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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF ALAMEDA

18 GLOBAL COMMUNITY MONITOR, a non-profit  
California corporation, and SUNSHINE PARK  
19 LLC, a California limited liability company,

20 Plaintiffs,

21 v.

22 LUMBER LIQUIDATORS, INC., a Delaware  
corporation, and LUMBER LIQUIDATORS  
23 SERVICES, LLC, a Delaware corporation,

24 Defendants.  
25

Case No. RG14733979

ASSIGNED FOR ALL PURPOSES TO JUDGE  
GEORGE C. HERNANDEZ, JR.

DEPARTMENT 17

**PLAINTIFFS' TRIAL BRIEF**

Action Filed: July 23, 2014

Trial Date: March 4, 2016

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1                   **I.       INTRODUCTION**

2                   Defendant Lumber Liquidators, Inc. (“Defendant,” “Lumber Liquidators,” or “LL”) is violating  
3 California’s Proposition 65<sup>1</sup> (“Prop 65”) by knowingly exposing consumers and their families to cancer-  
4 causing formaldehyde without a clear and reasonable warning. Plaintiffs Global Community Monitor and  
5 Sunshine Park (collectively, “Plaintiffs” or “GCM”) have conducted more than 400 tests at certified  
6 laboratories proving that 26 of LL’s laminate flooring products (most made in China) vastly exceed the  
7 Prop 65 no significant risk level (“NSRL”) for formaldehyde (on average by about 600%).

8                   With no serious defense, LL initially responded by filing a SLAPP-suit (“strategic lawsuit against  
9 public participation”) against GCM on October 10, 2014, alleging trade libel, unfair business practices,  
10 intentional interference with prospective economic advantage, and violation of California securities law.  
11 GCM brought a special motion to strike pursuant to California’s anti-SLAPP law, CCP §425.16. The  
12 Court granted the motion on April 14, 2015, finding that the cross-complaint arose out of GCM’s free  
13 speech/petitioning activity and that Lumber Liquidators did not have a probability of prevailing on its  
14 claims. The Court dismissed LL’s frivolous filing and made GCM entitled to its attorney fees and costs.  
15 Accordingly, the cross-complaint is no longer at issue.

16                   Proposition 65 provides for private enforcement if the California Attorney General and enumerated  
17 public prosecutors do not initiate diligent prosecution within 60 days of service of notice of violations to  
18 the alleged violator and the public attorneys (H&S Code §25249.7(d)(1)), and provides for the assessment  
19 of civil penalties up to \$2,500 per day for each violation. H&S Code §25249.7(b)(1).

20                   Plaintiffs will show that Lumber Liquidators knowingly and intentionally sold laminate flooring  
21 that exposed consumers to formaldehyde, a chemical known to cause cancer, without a clear and  
22 reasonable warning under H&S Code §25249.6. Lumber Liquidators has never provided the Proposition  
23 65 “safe harbor” warning. For most of the time period at issue Defendant provided a confusing, small-  
24 print warning on the second or later page of an invoice. In a clumsy and ultimately ineffectual attempt to  
25 provide a warning, Lumber Liquidators went through six iterations of its invoice with varying  
26 presentations and wording of the pertinent language between 2010 and the present. The version of the  
27 warning that was in effect for the longest time period – December 2010 to January 2013 – stated:  
28 “WARNING: Installation of any wood flooring product may create wood dust and/or expose chemicals  
known by the State of California to cause cancer or reproductive harm.” The Court need only consider the  
wording of this statement to find that it is completely unclear. Like most of the other warnings at issue, the

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<sup>1</sup> “Prop 65” is found at Health and Safety Code §25249.5, *et seq.* All citations are to the Health & Safety Code unless otherwise noted.

1 language (i) focuses on the risks of “wood dust” during “installation,” (ii) improperly suggests uncertainty  
2 about whether the products are risky by using the term “may,” (iii) creates additional certainty by the use  
3 of “and/or,” and (iv) does not indicate whether Lumber Liquidators’ products are themselves the source of  
4 any listed chemical. At the time this warning was in effect, and indeed until after this lawsuit was filed,  
5 there was no in-store signage, which is the warning method on which Lumber Liquidators primarily relies.  
6 Given the lack of clarity of the invoice language on its face, that is all the Court need address to find that  
7 Plaintiffs have met their burden. But this and other warnings were infected with multiple other problems  
8 as well, including that they are obscured in invoice terms and conditions or internet scroll-down boxes,  
9 and fail to identify or directly link to the product in question.

10 Plaintiffs will prove at trial that Defendant manufactures, packages, distributes, markets, or sells in  
11 California 26 laminate flooring products (“Products”) containing formaldehyde (gas).<sup>2</sup> Although  
12 Defendant claims that these products do not exceed the No Significant Risk Level (“NSRL”) under H&S  
13 Code §25249.10(c) and therefore need not include a warning, Defendant will be unable to meet their  
14 burden under this provision. Lumber Liquidators’ main expert, Dr. Lorenz Rhomberg, calculates that the  
15 company’s laminate flooring Products expose consumers on average to 278 micrograms per day (ug/day)  
16 of formaldehyde. (Rhomberg Trial Dec. Ex. 2, p.1 (278 ug/day)). This is more than 600% of the  
17 Proposition 65 no significant risk level (“NSRL”) for formaldehyde of 40 ug/day. This should be the end  
18 of the story.

19 However, Dr. Rhomberg posits that the formaldehyde levels will decay over various time periods.  
20 Dr. Rhomberg presents three “preferred” models for this decay. ***Under Model #1, Dr. Rhomberg admits***  
21 ***that the formaldehyde levels in consumers’ homes remain above the 40 ug/day NSRL for 10.4 years.***  
22 (Rhomberg Depo. 2, 175:4-176:3 (Feb. 5, 2016)). ***Under Model #2 (based on raw unlaminated board,***  
23 ***not the Products in this case), Dr. Rhomberg admits that formaldehyde levels remain above the 40***  
24 ***ug/day NSRL for 5.5 years.*** (Rhomberg Depo. 1, 239:9-242:22 (Nov. 23, 2015)). ***Under Model #3, Dr.***  
25 ***Rhomberg admits that formaldehyde levels in the home remain above 40 ug/day for the entire 70 year***  
26 ***period, never dropping below 69 ug/day.*** (Rhomberg Depo. 2, 186:6-13 (Feb. 5, 2016)). Dr. Rhomberg  
27 gets around this inconvenient problem by hypothesizing that most people will move out of their homes in  
28 9 or 30 years. Rhomberg Trial Dec. ¶¶108-109. As a matter of law, Lumber Liquidators fails to meet its  
burden to prove the affirmative defense that the exposures fall below the NSRL. Under each and every  
scenario, even assuming Defendant’s decay models are correct (which they are not), Lumber Liquidators

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<sup>2</sup> Plaintiffs alleged violations from 27 products but will not pursue at trial their claims with respect to one of the 27, which is 12 mm Dream Home Ispiri Chimney Tops Smoked Oak Laminate Flooring.

1 flooring exposes consumers to formaldehyde levels far above the NSRL for the entire 1-year Proposition  
2 65 statute of limitations for penalties, and the entire 3-year statute of limitations for injunctive relief.  
3 *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 443, n.4.  
4 Furthermore, under Model #3, formaldehyde levels in the home remain well above the NSRL for the  
5 entire 70-year period. It simply cannot be a valid defense to posit that while levels remain above the  
6 NSRL for 70-years, people can avoid this risk if they evacuate their homes. The courts should avoid such  
7 absurd constructions of a statute intended to protect public health.

8 Furthermore, as will be discussed below, Lumber Liquidator’s decay rate testing is “junk science.”  
9 For instance, LL’s laboratory, Benchmark International (“Benchmark” or “BMI”) failed to follow any  
10 established test method, and instead invented its own test methods after 60 Minutes ran a major story on  
11 this case. “Only scientifically approved methods and procedures may be followed to quantify an exposure  
12 under the Act [Prop 65].” *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 167. BMI’s made-up test  
13 fails to comply with both generally accepted scientific methods and widely accepted formaldehyde  
14 chamber testing protocols and thus fails to represent any plausible “real world” scenario. As such, the test  
15 data must be disregarded. *As You Sow v. Conbraco Indus.* (2005) 135 Cal.App.4th 431, 452-3. Further,  
16 even if BMI’s fabricated chamber testing configuration were valid, BMI’s measurements are neither  
17 accurate nor precise, as Mr. Offermann’s declaration makes clear. Offermann Dec. ¶¶42-59.

18 By contrast, Plaintiffs’ two certified laboratories conducted hundreds of tests in strict compliance  
19 with the official California Department of Public Health (“CDPH”) test method of composite wood  
20 products. Plaintiffs’ extensive testing shows that the formaldehyde levels released from the 26 laminate  
21 flooring Products at issue are far above levels requiring cancer warnings under California law. Although  
22 Lumber Liquidators’ improper averaging of exposures over 70-years is irrelevant as a matter of law,  
23 Plaintiffs have also conducted more than 300 tests showing that formaldehyde levels do not decay and will  
24 remain far above the Proposition 65 NSRL for the entire 70-year period. Wescott Dec. ¶70; Sears Dec.  
25 ¶¶91, 97, 106, 113, 119, 124. Thus, Lumber Liquidators fails to meet its burden to establish the NSRL  
26 affirmative defense.

27 Atmospheric Scientist Camille Sears, MS, calculated exposure levels under all valid California  
28 agency methodologies. Ms. Sears calculated that under every published methodology, Lumber  
Liquidators’s Products expose average consumers to levels of formaldehyde many times above the  
Proposition 65 No Significant Risk Level. Ms. Sears’ calculations are summarized in the following table.

Table 1: Ms. Sears Summary of Conclusions

Method	Calculated Quantity	Result	NSRL	Multiple of NSRL
A	Daily exposure (average)	227.6 µg/day	40 µg/day	5.7x
B	Daily exposure (CDPH)	1,238 µg/day	40 µg/day	31.0x
C	Excess cancer risk (Inhalation Unit Risk)	68.3 per million	10 per million	6.8x
D	Excess cancer risk (OEHHA 95/80 <sup>th</sup> inhalation)	152.7 per million	10 per million	15.3x
E	Excess cancer risk (OEHHA Mean inhalation)	108.6 per million	10 per million	10.9x

## II. STATUTORY BACKGROUND

Prop 65 provides: “No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving a clear and reasonable warning to such individual . . .” (§25249.6). Prop 65 does not control, specifically limit or absolutely prohibit exposures. Instead, Prop 65 provides the public with information needed to make educated decisions, if those exposures exceed established levels. Armed with this knowledge, regulated businesses can decide whether to reduce the exposures so as to avoid the warning obligation or continue business as usual and provide the warning. Members of the public faced with a warning can make informed decisions about whether to allow themselves to be exposed to toxic chemicals, or demand that companies provide products and services and otherwise conduct their activities in ways that do not expose them to toxic chemicals. See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 461-62 (“*SmileCare*”); *Consumer Cause, Inc. v. Weider Nutrition Int’l, Inc.* (2001) 92 Cal.App.4th 363, 370 (“*Weider*”) (“Prop 65 also tells businesses: Don’t expose us to any of the[se] . . . chemicals without first giving us a clear warning. We each have a right to know, and to make our own choices about being exposed to these chemicals.”). By forcing companies to disclose the presence of toxic chemicals, Prop 65 aims to deter the use of those chemicals. *SmileCare*, 91 Cal.App.4th at 461. Courts have been given clear instructions in adjudicating the issues under Prop 65 from our Supreme Court.

Chemicals are added to the Prop 65 list by the Governor if “in the opinion of the state’s qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer.” §25249.8(b). Under Prop 65, the plaintiff bears the *prima facie* burden to show a *detectable* exposure to a listed chemical without a clear and reasonable warning. See §25249.6; *SmileCare*, 91 Cal.App.4th at 474. If the plaintiff carries its burden, the defendant is in violation of Prop

1 65 unless it proves an affirmative defense. Chief among these is Prop 65’s exemption for an exposure that  
2 “poses no significant risk” of cancer. §25249.10(c). The regulations establish the “no significant risk”  
3 level to be a level of exposure that would result in less than 10 cases of cancer for every million people  
4 exposed (“ten in a million”). 27 CCR §25703(b). The statute creates a health-protective standard, stating  
5 that a company can avoid posting a warning only if it “can show that the exposure poses no significant  
6 risk *assuming lifetime exposure at the level in question.*” §25249.10(c) (emphasis added). The  
7 regulations define “lifetime exposure” to be “seventy years.” 27 CCR §25721(c). For certain chemicals,  
8 including formaldehyde, the Office of Environmental Health Hazard Assessment (“OEHHA”) has  
9 published No Significant Risk Levels (“NSRLs”). The NSRL for formaldehyde is 40 micrograms per day  
10 (“µg/day”). 27 CCR §25705(c)(2). Thus, if a company exposes consumers to formaldehyde at levels  
11 above 40 µg/day, it must provide a clear and reasonable cancer warning.

12 The statute puts the burden squarely on defendants to prove that the specific exposure level in  
13 question is below the “no significant risk” level in order to meet the affirmative defense. “In any action  
14 brought to enforce [Prop. 65], the *burden of showing that an exposure meets the criteria of this*  
15 *subdivision shall be on the defendant.*” §25249.10(c) (emphasis added). Enforcers need prove only that  
16 there is some exposure, in *any* detectable amount. Unlike a toxic tort the plaintiff need not establish  
17 exposure above any specific threshold, indeed they need not establish any specific level at all. Any  
18 detectable level will suffice. In sharp contrast, it is a defendant that must establish that the exposure at the  
19 “*level in question*” is below the NSRL. The *SmileCare* court explained that once plaintiffs make their  
20 *prima facie* case that defendant has exposed people to a listed chemical without warning, that:

21 put[s] the burden on defendants to make a prima facie showing that the level of exposure was  
22 within the limits set by the Act. . . [Plaintiff] did not have to fund scientific studies or collect  
23 medical data to establish the [no effect level] *or to gauge the level of exposure at defendants’*  
24 *offices.* Nor did it have to hazard a guess. Under the Act, *defendants, not [plaintiff], had to*  
25 *contend that the exposure was at a specific level . . . Defendants were required . . . to present*  
26 *evidence to prove the exposure . . . was . . . below the [no effect level].*

27 91 Cal.App.4th at 474-76 [emphases added and omitted].

### 28 **III. FACTUAL BACKGROUND**

#### **A. Lumber Liquidators’ Chinese Laminate Flooring.**

29 This case concerns 26 “laminate flooring” products manufactured for and sold by Defendant  
30 Lumber Liquidators, most of which were produced in factories in China. Sears Dec. Ex. A; Wescott Dec.  
31 ¶10. Laminate flooring is an inexpensive alternative to hardwood flooring designed to look like hardwood,  
32 but with a thin top layer that is a plastic photograph of wood (not a veneer of hardwood). Wescott Dec.  
33 ¶14.

1 The laminate flooring Products at issue are composed like a “formaldehyde sandwich.” The “tuna  
2 salad” in the middle is what is commonly referred to as medium density fiberboard (“MDF”) (sometimes  
3 called high density fiberboard (“HDF”). *Id.* ¶12. The MDF is produced by applying a resin glue  
4 (“mayonnaise”) to wood fibers (“tuna”), which is then compacted in a press, heat is applied, and the glue  
5 is “cured” (“panini press”), thereby producing a solid panel. *Id.* ¶13. The formaldehyde emissions at issue  
6 in this action originate from the urea formaldehyde (“UF”) glue (the “mayonnaise” in the “tuna salad”)  
7 used to hold the MDF together. *Id.* The bottom and top layers of the laminate wood flooring (the “bread”  
8 part of the sandwich) are laminates. *Id.* ¶¶13, 14. The laminate on the top is a piece of plastic with a  
9 photographic image designed to look like wood and a plastic wear-resistant layer, while the bottom  
10 laminate side contains a water-resistant moisture barrier, often with a padding material layer. *Id.*; Verhey  
11 Dec. ¶7. These laminated surface layers that cover the top and bottom of the MDF core of each plank  
12 allow very little formaldehyde to diffuse through the laminate layer into the air. Offermann Dec. ¶18.

13 When laminate flooring is installed in a home, individual planks “click” together, like pieces  
14 of a puzzle. This process results in “seams” where each board is attached to the next board with  
15 “click joints” on the side edge of each board, and “butt joints” on the end of each board. Offermann  
16 Dec. ¶¶18-20. A similar type seam is produced at the edge of a room, where a board is cut to fit the  
17 room. *Id.* It is well recognized that formaldehyde emits from laminated flooring primarily through  
18 these seams and edges. Offermann Dec. ¶¶18, 28; Wescott Dec. ¶¶94-96. For example, LL’s expert  
19 Dr. Gregory Smith testified:

20 Q: where would the formaldehyde be emitted from the product? Would it be through the  
21 laminate layer or the edges?

22 A: It would only be through the edges. (Smith Depo. 39:14-17).

23 \*\*\*

24 Q: Isn't the seam, though, much larger than size of a formaldehyde molecule?

25 A: Giant compared to a formaldehyde molecule. There will be spots where they touch,  
26 absolutely, and have bigger contact. When you put the two planks together, they will come in  
27 touch, so there will be molecular contacts at some one point, where one piece will impinge on  
28 other. But there will be many areas along that length where you have tiny gaps. I will expect  
formaldehyde molecules to be able to come up, because they are quite small.

(Smith Depo. 41:12-22).

Different MDF factories use different resin formulations with different formaldehyde to urea ratios  
(F/U ratio), and formulations will cause different formaldehyde emission rates. Wescott Dec. ¶¶13, 93.

1 Generally, less expensive resins (with higher formaldehyde to urea ratios) result in higher formaldehyde  
2 emission rates. *Id.*

3 Lumber Liquidators’ obtained the flooring Products at issue in this case from at least six different  
4 Chinese “mills” or factories. Wescott Dec. ¶¶15, 31. LL has stated that it routinely changes mills. *Id.* ¶93.  
5 In particular, LL has stated that it changed most of its Chinese mills in 2011-2013 to reduce costs, and  
6 generally changes 15-30% of its mills annually. Plaintiffs’ Exhibits 665 at 20385, 666.

7 **B. Formaldehyde is a Known Carcinogen and Serious Health Risk.**

8 Formaldehyde has been listed as a chemical known to the state to cause cancer since 1988. 27  
9 CCR §27001; [http://oehha.ca.gov/prop65/prop65\\_list/files/P65single120415.pdf](http://oehha.ca.gov/prop65/prop65_list/files/P65single120415.pdf). The California Air  
10 Resources Board (“CARB”) has identified formaldehyde as one of the most serious indoor air pollutants,  
11 and has concluded that it causes cancer, eye, nose and throat irritation, headache, allergic reactions,  
12 nausea, aggravated asthma and decreased lung function. Plaintiffs’ Exhibit 807 at 1368. CARB has  
13 identified composite wood products as a primary source of formaldehyde pollution in indoor air.  
14 Plaintiffs’ Exhibit 807 at 1431.

15 One of GCM’s experts, Francis Offermann, PE, CIH, was Principal Investigator for a report on  
16 indoor air pollution published by the CARB and the California Energy Commission in 2009. Plaintiffs’  
17 Exhibit 841. That report found that formaldehyde is the indoor air pollutant with the most significant  
18 health risk, and composite wood products (which include laminate flooring) were the major source of the  
19 observed elevated indoor formaldehyde concentrations. Offermann Dec. ¶10. One of the outcomes of that  
20 study was CARB’s adoption of the Formaldehyde Air Toxics Control Measure (“ATCM”) limiting  
21 formaldehyde emissions from composite wood products’ MDF and other cores (the “tuna salad”). *Id.*

22 TECO Labs, a CARB-certified laboratory, tested Lumber Liquidators’ Products and found that  
23 they exceeded the CARB ATCM formaldehyde levels by more than five times on average, and in some  
24 cases by more than 17 times. Verhey Dec. ¶14 and Ex. B. Dr. Steven Verhey, of TECO, states that “some  
25 of the tests in Exhibit B [of LL Products] show formaldehyde emissions levels higher than I had ever seen  
26 before.” *Id.* ¶14. By contrast, TECO tested US-made products and found that formaldehyde levels were far  
27 below the CARB ATCM limit (less than 50%). *Id.* ¶15.

28 **IV. PLAINTIFFS’ PRIMA FACIE CASE**

**A. Lumber Liquidators Is Knowingly And Intentionally Exposing People To  
Formaldehyde**

Proposition 65 provides: “No person in the course of doing business shall knowingly and  
intentionally expose any individual to a chemical known to the state to cause cancer or reproductive

1 toxicity without first giving clear and reasonable warning to such individual . . . .” H&S Code §25249.6.  
2 Under Proposition 65, “knowingly” means simply “knowledge of the fact that a discharge of, release of, or  
3 exposure to” a listed chemical has occurred. 27 CCR §25102(n). “No knowledge that the discharge,  
4 release or exposure is unlawful is required.” 27 CCR §25102(n). “Intentionally” means only that there  
5 was some human conduct on the part of the defendant that caused the exposure. *See Nicolle-Wagner v.*  
*Deukmejian* (1991) 230 Cal.App.3d 652, 660.

6 There can be no question that the 26 Products contain formaldehyde. *E.g.*, Verhey Dec. Ex. B.  
7 Further, there can be no question that Lumber Liquidators knew that the products at issue contain  
8 formaldehyde. *E.g.*, Plaintiffs’ Exhibits 573, 574; Defendant’s Response to Plaintiffs’ Requests for  
9 Admission, Set One, Nos. 1 and 2. And Lumber Liquidators admits that it intentionally sold the products  
10 while knowing that they contain formaldehyde. *Id.* No. 3.

11 Accordingly, there can be no other conclusion but that Lumber Liquidators knowingly and  
12 intentionally exposed people to formaldehyde, a chemical known to the state of California to cause cancer.

### 13 **B. Lumber Liquidators Has Not Warned Of The Risk Posed By The Products**

14 To comply with Proposition 65, businesses selling listed products must “giv[e] [a] clear and  
15 reasonable warning” to individuals prior to exposure. H&S Code §25249.6. The purpose of Proposition 65  
16 is “to facilitate the *notification* of the public of potentially harmful substances, so informed decisions may  
17 be made by consumers on the basis of disclosure.” *DiPirro*, 153 Cal.App.4th at 183 (emphasis in original).

18 Proposition 65 provides for a “safe harbor” warning that is deemed to be “clear and reasonable”  
19 under the statute. *See, e.g., Physicians Cmte. for Responsible Medicine v. McDonald’s Corp.* (2010) 187  
20 Cal.App.4th 554, 570 (“*PCRM*”) (effect of the “safe harbor” provisions is “[i]f a warning message in the  
21 words specified in the regulation is given *in one of the methods specified by the regulation*, the warning  
22 shall be deemed to be clear and reasonable”) (quoting *Envtl. Law Found. v. Wykle Research, Inc.* (2005)  
23 134 Cal.App.4th 60, 66) (internal quotation marks omitted; emphasis added).

24 For purposes of assessing clarity and reasonableness, the Court asks whether the warnings are  
25 “‘likely to be read and understood by an ordinary individual under customary conditions of purchase or  
26 use.’” *Am. Meat Institute v. Leeman* (2009) 180 Cal.App.4th 728, 760 (quoting 27 CCR §25603.1(c));  
27 *accord Physicians Cmte. For Responsible Medicine v. Applebee’s Int’l, Inc.* (2014) 224 Cal.App.4th 166,  
28 178. The determination whether an ordinary individual would find the language of a warning “clear” is  
made by the fact-finder and requires reference to nothing more than the language of the warning itself. *See*  
*PCRM*, 187 Cal.App.4th at 572 (assessing clarity of proposed warning language without reference to  
expert testimony or other extrinsic evidence). Indeed, the Attorney General’s regulation governing review

1 of Proposition 65 settlements provides that determination of whether warning language is “clear and  
2 reasonable” requires only “the text and appearance of the warning, along with a sufficient description of  
3 where the warning will appear in order to ascertain whether the warning will be ‘reasonable conspicuous’  
4 under the circumstances of purchase or use of the product.” 11 CCR §3232(a).

### 5 **1. Lumber Liquidators’ Warnings**

6 From December 2010 to the present, Lumber Liquidators has used three methods to communicate  
7 its warnings to customers. Ward Depo. 53:6-24; *id.* 54:9-14. First, beginning in December 2010 and  
8 continuing to the present, Lumber Liquidators has provided a warning among the terms and conditions on  
9 the second or later page of each multi-page invoice provided to California customers at the time of  
10 purchase in the store. Second, the company has made the same warning, placed in the same terms and  
11 conditions, available to customers making purchases on-line through a text box in which the warning is  
12 not visible without scrolling down the page. Third, beginning in November 2014 and to the present,  
13 Lumber Liquidators has posted signs bearing a non-product-specific warning in its California stores.  
14 Accordingly, from December 2010 to November 2014 – four months after the complaint was filed – the  
15 only method by which in-store customers received a warning was on the boilerplate terms and conditions  
16 at the time of purchase. Each of Lumber Liquidators’ warnings is described below.

#### 17 **a. Invoice Warnings**

18 Until late-November 2014, the only warnings Lumber Liquidators provided to customers who  
19 purchased products in-store were placed in the purchase terms and conditions included on multi-page  
20 invoices given to customers at the time of purchase. *See* Ward Depo. 39:5-22, 53:6-14. For the vast  
21 majority of the relevant time period, the warning focused on installation of the flooring and made no  
22 mention of whether the flooring products contained any listed chemicals or of any risk posed by the  
23 presence of the flooring after installation. The information presented on these invoices, including the  
24 warning, was boilerplate – at any given time, every Lumber Liquidators customer purchasing products  
25 that included at least one wood flooring product (whether the Products at issue in this case or other  
26 products sold by Lumber Liquidators) in California would receive an invoice bearing identical terms and  
27 conditions. Ward Depo. 40:2-21. The table below identifies the different iterations of Lumber  
28 Liquidators’ warning provided on customer invoices, including the text of the entire “warning” section in  
which the warning appears, which in many instances contains extensive, unrelated information concerning  
the risks posed by lifting and transporting heavy objects.

Form	Text of Warning (emphasis in original)	Dates <sup>3</sup>	Example
1	“WARNING: Installation of any wood flooring product may create wood dust and/or expose chemicals known by the State of California to cause cancer or reproductive harm.”	Dec. 2010 to January 2013	Plaintiffs’ Exhibit 1222
2	“ <b>Warning:</b> Products are heavy, awkward, and can exceed vehicle’s load capacity. Buyer should use safe lifting techniques and minimum of two able-bodied people. Improper loading, unloading and transporting of products can result in serious injury, vehicle damage, impaired visibility or interference with driving, decreased or loss of vehicle stability and/or product falling from vehicle. Installation of any wood flooring product may create wood dust and/or expose chemicals known by the State of California to cause cancer or reproductive harm.”	Jan. 17, 2013 to Aug. 13, 2013	Plaintiffs’ Exhibit 908
3	“ <b>Warning:</b> Products are heavy, awkward, and can exceed vehicle’s load capacity. Buyer should use safe lifting techniques and minimum of two able-bodied people. Improper loading, unloading and transporting of products can result in serious injury, vehicle damage, impaired visibility or interference with driving, decreased or loss of vehicle stability and/or product falling from vehicle. Installation of this product may create wood dust and/or expose chemicals known by the State of California to cause cancer or reproductive harm.”	Aug. 14, 2013 to Aug. 22, 2013	Plaintiffs’ Exhibit 879
4	“ <b>Warning:</b> Products are heavy, awkward, and can exceed vehicle’s load capacity. Buyer should use safe lifting techniques and minimum of two able-bodied people. Improper loading, unloading and transporting of products can result in serious injury, vehicle damage, impaired visibility or interference with driving, decreased or loss of vehicle stability and/or product falling from vehicle. Installation may create wood dust and/or product may contain chemicals known by the State of California to cause cancer or reproductive harm.”	Aug. 23, 2013 to Jan. 20, 2014	Plaintiffs’ Exhibit 881

<sup>3</sup> The date ranges in Table 1 are drawn from Lumber Liquidators’ Supplemental Response to Plaintiff GCM’s Special Interrogatories (Set One). The warning identified as #2 in Table 1 does not appear in Lumber Liquidators’ Supplemental Interrogatory response because the Proposition 65 warning sentence is identical to that in warning #1. Warning #2 is included as a separate item because in January 2013 the Proposition 65 warning sentence was embedded in a paragraph addressing other risks posed by Lumber Liquidators’ products.

5	<p><b>“Warning:</b> Products are heavy, awkward, and can exceed vehicle’s load capacity. Buyer should use safe lifting techniques and minimum of two able-bodied people. Improper loading, unloading and transporting of products can result in serious injury, vehicle damage, impaired visibility or interference with driving, decreased or loss of vehicle stability and/or product falling from vehicle. Installation of any wood flooring product may create wood dust and/or expose chemicals known by the State of California to cause cancer or reproductive harm.” (Same as #2.)</p>	Jan. 22, 2014 to June 2, 2014	Plaintiffs’ Exhibit 880
6	<p><b>“Warning:</b> Products are heavy, awkward, and can exceed vehicle’s load capacity. Buyer should use safe lifting techniques and minimum of two able-bodied people. Improper loading, unloading and transporting of products can result in serious injury, vehicle damage, impaired visibility or interference with driving, decreased or loss of vehicle stability and/or product falling from vehicle.”</p> <p><b>“Warning:</b> Product contains chemicals known to the State of California to cause cancer and/or birth defects or other reproductive harm.”</p>	June 2, 2014 to Present	Plaintiffs’ Exhibit 924

**b. Online Warnings For Internet Purchases**

Since Lumber Liquidators began providing Proposition 65 warnings on invoice terms and conditions in December 2010, the same terms and conditions have been made available to customers making purchases over the internet and who may have scrolled down within a thin text box to discover the language described above. Ward Depo. 70:3-6, 184:21-24.

**c. In-Store Warning Signs**

For the first time in November 2014, Lumber Liquidators posted in-store signs warning customers of a cancer risk posed by its products generally. Ward Depo. 79:10-25. The company sent an email to California stores asking them to post a temporary warning sign on “each register facing the customer and one in the employee break room/office area.” Plaintiffs’ Exhibit 571. The signs read: “NOTICE: This store and the products sold here contain detectable amounts of chemicals known to the State of California to cause cancer, and birth defects or other reproductive harm.” Plaintiffs’ Exhibit 570.

In December 2014, Lumber Liquidators sent each California store an email and mailing with permanent warning signs to be posted in California stores, as well as a document describing placement of the signs. Plaintiffs’ Exhibits 1230, 565. Signs on the register, break room, and front door use identical language: “WARNING: This store and the products sold here contain detectable amounts of chemicals

1 known to the State of California to cause cancer, and birth defects or other reproductive harm.” Plaintiffs’  
2 Exhibit 1232. A sign on the loading dock states: “WARNING: This facility and the products stored here  
3 contain detectable amounts of chemicals known to the State of California to cause cancer, and birth  
4 defects or other reproductive harm.” *Id.*

5 Nothing in any Lumber Liquidators store links the warnings placed on in-store signs with  
6 particular products sold in the store. Ward Depo. 167:4-7.

## 7 **2. Lumber Liquidators Did Not Provide Safe Harbor Warnings**

8 OEHHA’s implementing regulations identify “safe harbor” warnings that are deemed to satisfy the  
9 “clear and reasonable” standard. “Warnings for consumer products exposures that include the methods of  
10 transmission and the warning messages as specified by this section shall be deemed to be clear and  
11 reasonable.” 27 CCR §25603(a); *PCRM*, 187 Cal.App.4th at 570. For consumer products containing  
12 carcinogens, to qualify for the safe harbor, “[t]he warning message *must* include the following language: .  
13 . . . WARNING: This product contains a chemical known to the State of California to cause cancer.” 27  
14 CCR §25603.2.<sup>4</sup> The regulations also specify acceptable methods for communicating the warning to  
15 consumers. 27 CCR §25603.1(a)-(d); *see also Dowhal v. SmithKline Beecham Consumer Healthcare*  
16 (2004) 32 Cal.4th 910, 918 (“The warning may be communicated through product labeling, point-of-sale  
17 signs, or public advertising.”).

18 For environmental exposures to carcinogens (as opposed to consumer exposures), the safe harbor  
19 language is “WARNING: This area contains a chemical known to the State of California to cause cancer.”  
20 27 CCR §25605.2(a)(1). The regulations also specify methods for communicating such warning. 27 CCR  
21 §25605.1(a).

### 22 **a. Lumber Liquidators’ Warnings Do Not Use The Specified Safe 23 Harbor Language**

24 The first five invoice warnings Lumber Liquidators provided through June 2, 2014 used language  
25 that departs substantially from the “safe harbor” warning provided by the regulations. *See* Plaintiffs’  
26 Exhibit 1403, Final Statement of Reasons (November 1988) (“FSR”) at 26 (specific language necessary).  
27 Warnings #1 to #5 do not link to a specific product, omitting the key terms “This product. . . .” “Consistent  
28 with the focus on specific consumer products, the safe harbor warnings set forth in the implementing  
regulations are required to specify that ‘[t]his product contains a chemical known to the State of  
California’ to be a carcinogen or a reproductive toxin. Cal. Code Regs., tit. 27, sec. 25603.2, sub. (a).” *Am.*

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<sup>4</sup> OEHHA is currently considering revisions to the Proposition 65 implementing regulations that would, among other things, revise the safe harbor warnings. Plaintiffs’ Exhibits 1403, 1404.

1 *Meat Institute*, 180 Cal.App.4th at 761. Warnings #1, #2, #3, and #5 in the above table do not include the  
2 essential verb “contains” required by the safe harbor warning, leaving the reader to wonder where the  
3 listed chemical may be lurking. Warnings #1 to #5 also focus on the risks of “wood dust” during  
4 “installation,” indicating that any risks are limited to the time period of installation only and that the  
5 concern should be with inhalation of wood dust.

6 Further, each of those warnings includes additional information beyond that specified by OEHHA  
7 in the “safe harbor” warning. Warnings #2 to #5 are each embedded in a paragraph that addresses risks  
8 unrelated to the risk of cancer addressed by Proposition 65, including the risk of lifting heavy objects,  
9 improper loading and vehicle transportation. *Id.* In addition, warnings #1 to #5 include the word “may,”  
10 stating that installation of the “product *may* ... expose chemicals.” *Id.* (emphasis added). This language  
11 takes the warnings outside the safe harbor. Indeed, the regulations intentionally omit the word “may” from  
12 the safe harbor language, reserving it only for “limited situations” that relate to food and “do not apply to  
13 other products.” FSR at 26.

14 Warning #6, which has been used since June 2014 (more than a month after Lumber Liquidators  
15 received Plaintiffs’ Notice of Violation in April 2014), is closer to the Proposition 65 safe harbor  
16 language, but still differs. Warning #6 differs from the safe harbor warning in that it does not specify that  
17 “*This product*” or “*This area*” poses the relevant risk. 27 CCR §§25603.2, 25605.2 (emphasis added). The  
18 difference is meaningful with respect to “*This product*” because the warnings do not specify which  
19 product a customer has purchased poses the cancer or reproductive toxicity risk. Because the boilerplate  
20 warning is included on every list of terms and conditions when at least one wood flooring product is sold,  
21 the customer receives the same warning even if only some of the products purchased contain Proposition  
22 65 listed chemicals.

23 LL’s in-store signage also differs from the safe harbor language. Like warning #6, the in-store  
24 signage is not specific to any product, referring to “*This facility and the products stored here,*” Plaintiffs’  
25 Exhibit 1232 (loading dock sign), or “*This store and the products sold here,*” *id.* (other three permanent in-  
26 store signs); Plaintiffs’ Exhibit 570 (Nov. 2014 temporary warning sign). Thus, these warnings also fail to  
27 provide customers with information about which specific product(s) poses a risk of cancer, as required by  
28 the consumer safe harbor warning. 27 CCR §25603.2; *see also PCRM*, 187 Cal.App.4th at 572 (overbroad  
warning that does not permit consumers to identify product(s) posing risk is not clear). Nor do the  
warnings state “*This area*” as required by the environmental safe harbor warning. 27 CCR §25605.2.  
Further, Lumber Liquidators downplays the risk posed by its products by using in-store signage that states  
that products: “*contain detectable amounts of chemicals known by the State of California to cause cancer .*”

1 . . .” Plaintiffs’ Exhibits 570, 1232 (emphasis added). This departure from the safe harbor language  
2 minimizes customers’ perception of risk by suggesting that the chemicals were present in only negligible  
3 amounts and disqualifies all of the in-store signage from the Proposition 65 safe harbor. FSR at 5  
4 (inclusion of additional information, even if “truthful and accurate,” does not comply with safe harbor).

5 **b. Lumber Liquidators’ Warnings Do Not Use Safe Harbor Methods Of**  
6 **Communication**

7 Lumber Liquidators did not employ safe harbor methods of communication to transmit warnings to  
8 customers. OEHHA regulations provide that safe harbor warnings to consumers may be presented “on a  
9 product’s label or other labeling.” 27 CCR §25603.1(a). “Labeling” is “any label or other written, printed  
10 or graphic matter affixed to or *accompanying* a product or its container or wrapper,” *id.* §25602(e)  
11 (emphasis added). Safe harbor warnings may also be communicated by: “Identification of the product at  
12 the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs,  
13 menus, or a combination thereof.” *Id.* §25603.1(b).

14 The warnings LL provided on hard-copy invoices and to online customers do not fall into one of  
15 the specified safe harbor methods for consumer warnings. The terms and conditions are not “a display of  
16 written, printed or graphic matter upon a product or its immediate container,” *id.* §25602(d), nor are they  
17 “other written, printed or graphic matter affixed to or accompanying a product or its container or  
18 wrapper,” *id.* §25602(e). A customer who purchases more than one product will not know which product  
19 contains a cancer-causing chemical.

20 LL’s in-store signage also fails to satisfy the requirements of the safe harbor communication  
21 methods for consumer exposures. Although OEHHA regulations allow for safe harbor warnings to be  
22 presented on “signs” “at the retail outlet,” 27 CCR §25603.1(b), the same regulation also requires  
23 “[i]dentification of the product.” *Id.* (emphasis added). LL’s in-store signage fails to identify the particular  
24 products subject to the cancer warnings, instead referring generally to “This facility and the products  
25 stored here,” Plaintiffs’ Exhibit 1232 (loading dock sign), or “This store and the products sold here,” *id.*  
26 (other three permanent in-store signs); Plaintiffs’ Exhibit 570 (Nov. 2014 temporary warning sign). *See*  
27 Plaintiffs’ Exhibit 565.

28 Similarly for environmental exposures, the warning methods do not meet the safe harbor  
requirements. *See* 27 CCR §25605.1(a).

**3. Lumber Liquidators’ Warnings Are Not Clear And Reasonable**

Because Lumber Liquidators’ warnings do not fall into the safe harbor, they meet the requirements  
of the statute only if they are “clear and reasonable.” H&S Code §25249.6. OEHHA regulations provide:

1 Whenever a clear and reasonable warning is required under Section 25249.6 of the Act, the method  
2 employed to transmit the warning must be reasonably calculated, considering the alternative  
3 methods available under the circumstances, to make the warning message available to the  
4 individual prior to exposure.

5 27 CCR §25601; *In re Vaccine Cases* (2005) 134 Cal.App.4th 438, 450-53. For purposes of assessing  
6 clarity and reasonableness, the Court should ask whether the warnings are “likely to be read and  
7 understood by an ordinary individual under customary conditions of purchase or use.” 27 CCR  
8 §25603.1(c).

9 Although an entire system of multiple warnings must be considered as a whole, until November  
10 2014 (four months after the complaint was filed) the only warning received by Lumber Liquidators’ in-  
11 store customers was the invoice warning. Accordingly, Lumber Liquidators’ post-litigation signage is  
12 irrelevant for almost all of the time period at issue and the invoice warnings can be considered as a stand-  
13 alone warning for that time.

14 **a. The Language Of Lumber Liquidators’ Warnings Is Unclear**

15 **i. Terms And Conditions Warnings – In-Store Invoices And  
16 Internet**

17 The language of each of Lumber Liquidators’ six invoice warnings failed to clearly communicate  
18 the cancer risk posed by formaldehyde. First, each of warnings #1 to #5 focuses on “*installation*” of the  
19 product in question. For instance, Lumber Liquidators’ first warning (December 14, 2010, to January  
20 2013), states: “WARNING: *Installation* of any wood flooring product may create wood dust and/or  
21 expose chemicals known by the State of California to cause cancer or reproductive harm.” (Emphasis  
22 added.) Warnings #2 to #5 similarly begin with “Installation of...” This language misleads customers to  
23 believe that the risk is posed only by the act of installing the flooring, not by continued exposure to  
24 already-installed laminate flooring emitting formaldehyde. *See PCRM*, 187 Cal.App.4th at 572 (proposed  
25 warning that could potentially “mislead[]” customers as to source of risk was unclear). Nothing in  
26 warnings #1 to #5 indicates that the products continue to emit formaldehyde beyond the installation period  
27 and that the risks described are on-going. This alone is enough to find that the first five warnings are not  
28 clear.

Second, the reference to “wood dust” in each of warnings #1 to #5 reinforces the focus on  
installation and makes it more likely that customers would understand the warnings to mean that there is  
no risk outside of the installation period. Indeed, Lumber Liquidators’ internal documents show that the  
warning was specifically intended for wood dust, not formaldehyde. Plaintiffs’ Exhibit 1259 (“[E]ffective  
December 18th, 2010, we are required in California to provide clear and reasonable notice to customers

1 purchasing goods which may expose them to wood dust.”). The implementation of the warning was  
2 concurrent with the requirement to warn for wood dust, which went into effect in December 2009.  
3 Formaldehyde, on the other hand, was a listed chemical since 1988. 27 CCR §27001(b).

4 Third, each of warnings #1 to #5 advises consumers that “installation . . . *may* create wood dust  
5 and/or expose chemicals....” (Emphasis added.) The use of “may” in these warnings renders them unclear  
6 by indicating some uncertainty about whether the products are actually a source of risk. In adopting the  
7 regulations governing the “clear and reasonable” standard, OEHHA noted that during rulemaking a  
8 commentator proposed that the regulation describing the warning requirement provide that a warning is  
9 clear if it informs a consumer that “you *may* be exposed” to a listed chemical. FSR at 4 (emphasis added  
10 by OEHHA in FSR). OEHHA rejected this language for the regulation, explaining: “where there is an  
11 exposure to a listed chemical, such a warning would be untrue, since in fact the individual *will be* exposed.  
12 . . . As a general rule, advising that person ‘may be exposed’ appears inaccurate and unclear.” *Id.*; *see*  
13 *also Dowhal v. SmithKline Beecham* (2004) 32 Cal.4th 910, 929; *Am. Meat Institute*, 180 Cal.App.4th at  
14 761. This lack of clarity in the warnings is alone enough to find that the first five warnings are unclear.

15 Fourth, a similar uncertainty is caused by the use of “and/or” in warnings #1 to #5. This  
16 construction indicates that installation could create wood dust *or* expose carcinogenic chemicals, i.e., that  
17 it is possible that installation of the product does not have both of these effects. Customers purchasing  
18 laminate flooring could reasonably believe that the exposure of carcinogenic chemicals, a risk appearing  
19 after the disjunctive “or,” does not apply to the particular product they are purchasing. At the very least,  
20 customers would be left with uncertainty about whether Lumber Liquidators’ laminate flooring exposes  
21 them to carcinogenic chemicals. *See Griffin Dec.* ¶¶21-22.

22 Fifth, warnings #1, #2 and #5 refer to a risk posed by “any wood flooring product.” This language  
23 suggests that the risk from all wood flooring products from any company is the same and, thus, that  
24 selection of a particular product cannot increase or decrease the formaldehyde risk. *See Griffin Dec.* ¶23.  
25 Because not all wood flooring products expose customers to formaldehyde at levels above the level  
26 requiring a Proposition 65 warning, this language is misleading. “[T]o comply with Proposition 65, point  
27 of sale warnings must be designed to effectively communicate to consumers that *the specific product*  
28 *targeted* by the warning is a carcinogen or a reproductive toxin.” *Am. Meat Institute*, 180 Cal.App.4th at  
761 (emphasis added); *see also PCRM*, 187 Cal.App.4th at 572 (finding that warnings directed at all  
“well cooked chicken” and “thoroughly cooked chicken” were not clear and reasonable because they were  
overbroad in that only *grilled* chicken posed the risk). By suggesting that the risk is ubiquitous, the  
Lumber Liquidators’ warnings are flawed.

1 Warnings #3, #4 and #6 suffer from similar vagueness. *See* Griffin Dec. ¶24. Warning #3 refers to  
2 “this product,” and warnings #4 and #6 simply refers to “product.” Customers received this boilerplate  
3 language regardless of how many products they purchased. A customer purchasing more than one product  
4 would have no way to know which of the products posed the risk of cancer. *See* Plaintiffs’ Exhibits 879,  
5 881, 924; Ward Depo. 61:21-23, 62:1-2, 4-9, 13.

6 Sixth, each of warnings #2 to #5 do not address only the risk of cancer posed by exposure to  
7 Proposition 65 listed substances, but also address more readily apparent risks before even getting to the  
8 cancer warning, such as the risk of lifting heavy objects or improper loading and transportation of  
9 products. In each of these warnings, the sentence addressing the risk covered by Proposition 65 is placed  
10 at the very end of the warning paragraph. An ordinary customer is unlikely to read to the end of these  
11 paragraphs and apprehend the Proposition 65 warning because the information concerning unrelated,  
12 common sense risks are presented first. *See* Griffin Dec. ¶25. Similarly, warning #6 provides the same  
13 additional information, but breaks the warning into two paragraphs, first providing a warning about the  
14 common sense risks of heavy objects and second the Proposition 65 warning. Placement of the  
15 Proposition 65 warning second lessens the likelihood that it will be read. *Id.*

#### 14 **ii. In-Store Signage**

15 Lumber Liquidators’ in-store signage, introduced in November 2014, is also not “clear” for  
16 Proposition 65 purposes. First, all of Lumber Liquidators’ in-store signage refer to “detectable amounts”  
17 of chemicals. Plaintiffs’ Exhibits 570, 1232. This formulation suggests that the amount of chemicals to  
18 which customers may be exposed is *de minimis*, lessening customers’ perception of risk. At the very least,  
19 this unnecessary and distracting formulation makes the warnings more complex and less likely to be  
20 understood by the ordinary individual. *See* Griffin Dec. ¶40.

21 Further, like the terms and conditions warnings, none of the language Lumber Liquidators used on  
22 in-store signage specified the products that generate formaldehyde exposures posing a risk of cancer.  
23 Instead, the signs refer generally to “This store and the products sold here,” or “This facility and the  
24 products stored here.” Plaintiffs’ Exhibit 1232.

#### 24 **iii. Other Information Concerning Formaldehyde**

25 Even if Lumber Liquidators’ Proposition 65 warnings were otherwise clear, which they are not,  
26 they were undermined by statements Lumber Liquidators made to customers minimizing the risk of  
27 formaldehyde. The company’s website until relatively recently had an FAQ section including a page titled  
28 “Formaldehyde – What Is It?” Plaintiffs’ Exhibit 1223. This page provides information intended to  
assuage customers’ fears of formaldehyde:

1 Formaldehyde is a simple compound made of carbon, hydrogen and oxygen, and is a colorless,  
2 strong-smelling gas. It exists naturally in the environment, our bodies, and in food and is important  
3 in the human metabolic process. It is a central building block in the synthesis of many other  
4 compounds. Man-made formaldehyde is an important chemical used widely by industry to  
5 manufacture building materials and numerous household products. Thus, it may be present in  
6 substantial concentrations both indoors and outdoors.

7 *Id.*; see also Plaintiffs’ Exhibits 1257 (“Health and Safety” page on Lumber Liquidators’ website  
8 describing ubiquity of formaldehyde and emphasizing “commitment to safety”), 1258 (company’s  
9 advertising that its products are the “safest”). The page goes on to downplay the risk of formaldehyde,  
10 focusing on risks such as “watery eyes,” and acknowledging only at the end of the paragraph that “[i]t has  
11 also been shown to cause cancer in animals and may cause cancer in humans,” not even that it is “known”  
12 to cause cancer.

13 The Attorney General’s Proposition 65 regulations indicate that statements such as these render  
14 warnings unacceptable: “Certain phrases or statements in warnings are not clear and reasonable, such as . .  
15 . additional words or phrases that contradict or obfuscate otherwise acceptable warning language.” 11  
16 CCR §3202(b).

17 **b. The Method By Which Lumber Liquidators Presented Its Warnings Is  
18 Unreasonable**

19 Because the language employed by Lumber Liquidators’ warnings was unclear, the warnings were  
20 not sufficient under Proposition 65, no matter how those warnings were transmitted to customers. 27 CCR  
21 §25601 (requiring both clear language and a reasonable method of communication). But here, Lumber  
22 Liquidators’ warnings also fall short of the second requirement that the method of transmission be  
23 “reasonably calculated, considering the alternative methods available under the circumstances, to make  
24 the warning message available to the individual prior to exposure,” 27 CCR §25601. The Court of Appeal  
25 has explained: “Any meaningful definition of ‘availability’ prior to exposure must . . . consider *the*  
26 *probability* of the prospective consumer seeing or hearing the warning message. Availability of the  
27 warning message, to be consistent with the Act, must mean *more than the possibility* a consumer would be  
28 apprised of the specific warning message only through considerable effort.” *Ingredient Comm’n Council,*  
*Inc. v. Lungren* (1992) 2 Cal.App.4th 1480, 1494 (“*ICC*”) (emphasis added).

**i. Terms And Conditions Warnings – In-Store Invoices**

The primary problem with Lumber Liquidators’ method of transmitting warnings by in-store  
invoices is that few consumers read boilerplate language in contracts of adhesion such as that here. See  
Griffin Dec. ¶16. Making a warning available to customers is not enough, and the possibility that

1 customers may encounter the language is not enough; Proposition 65 calls for warnings to be transmitted  
2 in a manner that creates a *probability* that customers will see and read them. *ICC*, 2 Cal.App.4th at 1494.

3 Aside from this fundamental problem, there are other problems with Lumber Liquidators’  
4 presentation of the hard-copy terms and conditions warnings. First, Lumber Liquidators’ terms and  
5 conditions warnings are presented to customers at a point in the shopping process where the customer has  
6 already selected what product to buy, has tendered payment for the product, and is completing the  
7 purchase. Presentation of a warning at this time does not further Proposition 65’s purpose of facilitating  
8 “informed decision[-making]” by consumers. *DiPirro*, 153 Cal.App.4th at 183.<sup>5</sup>

9 Second, in every version of the terms and conditions used since December 2010, the Proposition  
10 65 warnings appear near the bottom of the page. *See, e.g.*, Plaintiffs’ Exhibits 1222 at 31947 (warning  
11 #1), 908 at 32001 (warning #2), 879 at 31911 (warning #3), 881 at 31917 (warning #4), 880 at 31914  
12 (warning #5), 924 at 32045 (warning #6).

13 Third, there is no visual information distinguishing the Proposition 65 warning from the other  
14 information presented in Lumber Liquidators’ purchase terms and conditions. The company will surely  
15 point out that the warning paragraph is preceded by a bolded “Warning:” preface. But almost every  
16 paragraph on the page is preceded by a similarly bolded preface. *See, e.g.*, Plaintiffs’ Exhibits 1222 at  
17 31947 (warning #1), 908 at 32001 (warning #2), 879 at 31911 (warning #3), 881 at 31917 (warning #4),  
18 880 at 31914 (warning #5), 924 at 32045 (warning #6).

19 The Court of Appeal’s decision in *Wykle* does not salvage Lumber Liquidators’ invoice terms and  
20 conditions warnings. In that case, the court considered whether a warning placed on an insert included  
21 within packages of dental amalgam adequately conveyed a Proposition 65 warning. The ordinary user of  
22 the dental amalgam at issue in that case was very different from the average purchaser of Lumber  
23 Liquidators’ flooring. The court noted: “it is critical that the ‘ordinary individual’ who customarily uses  
24 the amalgam within the contemplation of section 12601, subdivision (b)(3) is a dentist or trained dental  
25 assistant bearing responsibility for care of the patient and proper use of the amalgam.” 134 Cal.App.4th at  
26

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27 <sup>5</sup> Lumber Liquidators will surely point out that most versions of its terms and conditions document  
28 include a place for the customer to sign, acknowledging receipt. But given how inured the public has  
become to acknowledging receipt of boilerplate terms and conditions, even requesting a customer  
signature does not ensure that the terms and conditions will be read in their entirety. *See Griffin Dec.*  
¶26. Moreover, Lumber Liquidators did not require that customers sign the terms and conditions  
document to acknowledge receipt. *Ward Depo.* 68:7-20. And the first form of the terms and  
conditions, which was used from December 2010 to January 2013, did not provide a place for the  
customer to sign, instead providing a place for the customer to initial adjacent to the paragraph of the  
terms and conditions addressing returns and exchanges. *E.g.*, Plaintiffs’ Exhibit 890 at 31947.

1 71. Moreover, because the court in *Wykle* held that the insert was protected by Proposition 65’s safe  
2 harbor, it did not consider whether alternative methods of communication would have been substantially  
3 more effective, as would have been necessary if it were evaluating a non-safe harbor warning, as here. *Id.*  
4 at 68.<sup>6</sup>

5 **ii. Terms And Conditions Warnings – Internet**

6 Lumber Liquidators’ presentation of the terms and conditions warning to internet customers is  
7 even more obscure than that to in-store customers. The terms and conditions are available to online  
8 customers after they place products in their online shopping cart and go to “check-out” to complete their  
9 online purchase. Ward Depo. 70:19-21. Near the bottom of a summary webpage is an embedded window,  
10 or text box, containing the purchase terms and conditions. *Id.* 174:6-175:1. A customer would need to  
11 scroll down to the bottom of the summary page to see the embedded text box. *Id.* 174:22-175:1. A  
12 customer would then need to click inside the terms and conditions window and scroll down within that  
13 text box to locate the warning. *Id.* 175:2-14. Only a few lines of text are visible at a time within the  
14 embedded text box containing the terms and conditions. *Id.* 175:15-17; *see also* Plaintiffs’ Exhibit 1282.  
15 Because the warning is located near the bottom of every version of the terms and conditions, it is not  
16 visible online unless customers take some action to locate it, even though nothing on the Lumber  
17 Liquidators purchase summary page alerts them that a health and safety warning is within the embedded  
18 text box. *See* Ward Depo. 176:7-12. Lumber Liquidators’ online customers were able to complete their  
19 purchases even if they never clicked in the embedded text box and scrolled down to locate the Proposition  
20 65 warning. *Id.* 176:13-16. Given this, it is not *probable* that most internet customers expend the effort to  
21 locate and read the online terms and conditions warnings. *See* Griffin Dec. ¶29; *see also* ICC, 2  
22 Cal.App.4th at 1494 (a “possibility a consumer would be apprised of the specific warning message only  
23 through considerable effort” is not sufficient).

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<sup>6</sup> Lumber Liquidators apparently also intends to rely on a consent judgment in another Proposition 65 case where invoices were permitted in certain circumstances. This consent judgment is not binding authority or even persuasive. It merely provides that where products are sold by telephone, mail, or internet, an invoice is permissible in the unusual circumstance where the seller never has physical possession of the product or its packaging. *Mateel* Consent Judgment §7.7. If the seller has possession of the product or the packaging it must use one of four other agreed mechanisms of disclosure, none of which Lumber Liquidators satisfies. Here, Lumber Liquidators has possession of the product and its packaging. Further, with respect to internet sales, the consent judgment provides that the warning must appear on the same page as the product is displayed, on the same page as the order form for the product, or on the same page as the price is displayed. *Mateel* Consent Judgment §7.9. Lumber Liquidators does not meet these requirements, as the warning appears in a separate scroll-through text box on a different webpage.



1 **V. LUMBER LIQUIDATORS' AFFIRMATIVE DEFENSES.**

2 **A. There is No Dispute that Lumber Liquidators Laminate Flooring Products Expose**  
3 **Consumers to Formaldehyde at Levels Between 227 and 278 µg/day – Far Above the**  
4 **Prop 65 NSRL of 40 µg/day.**

5 Lumber Liquidator's expert, Dr. Rhomberg, and GCM's expert, atmospheric scientist Camille  
6 Sears, MS, reach nearly identical conclusions on the level of formaldehyde caused in homes in which  
7 Lumber Liquidators' products are installed. Using modeling inputs for "average consumers," Ms. Sears  
8 calculates that LL consumers will be exposed to formaldehyde at levels of 227.6 µg/day (Sears Dec.  
9 ¶7.C). Dr. Rhomberg calculates that average LL consumers will be exposed to formaldehyde at initial  
10 levels of 278 micrograms per day (µg/day). Rhomberg Dec. Ex. 2, p.1 (278 µg/day). Indeed, Dr.  
11 Rhomberg calculates a slightly higher formaldehyde level than Ms. Sears. Because both levels are more  
12 than 600% above the NSRL for formaldehyde of 40 µg/day, LL cannot prevail on its defense.<sup>7</sup>

13 **B. Lumber Liquidators' 70-Year Averaging Approach is Prohibited by Law.**

14 Lumber Liquidators attempts to get around the high levels of formaldehyde by averaging them  
15 over 70 years.<sup>8</sup> Dr. Rhomberg posits that although initial formaldehyde levels in a typical home with  
16 Lumber Liquidators flooring will be 278 µg/day, he calculates that those levels will decay over various  
17 time periods. Under Model #1 of his three "preferred" models, Dr. Rhomberg admits that the  
18 formaldehyde levels in consumers' homes remain above the 40 µg/day NSRL for 10.4 years. Rhomberg  
19 Depo. 2, 175:4-176:3 (Feb. 5, 2016). Under Model #2 (based on raw unlaminated board, not the Products  
20 in this case), Dr. Rhomberg admits that formaldehyde levels remain above the 40 µg/day NSRL for 5.5  
21 years. Rhomberg Depo. 1, 239:9-242:22 (Nov. 23, 2015). Under Model #3, Dr. Rhomberg admits that  
22 formaldehyde levels in the home remain above 40 µg/day for the entire 70 year period, never dropping  
23 below 69 µg/day. Rhomberg Depo. 2, 186:6-13 (Feb. 5, 2016). Dr. Rhomberg gets around this

24 <sup>7</sup> Much of the expert declarations are focused on the input variables that go into calculating the above  
25 exposure levels. GCM's certified industrial hygienist, Francis "Bud" Offermann, PE, advocates for  
26 certain input variables for air exchange rate. (Offermann Trial Dec. ¶¶122-127), and floor area  
27 coverage. (Offermann Trial Dec. ¶¶145-149). LL's certified industrial hygienist, Jack McCarthy  
28 advocates for slightly different variables. Offermann Trial Dec. ¶¶122-127. Similarly, GCM's  
atmospheric scientist, Camille Sears, and LL's toxicologist, Dr. Rhomberg, advocate for somewhat  
different inhalation rates and other input variables. *See* Sears Trial Dec. ¶¶49-59. Despite these expert  
disputes at the margins, the ultimate conclusion is that LL's expert calculates a *higher* formaldehyde  
exposure level than GCM's expert. LL's expert calculates a level of 278 µg/day, while GCM's expert  
calculates a level of 227 ug/day. Thus, almost all of the disputes on input variables can be set aside.

<sup>8</sup> This section is largely a duplication of Plaintiff's Motion in Limine No. 1 ("MIL #1"), and the Court  
may not need to consider this section after ruling on that motion.

1 inconvenient problem by hypothesizing that most people will move out of their homes in 9 or 30 years.  
2 Rhomberg Dec. ¶¶108-109.

3 Given the levels of formaldehyde in each of these models, Lumber Liquidators' NSRL defense is  
4 based entirely on its claim that Proposition 65 and its implementing regulations authorize defendants to  
5 compare a daily NSRL to a chemical concentration averaged over a lifetime of 70 years, including future  
6 speculative levels extending out 70 years. *See* Trial Declaration of Lorenz R. Rhomberg, Ph.D., ATS  
7 ("Rhomberg Dec."), ¶¶17:15-17. *See also* Trial Declaration of Dr. Gregory D. Smith in Support of  
8 Defendant ("Smith Dec."), ¶¶14-53 (discussing alleged decay rate of formaldehyde emission from  
9 laminate flooring). Dr. Rhomberg calculates rates of exposure by extrapolating future formaldehyde  
10 concentrations based on alleged decay rates of the chemical or, in other instances, zero emissions based on  
11 assuming all exposed individuals will move from their homes. *See* Rhomberg Dec. ¶100 (assuming zero  
12 exposure after nine and thirty years); *Id.* ¶78 (factoring in purported decay of formaldehyde emissions).  
13 He then averages those inferred lower levels with current measured levels over 70 years. *Id.* By including  
14 assumptions about how long into the future people will be exposed, projecting future formaldehyde  
15 emission levels, and averaging measured and projected emissions over a 70-year period, Lumber  
16 Liquidators and its experts fail to "*assum[e] lifetime exposure at the level in question,*" *i.e.*, the chemical  
17 concentration of a listed chemical, contrary to H&S Code §25249.10(c).

18 **1. Proposition 65's Plain Language Mandates That, In Order To Invoke The**  
19 **NSRL, One Must Assume Daily Exposure At The Level of Exposure to a**  
20 **Listed Chemical For an Entire 70-Year Lifetime.**

21 Proposition 65 provides an exception to its warning requirement when a defendant establishes by a  
22 preponderance of evidence that the level in question of the listed chemical multiplied by the rate of  
23 exposure to the medium in which the listed chemical is found is less than a no significant risk level or  
24 "NSRL." H&S Code §25249.10(c). "A level of exposure to a listed chemical, *assuming daily exposure at*  
25 *that level*, shall be deemed to pose no significant risk provided that the level is determined: ... (3) By one  
26 of the following, as applicable: (A) If a specific regulatory level has been established for the chemical in  
27 question in Section 25705, by application of that level." 27 CCR §25701(b).<sup>9</sup> Pursuant to 27 CCR  
28 §25705, OEHHA has established a NSRL for formaldehyde of 40 micrograms ("µg")/day. 27 CCR  
§25705(c)(2). In order to take advantage of the no significant risk level warning exception, the person

<sup>9</sup> Although final responsibility for interpretation of Proposition 65 rests with the courts, "[t]he administrative construction of the governing laws through the promulgation of regulations by the [OE]HHA is " "entitled to great weight" ' ' in determining what the Legislature intended when it enacted [Proposition 65]." *DiPirro*, 153 Cal.App.4th at 192 (citation omitted).

1 responsible must assure that an exposure not exceed the NSRL on a daily basis: “**Daily exposure to a**  
2 **chemical at a level which does not exceed the level** set forth in [25705] subsections ... (c) ... for such  
3 chemical shall be deemed to pose no significant risk within the meaning of Section 25249.10(c) of the  
4 Act.” §25705(a) (emphasis added).

5 Section 25249.10(c) and the accompanying regulations ensure that the level of exposure that is  
6 compared to the daily NSRL level is based on a constant level in question of the listed chemical that must  
7 be assumed to expose people for an entire 70-year lifetime:

8 An exposure for which the person responsible can show that the exposure poses no significant risk  
9 **assuming lifetime exposure at the level in question** for substances known to the state to cause  
10 cancer, ... based on evidence and standards of comparable scientific validity to the evidence and  
11 standards which form the scientific basis for the listing of such chemical pursuant to subdivision (a)  
12 of Section 25249.8.

13 H&S Code §25249.10(c) (emphasis added).<sup>10</sup> “For the purposes of the Act, ‘level in question’ means the  
14 chemical concentration of a listed chemical for the exposure in question.” 27 CCR §25721(a).<sup>11</sup> See 27  
15 CCR §25721(c) (the level in question is “stated in terms of a concentration of a chemical in a given  
16 medium”). Thus, in terms of the level in question, the defendant must assume that exposed individuals are  
17 exposed at the measured chemical concentration for an entire lifetime. Section 25249.10(c) does not say to  
18 assume the level in question becomes zero because all of the exposed individuals move out at some future  
19 date. Nor does it say a defendant should attempt to estimate changes in the level in question based on  
20 predictions that the level of chemical will decay or otherwise reduce over time. The defendant is obliged  
21 to assume lifetime exposure “**at the level in question.**”

22 Distinct from the “level in question” is the “rate of exposure” for an individual to the *medium* in  
23 which the chemical at issue is transported to that person. Thus, the Act defines “[l]ifetime exposure” to  
24 mean “the reasonably anticipated **rate of exposure** for an individual **to a given medium of exposure**  
25 measured over a lifetime of seventy years.” 27 CCR §25721(b) (emphasis added). Importantly, the “rate  
26 of exposure” is tied to the medium by which the exposure occurs, *i.e.*, air, water or food. The “rate of  
27 exposure” is independent of the “level in question” of the listed chemical. Prop 65’s regulations make this  
28 distinction explicit:

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25 <sup>10</sup> Section 25249.10(c) further provides that “[i]n any action brought to enforce Section 25249.6,  
26 the burden of showing that an exposure meets the criteria of this subdivision shall be on the  
27 defendant.” *SmileCare*, 91 Cal.App.4th at 474-6.

28 <sup>11</sup> 27 CCR §25721(a) further states that “[t]he exposure in question includes the exposure for  
which the person in the course of doing business is responsible and does not include exposure to a  
listed chemical from any other source or product.”

1 For purposes of Section 25249.10(c) of the Act, the level of exposure to a chemical listed as  
2 causing cancer, assuming lifetime exposure at the level in question, shall be determined by  
3 multiplying the level in question (stated in terms of a concentration of a chemical in a given  
4 medium) *times the reasonably anticipated rate of exposure for an individual to the given  
5 medium of exposure measured over a lifetime of seventy years.*

6 27 CCR §25721(c) (emphasis added). It is a person’s “rate of exposure” to the “medium” that requires  
7 certain assumptions to be applied. The rate of exposure is expressed as a daily exposure. The regulations  
8 provide relevant assumptions regarding exposures to air pertinent to Lumber Liquidators’ formaldehyde  
9 exposure:

10 The following assumptions shall be used to calculate the reasonably anticipated rate of exposure to  
11 a chemical listed as causing cancer... (2) For an exposure reasonably anticipated to affect a certain  
12 subpopulation of the general population in any geographic area, specific data (if available) relating  
13 to that subpopulation shall be used to determine the level of exposure. (A) In the absence of more  
14 specific and scientifically appropriate data, the following assumptions should be made as  
15 appropriate: ... Air - cubic meters per day [20 for adults and adolescents 11 years of age or older;  
16 15 for children aged 2-10 years of age, and; 4 for infants aged 0-2 years of age]

17 27 CCR §25721(d)(2). Thus, in the case of an inhalation exposure, the rate of exposure is focused solely  
18 on how much *air* the affected subpopulation will breathe in a day. Although assessing the rate of exposure  
19 to air may involve applying a number of assumptions – key ones of which, *e.g.*, air intake rate, have been  
20 set forth in OEHHA’s regulation – the rate of exposure cannot include any changes to the level in question  
21 of the chemical. A defendant may not assume the chemical concentration decays over time nor can a  
22 defendant assume the concentration will go to zero because it assumes exposed individuals will move out  
23 of their homes in the future. Rather, the level in question of the chemical must be assumed to continue for  
24 70 years. 27 CCR §25721(c) (“assuming lifetime exposure at the level in question”).

25 The last key phrase employed in OEHHA’s regulations is the “level of exposure.” The level of  
26 exposure is “determined by multiplying the level in question (stated in terms of a concentration of a  
27 chemical in a given medium) times the reasonably anticipated rate of exposure for an individual to the  
28 given medium of exposure measured over a lifetime of seventy years.” 27 CCR §25721(c) (emphasis  
added). It is the “level of exposure” that is compared to the NSRL. By adding in projections and  
assumptions that purport to predict future, lower levels in question or assume the levels reduce to zero,  
Lumber Liquidators and its experts fail to properly calculate the level of exposure consistent with  
Proposition 65.

2. **OEHHA’s Final Statement of Reasons for the Agency’s Regulations for  
Exposure Assessments Under Proposition 65 Reinforces the Act’s Prohibition  
Against Projecting Future Levels in Question and Averaging Over an Entire  
Lifetime.**

The Final Statement of Reasons accompanying OEHHA’s adoption of the regulations

1 implementing H&S Code §25249.10(c) reinforces the proscription that defendants not be allowed to  
2 project future lower emissions and include those reduced levels in a lifetime average that purports to bring  
3 them below the NSRL.

4 First, the mandated 70-year lifetime cannot be artificially reduced by redefining a lifetime as a  
5 shorter duration of estimated actual exposure. The Statement of Reasons explains:

6 Since it is not possible to determine in advance what individuals will be exposed by a particular act  
7 or omission, and since different individuals enjoy different life expectancies, conventional  
8 assumptions must be utilized to promote predictability and consistency in the enforcement of the  
9 law. Therefore, subsection (b) [§25721(b)] defines "lifetime" in the term "lifetime exposure" to  
10 refer to a life expectancy of 70 years.

11 Plaintiffs' Exhibit 1406 at 3571.

12 Second, the exposure must be assumed to last an entire lifetime of 70-years at the "level in  
13 question":

14 The exemption test of section 25249.10(c) is based upon exposure. It is the "exposure" ***over the 70  
15 year lifetime*** which must pose no significant risk "***at the level in question.***"

16 *Id.* (emphasis added). In other words, the level in question cannot be assumed to change during the  
17 mandated 70-year period. This precludes averaging the level in question based on estimates of future  
18 concentrations of the chemical over a 70-year lifetime.

19 Indeed, OEHAA expressly rejected such an averaging scheme proposed by one commentator:

20 One commentator recommended that the Agency make clear that the "reasonably anticipated rate  
21 of exposure for an individual to a given medium of exposure measured over a life time of 70  
22 years" ***shall be the average concentration of the chemical to which the individual may be  
23 reasonably anticipated to be exposed over a lifetime of 70 years.*** (C-39, p. 4.) Any reference to  
24 "average concentration", however, appears more closely linked to the definition of "level in  
25 question" than the definition of "lifetime exposure." Further, a reference to the average  
26 concentration of a chemical to which an individual may be reasonably anticipated to be exposed in  
27 a lifetime would appear to make persons responsible for the exposures of others. Such a result is  
28 precisely what the second sentence of subsection (a) is intended to avoid. Accordingly, ***this  
recommendation was not adopted.***

*Id.* (emphases added). Thus, one cannot attempt to "anticipate" future levels that one speculates may occur  
over a 70-year period and then use an average of those projected levels to change the level in question. Dr.  
Rhomberg's assumptions that people will move out of their homes where the laminate flooring is installed  
after only 9 years and 30 years and then reducing the formaldehyde levels to 0 µg/L for 61 years and 40  
years of the 70-year lifetime does not assume lifetime exposure at the level in question. At best, this would  
only assume a 9 year or 30 year exposure at the level in question. Likewise, speculating about how the  
originally measured level in question of formaldehyde emitting from each laminate flooring product may  
decay over 9, 30 or 70 years continually, changes the level in question and, thus, does not assume daily

1 exposure to the level in question for a full 70-year lifetime. H&S Code §25249.10(c).

2 The Final Statement of Reasons further makes clear that the rate of exposure is based on a daily  
3 intake of the medium. Likewise, the resulting level of exposure will be a daily exposure number that,  
4 pursuant to H&S Code §25249.10(c), is assumed to continue for 70-years. Discussing the formula for  
5 deriving a level of exposure by multiplying the level in question by the rate of exposure, the Statement  
6 explains by way of example:

7 Under this formula, a certain *daily exposure* to a chemical in a food product could be calculated,  
8 taking into account the concentration of the chemical in the food (in micrograms of chemical per  
9 gram of food), and multiplying that concentration times the quantity ingested (in grams of food *per*  
10 *day*). The product of this multiplication yields the quantity of chemical ingested in that food (*in*  
11 *micrograms of chemical per day*). This level must not exceed the level derived pursuant to this  
12 article.

13 Plaintiffs' Exhibit 1406 at 3572 (emphasis added); *see also id.* (discussing regulation's establishment of  
14 rates of exposure of "two (2) liters of drinking water per day" and "twenty (20) cubic meters of air per  
15 day"). This is reinforced by the fact that the NSRLs are established as per day limits. 27 CCR 25705(d)(3)  
16 ("Level (micrograms/day)"). It is this daily level of exposure that must be assumed to continue for 70  
17 years.

18 The Statement of Reasons provides an example of an exposure assessment that closely reflects the  
19 indoor air exposures resulting from Lumber Liquidators' laminate flooring. The example involves  
20 exposures to asbestos fibers in indoor air inside an office building. Plaintiffs' Exhibit 1406 at 3574-75.  
21 The example describes a straightforward comparison of the increased levels of asbestos in the building to  
22 the no significant risk level of 5 asbestos fibers per cubic meter per air. *Id.* at 3575. As OEHHA states, "If  
23 the increased level in the building exceeds the no significant risk level, the owner should provide a  
24 warning to the building's occupants." *Id.* There is no suggestion that one would project zero emissions  
25 because the occupants would not live or work in the office building for a full 70-years. *Id.* Nor does  
26 OEHHA suggest that anything but the level of asbestos fibers actually measured in the building would be  
27 considered to calculate the level in question. *Id.* The same straightforward comparison of the actually  
28 measured formaldehyde levels emitted from Lumber Liquidators' laminate flooring coupled with a  
reasonable daily rate of exposure to air inside California residences where laminate flooring is installed,  
and then assuming that level and daily exposure rate continue for a full 70-years, should similarly inform  
the exposure assessment for Lumber Liquidators' laminate flooring products. H&S Code §25249.10(c); 27  
CCR §25701(b); 27 CCR §25705(a).

Section 25721(d)(4) of Title 27 further precludes Lumber Liquidators from truncating its analysis  
to something less than an assumed lifetime exposure to the level in question. Section 25712(d)(4) provides

1 that, “[f]or exposures to consumer products, lifetime exposure shall be calculated using the average rate of  
2 intake or exposure for average users of the consumer product, and not on a per capita basis for the general  
3 population.” 27 CCR §25712(d)(4). As noted above, the rate of exposure is to the medium – not the level  
4 in question – and is calculated per day. *See supra* at 23-25. By instructing one to calculate a lifetime  
5 exposure using the average rate of exposure for average users of the product, OEHHA precludes any  
6 assumptions that speculate all average users will move away from the exposure in 9- or 30-years, as  
Lumber Liquidators and Dr. Rhomberg propose to do.

7 Indeed, when discussing this provision, the Statement of Reasons clearly limits any averaging  
8 period to the frequency of intake of a consumer product. “If it is reasonably anticipated that the product  
9 category containing chemical will be ingested only once per week, once per month, or once per year, the  
10 resulting intake of the chemical averaged over a daily basis would be 1/7, 1/30, and 1/365 of the value  
11 determined when the food is eaten once each day.” Statement of Reasons, p. 64; Rhomberg 3573. This  
12 example makes clear that OEHHA had no intention of projecting exposures through food to extend out 70  
13 years in order to determine a level in question. Instead, the example shows that the shortest frequency of  
14 intake would determine the daily average. Of course, laminate flooring is not food. Once installed in an  
15 average flooring consumers’ home, the average exposure is every single day. Hence, guided by OEHHA’s  
16 example, there is no rationale for averaging for any period of time – never mind 70 years. The only  
17 averaging to determine a laminate flooring product’s level in question would be for multiple test results  
for each of the 26 laminate flooring products or, to the extent the 26 products are deemed interchangeable,  
an average of all the relevant test results.

### 18 **3. Lumber Liquidators’ Projections of Future Levels in Question and Lifelong** 19 **Averaging Periods Would Lead to Absurd Results and Conflict With the** 20 **Electorate’s Intentions in Adopting Proposition 65.**

21 Proposition 65 is a remedial statute that should be broadly construed to accomplish its protective  
22 purposes. *People ex rel. Lungren v. Sup. Ct.* (1996) 14 Cal.4th 294, 306-307. “Absent ambiguity, we  
23 presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the  
24 court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its  
25 language.” [citation omitted] Of course, in construing the statute, “[t]he words ... must be read in context,  
26 considering the nature and purpose of the statutory enactment.” *Id.* at 301. “Where the language of a  
27 statutory provision is susceptible of two constructions, one of which, in application, will render it  
28 reasonable, fair and harmonious with its manifest purpose, and another which would be productive of  
absurd consequences, the former construction will be adopted.” *Id.* at 305. “When . . . the enactment  
follows voter approval, the ballot summary and arguments and analysis presented to the electorate in

1 connection with a particular measure may be helpful in determining the probable meaning of uncertain  
2 language.” *Id.* at 306.

3 In addition to running afoul of Proposition 65’s statutory and regulatory language, Lumber  
4 Liquidators’ argument that its duty to warn should turn on its self-serving projections of reduced  
5 exposures 70 years from the actual exposure directly contradicts the Voters’ expectation that Proposition  
6 65 would preclude such speculation. In Section 1 of the Act, the public declared their right “[t]o secure  
7 strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public  
8 health and safety.” The public voted for a law that would “[w]arn us before we’re exposed to any of these  
9 dangerous chemicals,” not to have to wait 70 years to see if a business manufacturing an emitting product  
10 was right about its speculations of future emission levels. Plaintiffs’ Exhibit 1376, Ballot Pamphlet,  
11 Proposed Stats. with arguments to voters, Gen. Elec. (Nov. 4, 1986) p. 54 (“Arguments in Favor of  
12 Proposition 65”). And the law was intended to be “clear, simple, and straightforward” and not burdened  
13 with a dizzying array of assumptions by defendants seeking post-hoc rationales for their toxic emissions.  
14 *Id.* The Voter Guide pointed out to the electorate that “[o]ften, scientists cannot determine precisely the  
15 health impact of low level exposures that occur over 20 or 30 years.” *Id.* at 23045. Voters did not intend  
16 that a defendant could avoid warnings by purporting to predict chemical emissions over 70 years. That is  
17 why the Act requires defendants to conduct a simple calculation by assuming a lifetime exposure at the  
18 level in question to determine the need for a reasonable warning.

19 In addition to undermining the Legislature’s express directive that exposure assessments under  
20 Proposition 65 must assume exposure at the level in question for a 70-year lifetime, Lumber Liquidators’  
21 effort to project future levels and include those in an average over 70 years leads to absurd results that  
22 would undermine Proposition 65’s warning requirements. Atmospheric scientist Camille Sears describes  
23 the perverse results that would result from applying Lumber Liquidators’ reasoning to products used  
24 solely by infants. “For example, a manufacturer of infant formula or baby food could create products with  
25 extremely high levels of carcinogens, arguing that infants will consume them for only one year. By  
26 Lumber Liquidators’ logic, infants could be exposed to carcinogens at levels 70 times higher than adults  
27 without any warning.” Expert Declaration of Camille Sears (Feb. 12, 2016) (“Sears Dec.”) ¶43.

28 By its own calculations, Lumber Liquidators’ expert concedes that the 26 laminate flooring  
products currently emit on average 278.2 µg/day of formaldehyde, a level that is about seven times higher  
than the Proposition 65 NSRL of 40 µg/day. Plaintiffs’ Exhibit 860. Dr. Rhomberg’s calculations show  
emissions in people’s homes above the NSRL every day for 10.4 years after installation in people’s  
homes. Rhomberg Depo. 2, 175:4-176:3 (Feb. 5, 2016); Sears Dec. ¶47. Dr. Rhomberg’s calculations

1 further show that the time-averaged daily exposure from the time of installation exceeds the NSRL for the  
2 first 25 years of exposure. Sears Dec. ¶47. Given Proposition 65’s clear directive that when assessing an  
3 exposure, one must *assume lifetime exposure at the level in question* for carcinogens like formaldehyde,  
4 there can be no room for an interpretation that would allow exposures for decades above the published  
5 NSRL without warnings.

6 In addition, Lumber Liquidators interpretation would make Proposition 65 unenforceable.  
7 Proposition 65 has a one-year statute of limitations for penalties and a three-year statute of limitations for  
8 injunctive relief. *Consumer Advocacy Group*, 104 Cal.App.4th at 442 n.4. It is undisputed that the  
9 formaldehyde levels from Lumber Liquidators Products would be far above the NSRL for the entire one  
10 and three-year limitations periods. However, Defendant argues that it would be necessary to wait 10.4  
11 years to see if the levels might eventually fall below the NSRL. But by that time, the limitations period  
12 would be long past and it would be impossible to bring an action. This interpretation would make a  
13 mockery of the statute.

#### 14 **4. Dr. Rhomberg’s Preferred Model #3 Remains Above the NSRL for 70-Years.**

15 All of Dr. Rhomberg’s exposure scenarios are therefore based on a misinterpretation of Prop 65,  
16 and an erroneous calculation methodology that is contrary to the statute and regulations. However, Dr.  
17 Rhomberg’s “Method 3” preferred scenario admits that, assuming an exposure for seventy years as  
18 required by Section 25249.10(c), the Lumber Liquidators’ flooring emits formaldehyde above the NSRL  
19 for the full 70-years. Rhomberg Dec. ¶109 (“Only in the unusual case of someone exposed from birth  
20 throughout a 70 year life to the same flooring installation would the estimated lifetime average daily  
21 exposure, of 70 µg/day, exceed the NSRL”). Although still inappropriately reducing and averaging the  
22 formaldehyde levels over that full 70-year period, in this scenario, Dr. Rhomberg admits that, even with  
23 an overlong averaging period, assuming a lifetime exposure exposes Lumber Liquidators’ laminate floor  
24 customers to a level of formaldehyde well above 40 µg/day. As a result, the company fails to meet its  
25 burden that the emissions are fall below the NSRL.

#### 26 **C. Lumber Liquidators’ 70-Year Averaging Approach is Based on Junk Science.**

27 Even if the Court could consider average exposures based on hypothetical projections 70-years  
28 into the future, Lumber Liquidators’ experts and test data do not support their conclusion that  
formaldehyde emissions from Lumber Liquidators’ Products decays quickly. Furthermore, Lumber  
Liquidators’ test data is contradicted by tests performed by GCM at two different certified laboratories  
that prove that formaldehyde emissions from the Products decay very slowly, and remain above the Prop  
65 NSRL for the entire 70-year lifetime.

1 As discussed above, Dr. Rhomberg presents three “preferred” models that allegedly portray the  
2 decay rate from the Products. Rhomberg Dec. ¶19. Below and at trial, we will discuss each model (in  
3 reverse order) and will demonstrate that none of the models meet LL’s burden to show by a preponderance  
4 of the evidence that emissions from LL Products ever fall below the NSRL.

5 **1. LL Preferred Model #3.**

6 Dr. Rhomberg’s Preferred Model #3 assumes that formaldehyde emissions will decay rapidly for  
7 three years, but then reach a steady state. Rhomberg Dec. ¶108. Dr. Rhomberg created Model #3 because  
8 LL has very little emission rate data for Products more than three years old. *Id.* ¶109. Under Model #3,  
9 formaldehyde levels in the average home with LL Products installed never drop below 69 ug/day – well  
10 above the 40 ug/day NSRL. (Rhomberg Depo. 2, 186:6-13 (Feb. 5, 2016); Rhomberg Dec. Ex. 4). Dr.  
11 Rhomberg hypothesizes that most people will move out of their homes in 9 or 30 years (Rhomberg Trial  
12 Dec. ¶108-109), but as discussed above this is not a valid defense. As a matter of law, Lumber  
13 Liquidators fails to meet its burden to prove the affirmative defense that the exposures fall below the  
14 NSRL since one of its own “preferred models” remains well above the NSRL for all 70-years. *SmileCare*,  
15 91 Cal.App.4th at 474-76.

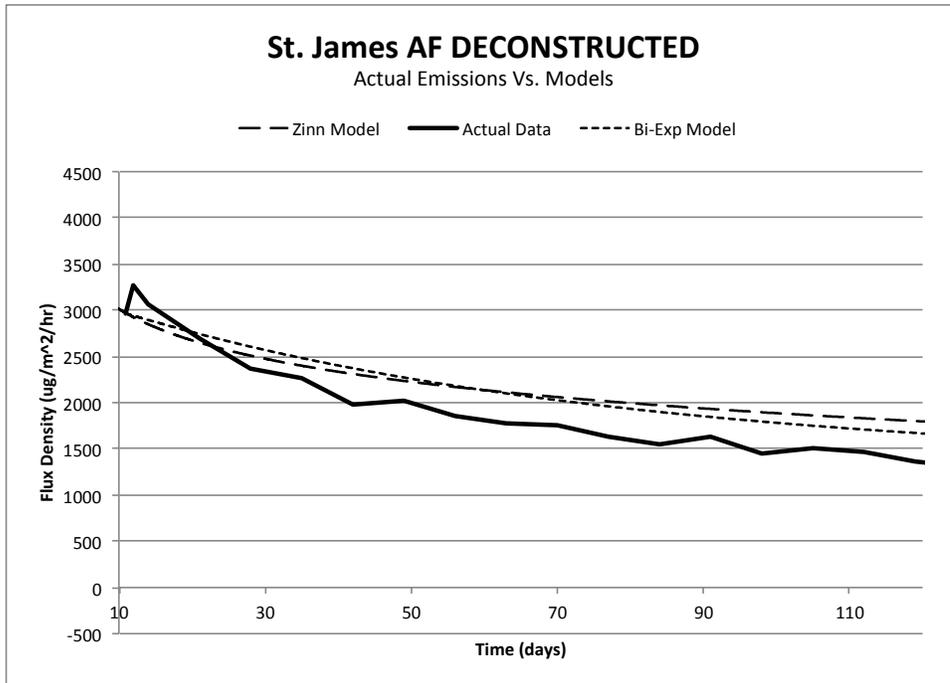
16 **2. LL Preferred Model #2.**

17 LL’s Preferred Model #2 is based on formaldehyde decay rate data collected over two years by  
18 Zinn. Rhomberg Dec. ¶106. In Model #2, Dr. Rhomberg assumes that formaldehyde emissions from the  
19 Lumber Liquidators’ Products will decay at the same rate as measured by Zinn. Rhomberg Dec. ¶¶106-  
20 107.

21 The problem with Model #2 is that Zinn measured formaldehyde emissions from raw particleboard  
22 – with no lamination. Rhomberg Dec. ¶106; Rhomberg Depo 2, 37:8-38:2 (Feb. 5, 2016). All of the  
23 experts agree that formaldehyde emissions will decay from raw particleboard much more quickly than  
24 from 2-sided laminated MDF. LL’s expert, Dr. Smith, testified, “If it’s laminated on both sides ... you  
25 have fewer paths for the formaldehyde molecules to escape the system. Its’ going to take longer for it to  
26 decay [than raw particleboard]... [2-sided laminated boards] are going to decay at a slower rate than the  
27 raw board...” Smith Depo. 105:23-106:20. Dr. Wescott states similarly, “laminates will significantly alter  
28 the decay curve as the formaldehyde that is being held in the panel because of this ‘barrier’ will eventually  
leave the panel. It will just take it longer to move to sections of the panel that will allow it to escape.”  
Wescott Dec. ¶133.

GCM had two labs measure decay rates from raw MDF (LL products with lamination removed)  
and from laminated LL products over a period of three months and four months, respectively. The raw

1 MDF boards showed fast decay almost exactly as predicted by Zinn, but the laminated Products decayed  
 2 vastly more slowly. Wescott Dec. ¶138. Dr. Wescott presents graphs showing the raw MDF (LL products  
 3 with lamination removed) decay exactly as predicted by Zinn. Wescott Dec. ¶42, Figure 1. One of Dr.  
 4 Wescott’s graphs is presented below. The solid line portrays the actual formaldehyde emissions emitted  
 5 by LL’s Products with the lamination removed, and the dotted lines represent the Zinn Decay curve and  
 6 Dr. Rhomberg’s “bi-exponential” decay curved based on the Zinn data.

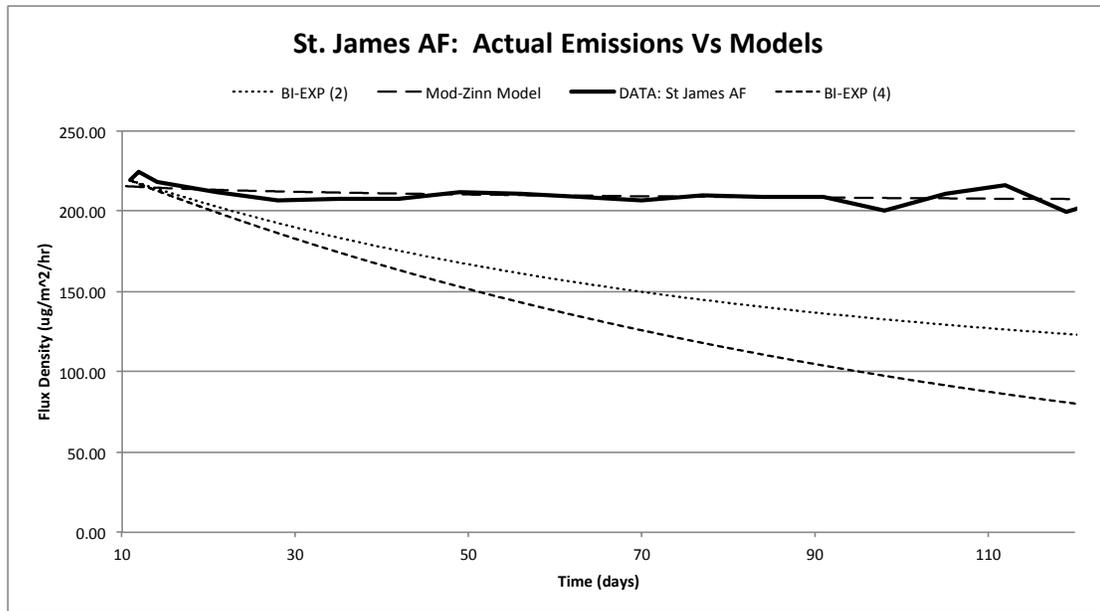


17 Dr. Wescott shows that laminated LL Products decay much more slowly than the raw MDF.  
 18 Wescott Dec. ¶70, Figure 4. One of Dr. Wescott’s graphs is presented below comparing actual  
 19 formaldehyde emissions measured from LL’s Products with lamination left on the Product (solid line),  
 20 compared to Dr. Wescott’s decay curve (dashed line labeled, “Mod-Zinn Model”), and compared to Dr.  
 21 Rhomberg’s Zinn-based raw particle-board model (dotted line labeled, “Bi-Exp 4”). Clearly, the laminated  
 22 Product decays much more slowly than the delaminated Product.<sup>12</sup>

23

24

25 <sup>12</sup> Although CARB has adopted the Zinn model to calculate emissions from raw particleboard, it uses  
 26 a much slower decay rate for 2-sided laminate. In Appendix B to the CARB Air Toxics Control  
 27 Measure for Formaldehyde, entitled, Estimation of Formaldehyde Emissions from Composite Wood  
 28 Products, Rhomberg 1718, CARB adopts the Zinn decay curve for raw particleboard only, Rhomberg  
 1721, but for 2-sided laminated particleboard, CARB assumes a “flat emission rate” that would  
 extend for 20 years. Rhomberg 1727.



Since Dr. Rhomberg’s Preferred Model #2 is based on the formaldehyde decay rate from raw particleboard, and there is no dispute that raw particleboard decays much more quickly than laminated board, Dr. Rhomberg’s Model #2 is entitled to no weight from the Court. “An expert opinion has no value if its basis is unsound.” *Lockheed Litig. Cases* (2004) 115 Cal.App.4th 558, 564.

However, even under this model, Dr. Rhomberg admits that formaldehyde levels will exceed 40 µg/day for over 5 years. Rhomberg Depo.1, 239:9-242:22.

### 3. LL Preferred Model #1.

LL’s Preferred Model #1 is based on two sets of test data. Rhomberg Dec. ¶¶85-86, 104. First, are a variety of tests conducted on samples of new LL products. Dr. Rhomberg calls these the Phase I tests. These tests were conducted by two different labs, Benchmark and Berkeley Analytical, and were conducted using several different methodologies. Rhomberg Dec. ¶43. Many of the Phase 1 tests conducted by Berkeley Analytical were tested using the CDPH 01350 method (2 planks clicked together, mounted on a steel plate with aluminum tape around the cut edges), Rhomberg Dec. ¶43, others were tested by Benchmark with 2 planks placed “back-to-back” with aluminum tape around the edges, while others were tested with a single plank with front and back open, but aluminum tape around the edges. Snapp Depo. 1, 71:13-14; Snapp Depo. 2 338: 3-11.

Dr. Rhomberg compared this Phase 1 dataset to a Phase 2 dataset to determine a decay rate. All of the Phase 2 tests were conducted by Benchmark lab. Snapp Dec. ¶49, Rhomberg Dec. ¶79. All of the Phase 2 tests were conducted using a new test method that Benchmark’s President, Travis Snapp, “made-up” by himself after viewing a program on 60 Minutes concerning formaldehyde in LL’s Products. Snapp Depo 86:18-24; <http://www.cbsnews.com/news/lumber-liquidators-linked-to-health-and-safety-violations>.

1 Mr. Snapp readily admitted that the test method is not endorsed by any governmental agency or standards  
2 agency, and is not discussed in any published scientific literature. Snapp Depo. 86:6-21. In this method, a  
3 single plank of LL Product was prepared by sealing the edges with paraffin wax, and leaving the  
4 lamination on the sample's front and back side. Snapp Dec. ¶51; Snapp Depo. 2, 262:21-23. The Phase 2  
5 samples are comprised of 387 samples taken from LL customers, and ranged in age from 80 days to 7  
6 years old, but with the vast majority less than 4 years old. Rhomberg Dec. ¶46; Rhomberg Depo 2, 57:12-  
7 16 (Feb. 5, 2016).

8 Dr. Rhomberg concludes that the Phase 1 samples have a significantly higher emission rate than  
9 the Phase 2 samples. He therefore concludes that there must be a fast decay between day 1 (represented by  
10 the Phase 1 data) and day 80 (represented by the Phase 2 data). Then there is a slower second phase of  
11 decay from day 80 to year 7, which is displayed in the Phase 2 dataset. Rhomberg Dec. ¶85-86. Dr.  
12 Rhomberg calls this a "bi-exponential" decay, with an initial fast decay from day 1 to day 80, followed by  
13 a much slower decay curve from day 80 onward. Rhomberg Dec. ¶89.

14 As discussed below, there are several serious problems with Dr. Rhomberg's analysis that renders  
15 it "junk science." *People v. Leahy* (1994) 8 Cal.4th 587, 599. "Only scientifically approved methods and  
16 procedures may be followed to quantify an exposure under the Act [Prop 65]." *DiPirro*, 153 Cal.App.4th at  
17 167. Dr. Rhomberg's methods and the test methods employed by Benchmark are not scientifically  
18 approved or valid methods and should therefore be given no weight by the Court.

19 **a. Benchmark Phase 2 Tests Failed to Follow A Generally Accepted  
20 Scientific Method.**

21 As discussed in detail in Motion in Limine #3, Benchmark failed to follow any generally accepted  
22 scientific method. The basic rule of *People v. Kelly* (1976) 17 Cal.3d 24, 32, is that expert testimony  
23 should be disregarded if it does not apply generally accepted scientific procedures. Benchmark failed to  
24 comply with either CDPH 01350, or ASTM D6007-2014. In particular, Benchmark failed to comply with  
25 D6007-2014's requirement that the sample be left in the chamber for three full air changes prior to testing.  
26 Instead, Benchmark left the samples in the chamber for only one air change. Offermann Dec. ¶63. This  
27 necessarily skews all of the Benchmark testing toward artificially low results. *Id.* ¶64. Motion in Limine  
28 #3 details other ways that Benchmark's testing failed to comply with ASTM D6007. Since Benchmark  
failed to comply with any generally accepted scientific method, its test results should be disregarded.  
*DiPirro*, 153 Cal.App.4th at 167.

Since all of the Phase 2 tests were conducted by Benchmark, there is no reliable Phase 2 data on  
which Dr. Rhomberg can base his opinion. (Unlike the Benchmark Phase 1 tests, the Phase 1 testing  
conducted by Berkeley Analytical is valid and admissible).

1                                   **b.       The Benchmark Phase 2 Testing Fails to Represent Real World**  
2                                   **Conditions Because there are no Exposed Seams.**

3                                   Motion in Limine #3 also explains that the Benchmark testing should be disregarded because it  
4 fails to represent “real world” conditions since there are no “seams” in any of the samples. Laminate  
5 floors can only be installed by clicking dozens of boards together (“click joints”). Offermann Dec. ¶¶18-  
6 20. The top and bottom of each plank is laminated with plastic. As explained by LL’s expert wood  
7 chemist, Dr. Smith, “It’s not possible [for formaldehyde] to go through either the top or the bottom  
8 laminate. For all intents and purposes, they are impermeable to gas.” Smith Depo. 39:17-20; Offermann  
9 Dec. ¶18. However, the edges of the planks are not laminated, and therefore, the edges and “click joints”  
10 are the primary source of formaldehyde emissions. Smith Depo. 41:12-22.

11                                   Despite evidence by Defendant’s own experts that seams are necessary to reflect exposures in a  
12 real-world scenario, none of the formaldehyde emissions tests conducted by BMI include seams.  
13 Offermann Dec. ¶17; McCarthy Depo. 111:9-20, 112:24-113:14. To prepare samples, Benchmark selected  
14 a sample of a plank of laminate flooring, and then sealed the edges with either aluminum tape or paraffin  
15 wax so that no edges or seams were exposed through which formaldehyde could escape. Offermann Dec.  
16 ¶17 (citing Transcript of Travis Snapp (Dec. 29, 2015) at 119:6-16; 120:15-17). In doing so, Benchmark  
17 essentially insured that the measured emission rates would be substantially lower than those in an actual  
18 residential setting. Offermann Dec. ¶16; Wescott Dec. ¶94. BMI blocked all primary pathways for  
19 emissions.

20                                   As the court held in *As You Sow v. Conbraco Indus.* (2005) 135 Cal.App.4th 431, 452-3, under  
21 Prop 65, a test method “must ‘closely duplicate,’ or be ‘substantially identical to,’ a ‘real world’” scenario.  
22 Since Benchmark’s tests do not represent “real world” conditions, they are unreliable. Since Benchmark  
23 conducted all of the Phase 2 tests, there is no basis for Dr. Rhomberg bi-exponential equation.

24                                   **c.       The Benchmark Test Methods For Completely Sealed Flooring Samples Are**  
25                                   **Neither Precise Nor Accurate And Cannot Be Reasonably Relied Upon.**

26                                   The absence of seams coupled with the test methods selected by Lumber Liquidators renders all of  
27 Benchmark’s Phase 1 and Phase 2 sampling unreliable because it is imprecise and has a high probability  
28 of being inaccurate. Offermann Dec. ¶¶32-59. Mr. Offermann sits on the ASTM committee with oversight  
over the D6007 method. *Id.* ¶7. Mr. Offermann explains how Benchmark’s testing method is not sensitive  
enough to accurately detect the low levels of formaldehyde allowed to emit from a fully sealed flooring  
sample. Offermann Dec. ¶¶32-59. Mr. Offermann points out that the “decision to have no exposed edges  
and seams guarantees that the emission rates of formaldehyde into the test chamber, and hence the test

1 chamber formaldehyde concentration will be very low.” *Id.* ¶33.<sup>13</sup> Indeed, only one of the 389 Phase 2  
2 samples analyzed by Benchmark was above the lower measurement range of Benchmark’s sampling  
3 method. *Id.* ¶40. “Similar for Benchmark’s Phase 1 ... emission rate tests, of the 303 air samples just 67  
4 (i.e. 22%) were above the lower measurement range.” *Id.* ¶41.

5 As a result, the lab analyses produced by Benchmark have a very low precision and thus poor  
6 accuracy. The measurement imprecision is similar to what you would expect when an instrument  
7 attempts measurements below or near the lower measurement range of the instrument (e.g. trying  
8 to measure the weight of an apple on a bathroom scale.).

9 *Id.* ¶42. Mr. Offermann calculates “that the uncertainty with each formaldehyde concentration  
10 measurement is on the order of  $\pm 100\%$ . *Id.* ¶58. In his expert opinion, due to the complete sealing of the  
11 flooring samples and the use of the less sensitive sampling method, the measurement methods used by  
12 Benchmark are “not capable of precise measurements for the low concentrations that were attempted to be  
13 measured in their Phase 1 and Phase 2 tests of the Lumber Liquidator laminate flooring samples. *Id.* ¶59.  
14 Benchmark’s inaccurate and imprecise testing results cannot reasonably be relied upon by Defendants’  
15 experts and should be excluded or given no weight by the Court.

16 **d. Phase 1 Tests are Not Comparable to the Phase 2 Tests.**

17 As discussed in Motion in Limine #2, the Phase 1 tests are not comparable to the Phase 2 tests. In  
18 Phase 1, Benchmark and Berkeley Analytical sealed the edges of the samples with aluminum tape. Snapp  
19 Depo. 1, 71:13-14; Snapp Depo. 2 338: 3-11. In Phase 2, Benchmark used a novel method invented by  
20 Mr. Snapp in which the edges of the samples were sealed with paraffin wax. Snapp Depo. 2, 262:21-23.  
21 None of the Phase 1 samples were sealed with wax.

22 Mr. Snapp readily admitted that wax seals the samples more tightly than aluminum tape. Mr.  
23 Snapp stated, “our opinion of the paraffin wax is that it more closely seals the edge versus the aluminum  
24 tape. We have had instances when using aluminum tape that the aluminum tape has come off of contact  
25 with the edge, exposing the edge within the chamber.” Snapp Depo. 2 259:16-20.

26 Since wax admittedly seals the edges (which are the main source of formaldehyde emissions) more  
27 tightly than aluminum tape, it should be no surprise that the Phase 2 tests (using wax) show generally  
28 lower emission levels than the Phase 1 tests (using aluminum tape). This is not a result of decay over the

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25 <sup>13</sup> Benchmark uses what is called an “impinger” to draw the air samples out of their small test  
26 chambers. Snapp Depo 1, 146:25-147:1-2; 70:23-25. The measurement range of the impinger  
27 sampling method is insufficient to accurately determine the low formaldehyde concentrations from  
28 the sealed flooring samples. *Id.* The two laboratories employed by Plaintiffs – Berkeley Analytical  
and Intertek – use a sample collection method that is 20 times more sensitive than the impinger  
method and that is required by CDPH Method 1350 for testing finished laminated flooring.  
Offermann Dec. ¶36.

1 80-day period between the Phase 1 tests and the first day of the Phase 2 tests, but rather a simple  
2 difference in sample preparation method. The Court should disregard evidence based on a flawed analysis.  
3 *Baptist v. WCAB* (1982) 137 Cal.App.3d 903, 906.

4 Furthermore, Benchmark conducted one additional set of 60 tests that LL's experts have  
5 inexplicably declined to include in the Phase 1 data. Plaintiffs' Exhibit 1105; *see* Snapp Depo. 1, Exs. 3 &  
6 12. These tests can be referred to as the "Navi Dhillon" tests based on the name of the contact included on  
7 the test reports. *See, e.g.* Snapp Depo. 1, Ex. 12. The Navi Dhillon tests were performed in the same  
8 manner as the Phase 2 Stericycle samples. *Id.* 156:13-16. These tests were done on samples of single  
9 boards with front and back exposed. *Id.* 157:18-21. All four edges of these samples were sealed. *Id.*  
10 157:16-17. These samples were in the small test chamber for two-hours before air sampling began. *Id.*  
11 158:12-20. The critical point is that the results of the "Navi Dhillon" Phase 1 tests are almost identical to  
12 the Phase 2 tests. Wescott Dec. ¶109. This suggests that when the Phase 1 and Phase 2 tests are prepared  
13 identically, the comparable tests show little or no decay over the 80 day time period. *Id.* Expert evidence  
14 should be afforded no weight if it ignores contradictory evidence, as was done by LL's experts here.  
*Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415; *Hyatt v. Sierra*  
*Boat Co.* (1978) 79 Cal.App.3d 325, 338.

15 **e. Benchmark Tests Do Not Show Any Decay Because Each Sample Was**  
16 **Only Tested on a Single Day, and it is Therefore Not Longitudinal.**

17 As explained by Dr. Wescott, the Benchmark Phase 2 test data proves nothing because each  
18 sample was tested on one day only. Therefore, the testing by definition cannot show that any plank  
19 decayed at all over time. For example, a four-year old plank with a low emission rate may have had the  
20 same low emission rate on day 1. Since each plank was only tested once, the test method does not  
21 demonstrate any long-term behavior. Wescott Dec. ¶93. Dr. Wescott explains that each manufacturer has  
22 different resin formulations with different emission profiles. *Id.*; Wescott Dec. ¶13. Since Lumber  
23 Liquidator has stated that it changes between 15-30% of manufacturers each year, and changed 50% of its  
24 manufacturers in 2012-2013 alone, the Phase 2 testing can say nothing about the longitudinal emissions of  
25 any given LL Product. *Id.* ¶93, citing Bates 20385; Plaintiffs' Exhibit 666. It is just as likely that the  
26 manufacturers used by LL in 2012 and prior used higher quality resins with lower emissions. The Court  
27 should disregard this Phase 2 "evidence" because it is based on a flawed analysis. *Baptist*, 137 Cal.App.3d  
28 at 906.

29 **f. LL Has No Data Whatsoever for the First 80-days, But That is When**  
30 **LL Contends Almost All of the Decay Occurs.**

31 Dr. Rhomberg's bi-exponential decay curve predicts a very steep decay in the first 80 days and

1 then a very slow decay from day 80 through 70 years. Rhomberg Dec. ¶89. Dr. Rhomberg’s model  
2 predicts that emissions from the 2-sided laminated Products will decrease by 50% in the first 50 days.  
3 Wescott Dec. ¶133. Dr. Rhomberg’s bi-exponential model predicts that emissions will decrease from 278  
4 µg/day on day 1 to 84 µg/day at the end of the second month (60 days) – a decrease of 194 µg/day or  
5 69%. Rhomberg Dec. Ex. 2. From Day 60 through the end of year 70, the decrease is extremely slow by  
6 comparison. Over the entire 70-year period, the decay is only another 30% from the initial level. *Id.*

7 This presents several problems. First, LL has no data for the first 80-days, when almost all of the  
8 suggested decay occurs. The Phase 1 data starts and ends at Day 1. But the Phase 2 data does not begin  
9 until Day 80. Thus, during the precise time period when Dr. Rhomberg predicts the steepest decay, there is  
10 absolutely no data. When asked about this, LL’s expert Dr. Smith stated, “I wouldn’t use this curve to  
11 predict anything that happens between zero to 80 days.” Smith Depo. 203:11-12. Dr. Smith continues,  
12 “Because I don’t have any data in that area earlier than 80 days, I would be resistant to want to use this to  
13 make predictions in that area.” *Id.* 206:4-6. Yet, this is precisely what Dr. Rhomberg has done – he has  
14 predicted that almost all of the projected decay happens in the first 80 days – the precise time period when  
15 there is no data.

16 Even Dr. Rhomberg admitted in his deposition, “*This fitted biexponential curve I will admit is*  
17 *overestimating the rate of decay in the very short time frame.*” Rhomberg Depo. 2, 171:19-21 (emphasis  
18 added). “[B]ecause we have so little data between zero and, say, ninety days ... it’s hard to fit the value of  
19 the first exponential with any kind of precision.” *Id.* 169:10-14.

20 “That makes this initial one [decay curve] *sort of arbitrary*... This biexponential curve fitted to the  
21 Phase 2 data does a good job at estimating the second decay parameter at the expense of having a  
22 hard time estimating the first one. And the way that hard time manifests itself is that *it gives an*  
23 *extraordinarily steep initial drop – probably more than is realistic*... We know it doesn’t go  
24 down that fast in other circumstances. It doesn’t go down that fast in the conditioning chambers; it  
25 doesn’t go down that fast in the particle board data... it’s the deficiencies that are in these data that  
26 make that component of the curve difficult to pin down and to make it do a precise job of  
27 predicting within those first ninety days.”

28 Rhomberg Depo. 2, 173:10-174:14 (emphasis added). But it is precisely during that first ninety days,  
where Dr. Rhomberg admits that his Model #1 curve is “overestimating that rate of decay” and is “sort of  
arbitrary,” that Dr. Rhomberg predicts almost all of the decay occurs.

This “evidence” is far too uncertain to be given any weight by the Court. An expert may not base  
his opinion on insufficient data. *Richard v. Scott* (1978) 79 Cal.App.3d 57. Here, Dr. Rhomberg and Dr.  
Smith admit that they have no data to support the vast majority of their biexponential decay curve. The  
Courts should exclude evidence when it lacks reliability, and demonstrates a “mere possibility” rather than  
a “probability.” *Cottle v. Sup. Ct.* (1992) 3 Cal.App.4th 1367, 1384 (toxicologist testimony excluded due

1 to lack of evidence). The courts should exclude expert testimony that is “mere speculation.” *Stephen v.*  
2 *Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 371; *Lockheed Litig. Cases*, 115 Cal.App.4th at 563-564  
3 (the matter relied on by an expert must provide a reasonable basis for his opinion, and opinions based on  
4 speculation or conjecture are not admissible). In this case, Dr. Rhomberg himself admits that the first  
5 phase of the biexponential decay curve is “sort of arbitrary,” and “overestimates the rate of decay.” By Dr.  
6 Rhomberg’s own admission, the biexponential curve is not only mere speculation, but it is wrong. As  
7 such, the Court should exclude Dr. Rhomberg’s testimony or give the testimony no weight. *Casey v.*  
8 *Perini Corp.* (2012) 206 Cal.App.4th 1222, 1235 (expert testimony in asbestos case excluded because it  
9 was based on “conjecture” and “surmise.”)

10 Furthermore, the biexponential curve is contradicted by the evidence. Dr. Rhomberg admits that  
11 his Model #1 biexponential curve predicts a much faster rate of decay for laminated board in the first 50  
12 days than has been measured for delaminated raw panels. This contradicts the testimony of Dr. Smith,  
13 who stated that raw panels will decay more quickly than laminated panels since the formaldehyde can  
14 escape more easily from a raw panel than from a laminated panel. Smith Depo. 106:14-23. Dr. Rhomberg  
15 admits this deficiency in his deposition: “it doesn’t go down that fast in the particle board data... it’s the  
16 deficiencies that are in these data that make that component of the curve difficult to pin down and to make  
17 it do a precise job of predicting within those first ninety days.” Rhomberg Depo. 2, 173:10-174:14.

18 **D. Plaintiffs’ Experts Show that Lumber Liquidators’ Flooring Vastly Exceeds the**  
19 **NSRL.**

20 Defendant bears the burden to prove the NSRL defense, and as discussed above, Defendant has  
21 failed to meet that burden. Plaintiffs bear no burden to show that Defendants exceed the NSRL.  
22 *SmileCare*, 91 Cal.App.4th at 474-76. Nevertheless, GCM’s experts have shown, using standard  
23 California agency methodology and test methods, that Lumber Liquidator’s Products expose consumers to  
24 formaldehyde levels far above the NSRL.

25 GCM’s experts relied on tests conducted by two highly respected certified laboratories, Berkeley  
26 Analytical and Intertek. Sears Dec. Ex. C.<sup>14</sup> The labs conducted 86 different tests on the 26 Products using  
27 the California Department of Public Health (“CDPH”) method 01350. *Id.* ¶76). In compliance with CDPH  
28 01350, the tested products underwent a 10-day conditioning period (left unwrapped to “air out”), and  
formaldehyde emission rates were determined for periods of 24, 48, and 96-hours after the conditioning  
period ended. Pursuant to CDPH 01350 guidance, the lamination was left on the flooring, two boards were

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<sup>14</sup> Lumber Liquidators also contracted with Berkeley Analytical to conduct many of its “Phase 1” tests. (Rhomberg Dec. ¶43)

1 “clicked” together, the outside edges were covered with VOC-proof aluminum tape, and the boards were  
2 taped to a stainless steel plate. This method approximates “real world” conditions where the floor is  
3 composed of many boards “clicked” together, placed on the floor, but formaldehyde can escape through  
4 the seams between boards. Offermann Dec. ¶18-31.<sup>15</sup>

5 Based on this test data, atmospheric scientist Camille Sears, M.S. performed 5 different NSRL  
6 calculations, all using standard California Agency methodologies. Ms. Sears is a highly-respected  
7 atmospheric scientist who has conducted over 150 Prop 65 analyses for the California Department of  
8 Justice. (Sears Dec. ¶8-12).

9 In “Method A,” Ms. Sears calculated “average” exposure levels using floor area coverage data  
10 from actual Lumber Liquidators’ customers (Sears Dec. ¶90), and standard California air models. Under  
11 Method A, Ms. Sears calculates that an average consumer of the average of Lumber Liquidators Products  
12 would be exposed to formaldehyde at an average level of 227.6 µg/day. The highest emitting Product  
13 would expose consumers to 655 ug/day of formaldehyde, and the lowest emitting Product would expose  
14 the consumer to 56 µg/day. Sears Dec. ¶91. The average level of all Products exceeds the Prop 65 NSRL  
15 of 40 ug/day by 5.4 times (540%). Sears Dec. ¶91.

16 In “Method B,” Ms. Sears calculated exposure levels based on the method proscribed by the  
17 California Department of Public Health in the same CDPH 01350 guidance document that sets forth the  
18 standard test method used by both labs. Under this method, CDPH uses conservative, health protective  
19 assumptions that a consumer may cover 100% of their floors with the Products, and a consumer may live  
20 in a newer home with a lower air exchange rate. Sears Dec. ¶96. Using this method, Ms. Sears calculates  
21 that a consumer of the Lumber Liquidators Products would be exposed to an average formaldehyde level  
22 of 1,238 ug/day. The highest emitting Product would expose consumers to 3564 ug/day of formaldehyde,  
23 and the lowest emitting Product would expose the consumer to 305 ug/day. Sears Dec. ¶97. The average  
24 level for all Products exceeds the Prop 65 NSRL of 40 ug/day by 30 times (3000%). Sears Dec. ¶97.

25 In “Method C,” Ms. Sears calculated the NSRL using the formaldehyde “unit risk value” as  
26 adopted by California OEHHA and California ARB. This is the method typically used by the California  
27 Department of Justice. (Sears Dec. ¶102-3). Under this method, Ms. Sears multiplied the average  
28 formaldehyde concentration in the typical home in which the Products are installed over the past one-year

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26 <sup>15</sup> GCM’s labs also conducted 48 “modified CDPH” tests in which both a seam and a small portion of  
27 the edge were left exposed. This test was designed to approximate real world conditions in which cut  
28 edges exist at the perimeter of the room which are not sealed. (Sears Dec. ¶78). While these test  
demonstrated significantly higher emissions (more than double) (Sears Dec. ¶¶83-85), GCM is not  
relying on those tests for its conclusions and instead relies on the standard CDPH 01350 test method.

1 period (the statute of limitations period). That level in question is multiplied by the cancer unit risk factor  
2 adopted by OEHHA and CARB, and the inhalation rate set forth in Prop 65 (20 cubic meters of air per  
3 day). Sears Dec. ¶103. The result of this calculation is then compared to the Prop 65 NSRL of 10 per  
4 million. Under Method C, Ms. Sears calculated the risk of the average of Lumber Liquidators’ Products to  
5 be 68.3 per million – more than 6 times the NSRL of 10 per million. Sears Dec. ¶104. The highest  
6 emitting Product creates a cancer risk of 196.7 per million, and the lowest creates a risk of 16.8 per  
7 million. Sears Dec. ¶106. All Products create a cancer risk well above the Prop 65 NSRL of 10 per  
8 million.

9 In “Method D,” Ms. Sears applied the California OEHHA 2015 Health Risk Assessment  
10 Guidelines using the 95<sup>th</sup> percentile inhalation rates. Sears Dec. ¶109.<sup>16</sup> These California State Agency  
11 Guidelines incorporate “age sensitivity” factors, which recognize that infants and children are far more  
12 sensitive to cancer-causing chemicals. The Guidelines also take into account factors for “time in the  
13 home” recognizing that people do not spend all of their time at home. The Guidelines have very specific  
14 factors for time in the home based on age (*i.e.*, infants spend more time at home than middle-aged adults).  
15 Sears Dec. ¶109. Using this Method D, Ms. Sears calculates that the average of all LL Products creates a  
16 cancer risk of 152.7 per million – more than 15 times above the Prop 65 NSRL of 10 per million. Sears  
17 Dec. ¶110. She also calculates that an infant would reach a 10 per million cancer risk in a mere 3.5  
18 months. *Id.* The Product with the highest emission rate would create a cancer risk of 439.7 per million,  
19 and the Product with the lowest emission rate would have a cancer risk of 37.6 per million. Sears Dec.  
20 ¶112. All of these numbers are far above the Prop 65 NSRL.

21 Finally, in Method E, Ms. Sears calculates cancer risk using the same OEHHA 2015 Health Risk  
22 Assessment Guidelines, but substitutes average inhalation rates, rather than 95<sup>th</sup> percentile rates. Sears  
23 Dec. ¶116. Using this Method E, the composite average CDPH test results for the 26 Products cause a 70-  
24 year average excess cancer risk of 108.6 per million. This exceeds the Proposition 65 NSRL of 10 per  
25 million excess cancer risk by more than a factor of 10. Furthermore, this methodology finds that it takes  
26 about 5.8 months of exposure for an infant to receive the Proposition 65 NSRL of 10 per million excess  
27 cancer risk. Sears Dec. ¶117. The product with the lowest exposure causes a 70-year average  
28 formaldehyde excess cancer risk of 26.7 per million. The product with the highest exposure causes a 70-  
year average formaldehyde excess cancer risk of 312.7 per million. Sears Dec. ¶118. Of course, all of the

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<sup>16</sup> The OEHHA Final Statement of Reasons includes a reference to the “traditional” use of 95<sup>th</sup> percent confidence limits as “best estimates” in “regulatory toxicology” risk assessments. Plaintiffs’ Exhibit 1406 at 3549; see, *DiPirro*, 153 Cal.App.4th at 194 (using 85<sup>th</sup> percentile).

1 Products far exceed the Prop 65 NSRL of 10 per million.

2 Ms. Sears summarizes her conclusions in Table 1 at paragraph 7.C. on page 3 of her Trial  
3 Declaration as follows:

4 Table 1: Ms. Sears Summary Of Conclusions

Method	Calculated Quantity	Result	NSRL	Multiple of NSRL
A	Daily exposure (average)	227.6 ug/day	40 ug/day	5.7x
B	Daily exposure (CDPH)	1,238 ug/day	40 ug/day	31.0x
C	Excess cancer risk (Inhalation Unit Risk)	68.3 per million	10 per million	6.8x
D	Excess cancer risk (OEHHA 95/80 <sup>th</sup> inhalation)	152.7 per million	10 per million	15.3x
E	Excess cancer risk (OEHHA Mean inhalation)	108.6 per million	10 per million	10.9x

17  
18 **E. Dr. Wescott Proves that Formaldehyde Emissions Do Not Fall Below the NSRL**  
19 **During the Entire 70-Year Lifetime.**

20 As discussed above, the decay rate of a product over a 70-year period is irrelevant to Prop 65, and  
21 only emissions at the “level in question” during the one-year statute of limitations period matter. However,  
22 for sake of rebuttal, GCM retained eminently qualified experts who have determined that all 26 Lumber  
23 Liquidators’ Products will continue to emit formaldehyde at levels far above the NSRL for the entire 70-  
24 year lifetime.

25 GCM retained one of the world’s leading experts on the topic of formaldehyde emissions from  
26 composite wood products, Dr. James Wescott. Dr. Wescott has a Ph.D. in chemistry, and has published  
27 numerous peer-reviewed scientific journal articles on formaldehyde emissions from composite wood  
28 products. Wescott Trial Dec. ¶¶2-9. Even Lumber Liquidator’s expert, Dr. Gregory Smith, recognizes that  
Dr. Wescott is an expert in the area of composite wood resin chemistry. Smith Depo. 23:2-6.

1 As Dr. Wescott explains in his Trial Declaration, GCM – rather than attempting to improperly  
2 infer a decay rate as LL does – conducted tests to *directly* observe and measure the decline in  
3 formaldehyde emissions over time from LL’s Chinese laminate products. GCM contracted with two  
4 separate certified laboratories, Intertek and Berkeley Analytical. Berkeley Analytical (“Berkeley”)  
5 evaluated the formaldehyde emissions of Kensington Manor (KM) Fumed Ironwood, Kensington Manor  
6 (KM) Hand Scraped (HS) Summer Retreat Teak, St. James Vintner’s Reserve, and St. James African  
7 Mahogany over a period of four months, with testing at least once each week. Three different test  
8 specimen preparation procedures were used for each sample. These procedures are termed: 1) CDPH, 2)  
9 Modified CDPH, and 3) CARB Deconstructed SOP. Since these four Products were each tested in three  
10 different configurations, with at least weekly testing (more in the first week) over a four month period, the  
11 total number of long-term emission tests performed by Berkeley exceeds 192 (4 products x 3  
12 configurations/product x 4 tests/configuration per month x 4 months = 192 tests (plus additional tests in  
13 the first week)). Wescott Dec. ¶15. The CDPH samples were prepared pursuant to CDPH Method 01350  
14 (2 planks clicked together, placed on a stainless steel plate, with aluminum tape around edges, but with  
15 click joint left untaped). Wescott Dec. ¶19. The Modified CDPH specimens were prepared identical to the  
16 CDPH samples, but with a 3.25 cm section of the cut edge left un-taped. Wescott Dec. ¶20. The CARB  
17 SOP samples were prepared pursuant to the CARB Standard Operating Procedure for Finished Good Test  
18 Specimen Preparation Prior to Analysis of Formaldehyde Emissions from Composite Wood Products, in  
19 which the lamination is removed from the bottom of two identical samples which are then taped face-to-  
20 face (to expose two bare surfaces) prior to placing in the chamber to measure the formaldehyde in the  
21 MDF core. Wescott Dec. ¶21. This method is sometimes referred to as “deconstruction.” Wescott Dec.  
22 ¶42.

20 Intertek conducted essentially identical tests to evaluate the formaldehyde emissions of Golden  
21 Teak, Blacksburg Barn and Glacier Peak Poplar over a period of three months, with testing at least once  
22 each week, testing in the same configurations of 1) CDPH, 2) Modified CDPH, and 3) CARB  
23 Deconstructed SOP. Intertek conducted over 108 such emission tests. Wescott Dec. ¶22. All samples were  
24 selected to represent a variety of Lumber Liquidators’ Products, ranging from high-emitting to low-  
25 emitting Products, with several in the typical range of the 26 Products. Wescott Dec. ¶¶30-32.

25 Dr. Wescott found that formaldehyde emissions from the *deconstructed* laminate flooring decayed  
26 fairly quickly over the four month period, in a manner nearly identical to that predicted by Dr.  
27 Rhomberg’s bi-exponential model (and as predicted by the California Air Resources Board, and the  
28

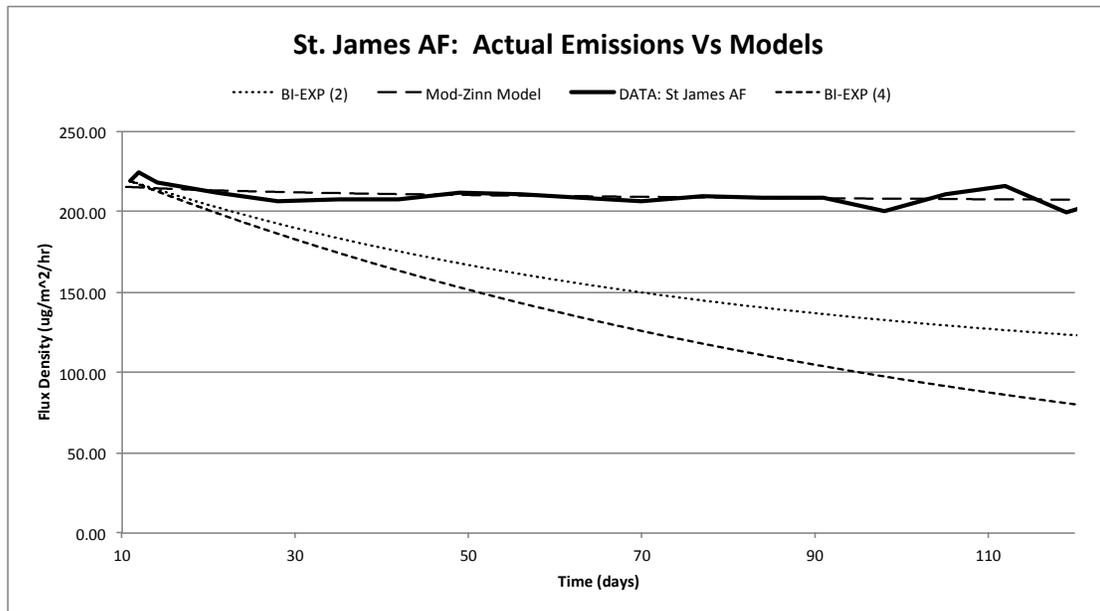
1 leading article by Zinn concerning formaldehyde emissions from raw, unlaminated panel). Wescott Dec.  
2 ¶¶42-43.

3 However, the Intertek and Berkeley Analytical testing showed that over the four month test period,  
4 formaldehyde emissions from the 2-sided *laminated* Lumber Liquidators' Product decayed much more  
5 slowly than from the raw MDF samples of the same products. Dr. Wescott concluded that the lamination  
6 on the top and bottom of the flooring materials significantly slowed the decay rate of formaldehyde  
7 emissions. Dr. Wescott explains, "The reason why the emission rate decay curves are so steep for the raw  
8 boards is the result of a greater exposed surface area, which allows for the formaldehyde to readily escape.  
9 In laminated wood flooring, the formaldehyde is retained better in the product as it has less pathways to  
10 readily leave the panel." Wescott Dec. ¶50. Dr. Wescott points out that Lumber Liquidator's expert, Dr.  
11 Smith agrees that "the raw board with no laminates on it, that would decay more quickly than the  
12 particleboard with laminates on it, because the formaldehyde can get out of the system real quickly."  
13 Wescott Dec. ¶62, quoting Smith Depo. at 59.

14 Dr. Wescott shows that his model fits the actual slow formaldehyde decay rate measured by both  
15 Intertek and Berkeley Analytical from actual samples of Lumber Liquidators flooring over 630 to 960%  
16 better than the models proposed by Dr. Rhomberg. Wescott Dec. ¶73. Dr. Wescott also shows that his  
17 model, with a vastly slower decay rate than calculated by Dr. Rhomberg, is many times more accurate  
18 than Dr. Rhomberg's decay curve. Wescott Dec. ¶¶76-77. Dr. Wescott compares his slow decay curve to  
19 Dr. Rhomberg's decay curves graphically in paragraph 70 of his declaration. The graphs clearly show that  
20 Dr. Wescott's decay curve fits the actual formaldehyde decay measured from Lumber Liquidators'  
21 Products much more accurately than either of Dr. Rhomberg's decay curves. Wescott Dec. ¶70. Dr.  
22 Wescott also points out that his decay model is supported by the California Air Resources Board, which  
23 predicts steady state emissions for 20 years, and by published scientific literature. Wescott Dec. ¶¶74, 91;  
24 CARB Appendix B, Estimation of Formaldehyde Emissions from Composite Wood Products, p. 8  
25 (Rhomberg 001718).

26 One of Dr. Wescott's graphs comparing Dr. Wescott's CARB/Zinn-based natural log decay curve  
27 to Dr. Rhomberg's decay curves is presented below for the Lumber Liquidators Product St. James African  
28 Mahogany. The graph charts the actual formaldehyde emissions measured from the Product over a period  
of four months (solid line) compared to Dr. Wescott's decay curve (long dashed line labelled "Mod-Zinn  
model"), and compared to Dr. Rhomberg's decay curves (short dotted lines labelled Bi-Exp (2) and Bi-  
Exp (4)). The graph (and the other graphs presents in paragraph 70 of Dr. Wescott's Declaration) makes

1 clear that Dr. Wescott's decay curve much more accurately represents the actual formaldehyde emissions  
2 from the Products than do either of Dr. Rhomberg's decay curves.



14 Atmospheric Scientist Camille Sears, M.S., applied the Wescott Decay curve to her five different  
15 California Agency standard methods to calculate formaldehyde exposure resulting from the average use of  
16 Lumber Liquidators' Products over a 70-year period. Sears Dec. ¶¶80-82.

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- For Method A ("real world" average air exchange rates and floor area coverage), Ms. Sears calculates that the 70-year average exposure level from the average Lumber Liquidators' Products would be 217.9  $\mu\text{g}/\text{day}$ . This is 540% of the 40  $\mu\text{g}/\text{day}$  NSRL. Sears Dec. ¶91.
  - For Method B (CDPH-specified air exchange rates and floor area coverage), Ms. Sears calculates that the 70-year average formaldehyde exposure level from the average Lumber Liquidators Products would be 1,185  $\mu\text{g}/\text{day}$  (29.6 times above the Prop 65 NSRL of 40  $\mu\text{g}/\text{day}$ ). Sears Dec. ¶97.
  - For Method C (CARB/OEHHA Formaldehyde Unit Risk Value), Ms. Sears calculates that the 70-year average exposure level from the average Lumber Liquidators' Products would be 65.4 per million (6.5 times the Prop 65 NSRL of 10 per million). Sears Dec. ¶106.
  - For Method D (OEHHA 2015 Risk Assessment Guidelines for 95<sup>th</sup> Percentile Inhalation Rates), Ms. Sears calculates that the 70-year average exposure level from the average Lumber Liquidators Products would be 152.7 per million (15.3 times the Prop 65 NSRL of 10 per million).

- For Method E (OEHHA 2015 Risk Assessment Guidelines for Average Inhalation Rates), Ms. Sears calculates that the 70-year average exposure level from the average Lumber Liquidators Products would be 108.6 per million (more than 10 times the Prop 65 NSRL).

Thus, even if a 70-year lifetime average projected exposure were allowed (and they are not), when actual formaldehyde decay rates from Lumber Liquidators' Products are calculated, the average consumer will be exposed to formaldehyde emissions from the Products at levels far above the Prop 65 NSRL for the entire 70-year period. Therefore, Lumber Liquidators cannot establish the NSRL affirmative defense under any circumstances.<sup>17</sup>

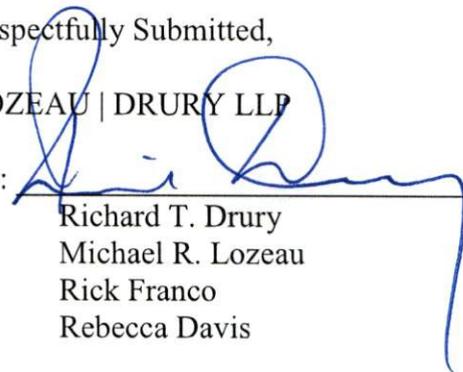
## VI. CONCLUSION

Based on the reasons stated above and the evidence to be presented at trial, the Court should rule in favor of Plaintiffs.

Dated: February 23, 2016

Respectfully Submitted,

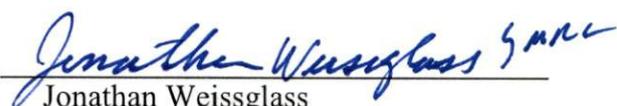
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Dated: February 23, 2016

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Sunshine Park LLC

<sup>17</sup> Dr. Rhomberg admits that he was aware of Plaintiff's decay rate test data, but that he elected to ignore it. Rhomberg Dec. ¶33. Dr. Rhomberg's opinions should be granted no weight since he has elected to ignore contradictory factual evidence. *Nardizzi*, 136 Cal.App.4th at 1415.

**PROOF OF SERVICE**

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607.

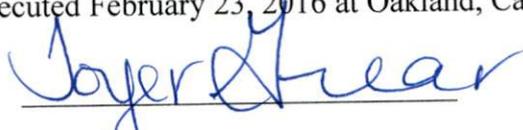
On February 23, 2016, I served a copy of the foregoing document(s) entitled:

**PLAINTIFFS' TRIAL BRIEF**

BY OVERNIGHT DELIVERY and ELECTRONIC SERVICE: by e-mailing a true copy and placing a true copy thereof in an FedEx envelope, sealing, and placing it for collection and priority overnight delivery following ordinary business practices addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed February 23, 2016 at Oakland, California.



Toyer Grear