



("Plaintiffs") seek determination as follows:

Issue 1: That defendants/respondents Governor Arnold Schwarzenegger, et al. ("Defendants") have a mandatory duty to include on the Proposition 65 list of chemicals known to the state to cause cancer or reproductive harm any chemicals listed by the International Agency for Research on Cancer ("IARC") in "Group 3" ("not classifiable as to its carcinogenicity to humans") as to which IARC has determined that there is at least "sufficient" evidence of carcinogenicity in animals.

Issue 2: That Defendants have a mandatory duty to include on the Proposition 65 list of chemicals known to the state to cause cancer or reproductive harm any chemicals that have been listed as carcinogens by IARC, even if the IARC Monographs for those chemicals have not yet been published.

Subsequently, the Court concluded to stay its ruling on Issue 1, pending resolution of appellate review of a decision in *Styrene Information and Research Center v. OEHHA*, Sacramento Superior Court case number 34-2009-00053089-CU-JR-GDS ("SIRC") (3rd App. Dist. No. C064301).

#### ISSUE 2:

Plaintiffs argue that Defendants violate a mandatory statutory duty by refusing to place chemicals on the Proposition 65 list after they have been added to the IARC list (available on the IARC website), but before the monograph addressing these chemicals is published. As exemplars, Plaintiffs identify six specific chemicals within IARC Groups 2A and 2B that are not yet listed because the IARC monograph is still "in preparation."<sup>1</sup> In their Trial Brief, filed on June 22, 2009, Plaintiffs explained that after an IARC Working Group studies and

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<sup>1</sup> The six chemicals are identified as (1) Cyclopenta[cd] pyrene; (2) Nitrate or nitrite (ingested)(under conditions that result in endogenous nitrosation; (3) Benz[*j*]aceanthrylene; (4) Benzo[*c*]phenanthrene; (5) Magenta (mixtures composed of C.I. Basic Red 9, methyl fuchsin, dimethyl fuchsin or trimethyl fuchsin); and (6) Microcystin-LR.

evaluates a chemical and makes an assessment of carcinogenicity, it publishes a summary of the decision as to carcinogenicity, and the more extensive monograph explaining the listing decision in detail is often not published until years later. As the Court observed in the January Interim Order, however, the evidentiary record was sparse as to what information is made available regarding the agents added to IARC's updated lists at the time of listing, and prior to the publication of monographs. In response to this observation, and the related colloquy at the hearing on January 21, 2010, on January 29, 2010 Defendants submitted a Declaration of Martha Sandy Regarding IARC Publications.

In her declaration Dr. Sandy states that "[p]rior to the publication of the monograph, OEHHA can determine from the documents [posted by IARC on its website] whether the IARC Work Group has concluded there is sufficient evidence of carcinogenicity in humans or animals, and whether IARC has determined that there are mechanistic or other relevant data that either (1) justify categorizing a substance as Group 1 ('known human carcinogen'), even if there is not sufficient evidence in humans, (2) justify categorizing a substance as Group 2 ('possibly' or 'probably carcinogenic to humans'), even if there is not sufficient evidence in animals, or (3) justify categorizing a substance as Group 3 ('not classifiable as to carcinogenicity to humans'), even if there is sufficient evidence in animals, because mechanistic or other relevant data indicate that the mechanism of carcinogenesis observed in animals does not operate in humans." The Sandy declaration clarifies that Defendants do not contend that the available information

regarding newly listed agents is insufficient.

Rather, Defendants argue that (a) as to those substances listed pursuant to Labor Code §6382(d), since the HCS Communication Standard relies on the "IARC Monographs (latest editions)" (29 C.F.R. §1910.1200(d)(4)(ii)), OEHHA clearly must consult the monographs themselves before listing the chemicals<sup>2</sup>, and (b) as to chemicals listed pursuant to Labor Code §6382(b)(1), the substance described on the website list sometimes differs from the substance described in the monograph, so if OEHHA did not consult the monograph before listing the chemical it would risk adding chemicals to the Proposition 65 list that should not be there. Defendants' evidentiary support for this argument is in the form of a brief Declaration of Martha Sandy (filed on July 29, 2009), in which she states in conclusory fashion "the description of a substance on the IARC website summary list sometimes differs from the description of the substance in the monograph," and sets forth a single example. Defendant assert, in essence, that since their practice is "reasonable" and is consistent with the HCS, it should not be disturbed. The Court finds this argument to be unpersuasive.

The Court agrees with Plaintiffs that Defendants' practice cannot be reconciled with the clear language of Labor Code §6382, subdivision (b)(1), which is phrased in terms of "substances listed ... by [IARC]," with no reference to monographs. Under *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425, OEHHA has a mandatory duty to list any chemical for which IARC has concluded

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<sup>2</sup> Plaintiffs do not argue otherwise.

there is "sufficient" evidence of cancer in humans or animals. This includes those agents added to the IARC list, whether or not the final monograph has been published.

The Court notes that Plaintiffs initially directed their arguments on Issue 2 solely to chemicals in Groups 1, 2A and 2B, and this interim order applies only to chemicals in those groups. The Court will address the applicability of this interim order to chemicals in Group 3 together with its final order on Issue 1.

July 7, 2010  
Date

  
Robert B. Freedman  
Judge of the Superior Court