacity as director
of the Office of Environmental Health Hazard
Assessment,

Defendants.

CASE NO.: 34-2013-00140720

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF AMERICAN CHEMISTRY
COUNCIL'S MOTION FOR
PRELIMINARY INJUNCTION

Hearing Place: Department 54
Hearing Date: April 19, 2013
Hearing Time: 9:00 a.m.

Action Filed: March 1, 2013

~~PROPOSED~~ ORDER

1
2 Plaintiff American Chemistry Council's ("Plaintiff") Motion For Preliminary Injunction came
3 on regularly for hearing on April 19, 2013 at 9:00 a.m. Daniel M. Kolkey and Patrick Dennis of
4 Gibson, Dunn & Crutcher LLP appeared on behalf of Plaintiff American Chemistry Council, and
5 Susan S. Fiering of the California Attorney General's Office appeared on behalf of Defendants Office
6 of Environmental Health Hazard Assessment and George Alexeeff (collectively "Defendants").

7 Having reviewed Plaintiff's Motion, the Memorandum of Points and Authorities in Support
8 Thereof, the supporting declarations submitted in support thereof, the Reply submitted in support
9 thereof, the Opposition filed by Defendants, and the record in this case, and having heard and
10 considered the oral arguments of the parties at the hearing,

11 IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that for the reasons stated in
12 this Court's tentative ruling dated April 18, 2013, a copy of which is attached hereto as Exhibit A,
13 Plaintiff's Motion is hereby GRANTED. Defendants are directed to immediately remove Bisphenol
14 A from the Proposition 65 list, which they posted on their website on or around April 11, 2013, and
15 Defendants and their agents, servants, and assigns are preliminarily enjoined from listing, ~~or taking~~
16 ~~any further action in listing,~~ Bisphenol-A as a reproductive toxicant under Proposition 65 pursuant to
17 the authoritative body listing mechanism (Cal. Code Regs., tit. 27, § 25306), including but not limited
18 to publishing any listing of Bisphenol A in the California Regulatory Notice Register, until a final
19 decision in this action is rendered. ~~A bond in the amount of \$ _____ shall be filed by~~
20 ~~Plaintiff within 10 days of this order.~~

21
22 DATED: April 19, 2013




THE HONORABLE RAYMOND M. CADEI
JUDGE OF THE SUPERIOR COURT

101500763.2

EXHIBIT A

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7848 (Department 54) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

**Department 54
Superior Court of California
800 Ninth Street, 3rd Floor
Raymond M. Cadei, Judge
Diane Ahee, Clerk
C. Chambers/M. Martinez, Bailiff**

Friday, April 19, 2013, 9:00 AM

Item 1 **2010-00082287-CU-BC**

Stewart Title Guaranty vs. Michael Borkowski

Nature of Proceeding: Motion for Summary Judgment and/or Adjudication

Filed By: Robertson, Catherine Schlomann

Plaintiff Stewart Title Guaranty Company's motion for summary adjudication of the sixth cause of action (breach of contract) of its first amended complaint (FAC) against defendant Michael Borkowski is GRANTED.

Plaintiff's request for judicial notice is granted. Defendant's request for judicial notice is granted with the exception of Exhibits 2, 5 and 6.

The court notes that it granted Plaintiff's motion for summary adjudication on its unjust enrichment cause of action.

Plaintiff alleges that Defendant breached the "Approval of Charges" section contained within the Sales Escrow Instructions by failing to satisfy a lien on the property. The Approval of Charges section provides: "I hereby agree to pay any charges and any advances and expenses that are properly chargeable to me regardless of the consummation of this escrow."

The following facts in Plaintiff's separate statement are undisputed. On April 19, 2007, Elizabeth Borkowski and American Brokers Conduit, executed a note and Deed of Trust (DOT) in the amount of \$150,000. (Plaintiff's Separate Statement ("UMF") 1(a).) The deed of trust secured the debt on real property at 5006 Buffwood Way, Sacramento, CA. (Id. 1(b).) American Brokers Conduit's beneficial interest under the note and DOT was later assigned to Wells Fargo Financial (WFF). (Id. 1(c).) On January 17, 2008, Elizabeth Borkowski died and defendant, her son, was named the executor and personal representative of the Estate of Elizabeth Borkowski. (Id. 1(d).) On or about May 28, 2008, Defendant, as Executor of the Estate, executed a document entitled "Seller's Estimated Net Proceeds. (Id. 4.) Also on May 28, 2008, Defendants, as Executor of the Estate, executed Sales Escrow Instructions. (Id. 5.) On February 20, 2009, WFF notified Plaintiff that payments on the deed of trust had gone unpaid and threatened to foreclose the property. (Id. 1(f).) Plaintiff made payments to WFF totaling \$158,466.39. (Id. 1(h).)

In RE: Cory James Hensley

Nature of Proceeding: Petition for Change of Name

Filed By: Rouse, James W.

The petition is granted.

Item 14 **2013-00139976-CU-PT**

In RE: Feng Yun Liang

Nature of Proceeding: Petition for Change of Name

Filed By: Liang, Feng Yun

The petition is granted.

Item 15 **2013-00140720-CU-MC**

American Chemistry Council vs. Office Environmental Health

Nature of Proceeding: Motion for Preliminary Injunction

Filed By: Kolkey, Daniel M.

American Chemistry Council's ("ACC") motion for preliminary injunction is GRANTED.

In January 2013, the Office of Environmental Health Hazard Assessment issued a notice of intent to list bisphenol-A ("BPA") on the Proposition 65 list. The decision to list was based on the 2008 the National Toxicology Program's Center for Evaluation of Risks to Human Reproduction ("NTP-CERHR") report on Bisphenol A titled "NTP-CERHR Monograph on the Potential Human Reproductive and Developmental Effects of Bisphenol A." ("Report") The notice explained that "the report concluded that the chemical causes developmental toxicity in laboratory animals at high levels of exposure. This report satisfies the formal identification and sufficiency of evidence criteria in the Proposition 65 regulations." (Exhibit B to Complaint.)

ACC moves for a preliminary injunction "restraining and enjoining [Defendants, Office of Environmental Health Hazard Assessment, and its director, George Alexeeff (collectively "OEHHA") . . . from listing, or taking any further action in listing, bisphenol-A ("BPA") as a reproductive toxicant under Proposition 65." ACC has filed a complaint for a preliminary and permanent injunction and for declaratory relief.

As an initial matter, the Court disagrees with OEHHA that because it listed BPA on Proposition 65 on April 11, 2013, that the motion is moot. Although ACC requested that the Court enjoin OEHHA from "listing, or taking any further action in listing" BPA, the Court may still order OEHHA to remove BPA from the list.

"[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Davenport v. Blue Cross of California* (1997) 52 Cal. App. 4th 435, 446.) "The judicial resistance to injunctive relief

increases when the attempt is made to compel the doing of affirmative acts. A preliminary mandatory injunction is rarely granted, and is subject to stricter review on appeal. As our Supreme Court noted many years ago, the granting of a mandatory injunction pending the trial, and before the rights of the parties in the subject matter which the injunction is designed to affect have been definitely ascertained by the chancellor, is not permitted except in extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from its refusal. (*Id.* [internal citations omitted]; see also *Shoemaker v. County of Los Angeles* (1995) 37 Cal. App. 4th 618, 625.)

For the reasons set forth below, the Court finds the ACC has met this burden.

Proposition 65

Proposition 65 (Health and Safety Code §§25249.5-25249.13) requires the Governor to publish a list of chemicals “known to cause cancer or reproductive toxicity.” (H&S Code §25249.8(a).) There are four methods used to determine whether a chemical should be placed on the Proposition 65 list. Both parties agree that the only method at issue here is the “authoritative body listing” which requires a listing if “a body considered to be authoritative” has “formally identified” it as causing cancer or reproductive toxicity.” (H&S Code §25249.8(b).) OEHHA is the lead agency that determines which chemicals have been formally identified by an authoritative body as causing cancer or reproductive toxicity. (27 CCR 25306(c).) The “National Toxicology Program solely as to final reports of the National Toxicology Program’s Center for Evaluation of Risks to Human Reproduction is an authoritative body. (27 CCR 25306 (l)(3).)

A chemical is formally identified when OEHHA determines that “the chemical [1] has been included on a list of chemicals causing cancer or reproductive toxicity issued by the authoritative body; or [2] is the subject of a report which is published by the authoritative body and which concludes that the chemical causes cancer or reproductive toxicity; [3] or has otherwise been identified as causing cancer or reproductive toxicity by the authoritative body in a document that indicates that such identification is a final action.” (27 CCR 25306(d)(1).)

“As causing reproductive toxicity” means either “[1] studies in humans indicate that there is a causal relationship between the chemical and reproductive toxicity, or [2] studies in experimental animals indicate that there are sufficient data, taking into account the adequacy of the experimental design and other parameters such as, but not limited to, route of administration, frequency and duration of exposure, numbers of test animals, choice of species, choice of dosage levels, and consideration of maternal toxicity, indicating that an association between adverse reproductive effects in humans and the toxic agent in question is biologically plausible.” (27 CCR 25306(g)(1)-(2).)

Moreover, OEHHA “shall find that a chemical does not satisfy the definition of as causing reproductive toxicity” if scientifically valid data which were not considered by the authoritative body clearly establish that the chemical does not satisfy the criteria of subsection (g), paragraph (1) or subsection (g), paragraph (2).” (27 CCR 25306(h).)

Reasonable Probability of Prevailing on The Merits

ACC’s Position

ACC argues that it has a reasonable probability of prevailing on the merits because the Report did not identify BPA as causing reproductive toxicity. According to ACC, the Report merely concluded that “the possibility that [BPA] may alter human development cannot be dismissed.” (Report, p. 7.) ACC points to the following excerpt from the Report to support its argument:

- (1) There is insufficient evidence for a conclusion that BPA causes adverse developmental or reproductive effect in humans. (Report, p. 7, figure 2a.)
- (2) There is “[n]egligible concern for adverse effects” for “[r]eproductive toxicity in adult men and women.” (Report, p. 8, figure 3.)
- (3) There is “[m]inimal concern for adverse effects” for “[d]evelopmental toxicity for fetuses, infants & children effects on mammary gland & early puberty in females). (Id.)
- (4) There is [s]ome concern for adverse effects” for “[d]evelopmental toxicity for fetuses, infants & children (effects on the brain, behavior and prostate gland)”. (Id.) In reaching this conclusion, the Report noted that “these studies in laboratory animals provide only limited evidence for adverse effects on development and more research is needed to better understand their implications for human health. However, because these effects in animals occur at bisphenol A exposure levels similar to those experienced by humans, the possibility that bisphenol A may alter human development cannot be dismissed.” (Report, p. 38.)
- (5) With respect to the animal testing, the “administered dose levels...are far in excess of the highest estimated daily intake of bisphenol A in children... adults..., or workers.” (Report, P. 7.)
- (6) “Overall, the current literature cannot yet be fully interpreted for biological or experimental consistency or for relevance to human health.” (Report, p. 20.)

The ACC also provides the expert opinion of Anthony Scialli, M.D, who was personally involved with the development of the NTP-CERHE evaluation process. (Declaration of Scialli (“Scialli Decl.”) ¶5.) Dr. Scialli states that the Report does not identify BPA as toxic to reproduction. (Id. ¶ 25.) Moreover, “statements about the experimental animal studies are made only on the context of exposure and other conditions applicable to those studies *and* only as interim steps in the iterative evaluation process.” (Id. [emphasis in original].) He opines that the Report “cannot be treated as a conclusion that BPA causes reproductive toxicity.” (Id. ¶ 28.) Dr. Scialli also explains that “studies that have appeared since the completion of the [Report] have addressed the few end points for which there was an expression of anything but the level of concern. These studies, taken with the other data in the [Report], clearly establish that BPA is not toxic to reproduction using the criteria of Section 25306(g)(2) of the regulations governing Proposition 65.” (Id. ¶ 47.)

The ACC further notes, and OEHHA concedes, that in July 2009, the State’s “qualified panel of experts,” the Developmental and Reproductive Toxicant Identification Committee (“DART-IC”) evaluated the Report and the underlying animal studies and

unanimously determined that the experimental animal data were insufficient. The DART-IC declined to add BPA to the Proposition 65 list. (See Tab 26 to Appendix to Complaint.)

OEHHA's Position

In opposition, OEHHA contends that the Report formally identified the "hazard" of BPA as developmental toxicity based on animal studies, and then quantified the risk to humans as 'some concern' for certain effects on the fetus and children at current exposure levels.

OEHHA points to the following excerpt from the Report to support its argument:

- (1) There is "clear and convincing evidence of adverse developmental effects at 'high' doses of bisphenol A in the form of fetal death, decreased litter size . . . in rats . . . and mice." (Report, p. 7.)
- (2) There is [s]ome concern for adverse effects" for "[d]evelopmental toxicity for fetuses, infants & children (effects on the brain, behavior and prostate gland)". (Id.)
- (3) The NTP has "some concern for effects on the brain, behavior, and prostate glands in fetuses, infants and children at current human exposures to bisphenol A. (Report, p. vii.)

OEHHA further argues that prior cases have rejected the ACC's arguments and that OEHHA may list a chemical solely on animal data. OEHHA principally relies on *Exxon Mobil Corporation v. OEHHA* (2009) 169 Cal.App.4th 1264 to support its position. In *Exxon*, OEHHA's listing of Di-isodecyl Phthalate ("DIDP" on Proposition 65 was challenged. In the NTP-CERHR report on DIDP, the NTP-CERHR concluded that DIDP "possibly" affects human development or reproduction. (*Exxon, supra*, 169 Cal.App.4th at 1274.) It also noted that "studies with rats have shown that exposure to DIDP can cause adverse development effect." (*Id.*) The report also found that it was "reasonable to assume that the DIDP rodent data is relevant to humans." (*Id.* 1273.) The report recognized the lack of human data and the evidence of effects on laboratory animals and found the "scientific evidence sufficient to conclude that DIDP is a developmental toxicant and could adversely affect development if the levels of exposure were sufficiently high." (*Id.* 1274.) The report found a "minimal concern for developmental effects in fetuses and children." (*Id.* at 1275.) The appellate court denied Exxon's petition for writ challenging the listing. The court also found that OEHHA's finding of substantial evidence based on an extrapolation to humans from experimental studies was not an abuse of discretion. (*Id.* 1288.) In so holding, the appellate court stated that "so long as OEHHA is able to conclude on the basis of the authoritative body's report *and the underlying scientific record* that an authoritative body has identified a chemical as a reproductive toxicant and that the identification takes the regulatory criteria into account, OEHHA may list it." (*Id.* 1281 [emphasis in original].)

OEHHA does not address the ACC's expert, Dr. Scialli's opinions or the ACC's arguments that reports subsequent to the Report have established that BPA is not toxic to reproduction.

Analysis

Here, the Court agrees with the ACC that the Report did not identify BPA as causing reproductive toxicity. Unlike in *Exxon*, there was no definitive statement that BPA is a developmental toxicant and could adversely affect development or a statement indicating that it was reasonable to assume that the rodent data was relevant to humans. The ACC's expert, Dr. Scialli opines that the Report "cannot be treated as a conclusion that BPA causes reproductive toxicity." (Scialli Decl., ¶ 28.) Moreover, the Report reiterates on a number of occasions that there is insufficient evidence and more research must be conducted to understand the effects on humans. Indeed, the Report specifically states that the "current literature cannot yet be fully interpreted for biological or experimental consistency or for relevance to human health." (Report, p. 20 [emphasis added].)

Additionally, it is undisputed that in 2009 DART-IC determined that the experimental animal data were insufficient and declined to add BPA to the Proposition 65 list. As the ACC notes, this case is not like *Exxon*, and is unprecedented as OEHHA has never listed a compound after DART-IC rejected the listing based on the same report that OEHHA relied upon. Moreover, OEHHA does not dispute that other reports have established that BPA is not toxic to reproduction.

Given the above, for the purpose of this motion only, the Court finds that ACC has a reasonable probability of prevailing on the merits.

Balancing of Harms

ACC proffers a number of declarations to support its position that its members will be irreparably harmed by the listing of BPA. Dr. Steven Hentges states that the listing would be "unprecedented" because "no governmental agency has ever found that BPA is a reproductive health concern." (Declaration of Steven Hentges, PH.D ("Hentges Decl.") ¶6.) Additionally, the listing will impact all consumer products containing BPA, rather than a narrow range of specific products. (*Id.* 57.) The listing "will cause widespread and irreversible consumer deselection of products made from BPA ...; retailers will remove products from store shelves and stop selling such products ...; and consumer product manufacturers will move to reformulate their products ... which will adversely and irreparably impact members of the ACC, other chemical manufacturers, wholesalers and retailers involved with BPA related products, and the public, which will be deprived of the highly beneficial properties of polycarbonate and epoxy resins." (*Id.* 60.) Dr. Ingrid Martin explains that listing BPA "will create irreparable consumer misperceptions regarding the potential health impacts of BPA-made products," which, in turn, "will lead consumers to the determination that any product that contains any level of BPA is a health risk and must be avoided at all costs." (*Id.* ¶ 5.) "Once consumers form a negative view of the health impact of products, that negative view is difficult to overcome, if it can be overcome at all, even if there is a later decision to remove BPA from the Proposition 65 list." (*Id.* ¶ 11.)

In opposition, OEHHA argues that the listing itself will not cause irreparable harm. OEHHA explains that pursuant to Proposition 65, the warning requirement is not triggered until the chemical has been listed for twelve months and the discharge prohibition is not triggered for twenty months. (H&S Code §§ 25249.9(a); 25249.10(b).) OEHHA further argues that the "stigma" and "deselection" of products is pure speculation and any "stigma" has already been caused by the actions of others.

Unlike ACC, however, OEHHA has not provided any evidentiary support to demonstrate that “stigma” and “deselection” of products will not occur. OEHHA lastly argues that the Public and OEHHA will be harmed because if the Court agrees with OEHHA that BPA must be listed, there will be a “delay in providing information to the public, information that may be important for public health.” (Opposition, 11:18-20.)

The Court is not persuaded by OEHHA’s arguments that ACC’s members will not be harmed because of the twelve and twenty month waiting period for ACC’s member to comply with Proposition 65. Indeed, as Drs. Hentges and Martin opine, the listing alone will cause irreparable consumer misperceptions, consumer deselection, etc. The fact that the ACC members may not have to immediately comply with Proposition 65 has no relevance to consumer perceptions. Moreover, OEHHA’s argument that the purpose of the listing is to “provide information to the public, information that may be important for public health” actually supports the ACC’s argument that consumers will not purchase products containing BPA if it is listed. The implication of OEHHA’s argument is that when a consumer becomes aware of the listing, the consumer will choose not to purchase products with BPA. Otherwise, there would be little reason for the listing. Accordingly, the Court finds that the balancing of the harms favors ACC.

Thus, under the legal standard established by *Davenport v. Blue Cross*, 52 Cal.App.4th 336, the Court finds that the ACC has established a right to a mandatory injunction. The Court further finds that irreparable injury to the ACC’s members will flow from a refusal to grant the preliminary injunction requested.

OEHHA is directed to immediately remove BPA from the Proposition 65 list.

At the hearing, the parties should be prepared to advise the Court regarding the appropriate amount of an injunction bond, if any.

ACC shall submit a formal order pursuant to CRC 3.1312 for the Court’s signature.
