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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

ALICE J. BRADFIELD et al.,

Plaintiffs and Appellants,

v.

APM TERMINALS PACIFIC, LTD., et al.,

Defendants and Respondents.

B206739

(Los Angeles County  
Super. Ct. No. BC322640)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Emilie H. Elias, Judge. Affirmed in part; dismissed in part.

Rose, Klein & Marias, Gregory Stamos, David A. Rosen, and Kevin P. Smith for  
Plaintiffs and Appellants.

Morgan, Lewis & Bockius, Andrea Sheridan Ordin, and Laura H. McKaskle;  
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo and Arturo Padilla; Chapman and Cutler  
and Thomas L. Van Wyngarden for Defendants and Respondents APM Terminals  
Pacific, Ltd., California United Terminals, China Shipping (North America) Holding Co.,  
Ltd., Crescent Wharf & Warehouse Co. (also erroneously sued as Crescent Terminal  
(Stevedoring Services of America)), WWL Vehicle Services Americas, Inc., formerly  
known as Distribution & Auto Service, Inc., Eagle Marine Services, Ltd., Hanjin  
Shipping Co., International Transportation Service, Inc., Marine Terminals Corporation,

Pasha Stevedoring & Terminals, LP, SSA Marine, Inc., SSA Terminals – Long Beach, LLC, Total Terminals, Inc., Trans Pacific Container Service Corporation, Yang Ming (America) Corporation, and Yusen Terminals, Inc.

Paul, Hastings, Janofsky & Walker and Zachary Robert Walton for Defendant and Respondent Baker Commodities, Inc.

Farella Braun & Martel and R. Christopher Locke for Defendant and Respondent Catalyst Paper Corporation.

Stone, Rosenblatt & Cha and Gregory E. Stone for Defendant and Respondent Cemex, Inc.

Manatt, Phelps & Phillips, Craig A. Moyer, Peter R. Duchesneau, and Benjamin G. Shatz for Defendants and Respondents Chemoil Corporation, Chemoil Terminal Corp., and Petro-Diamond Terminal Company.

Caldwell, Leslie & Proctor, Michael R. Leslie, Andrew Esbenshade, and Lisa M. Prince for Defendant and Respondent Equilon Enterprises, LLC and Shell Oil Products U.S.

Bewley, Lassleben & Miller, Leighton M. Anderson, and David A. Brady for Defendant and Respondent Fremont Forest Group Corporation.

Stephoe & Johnson, Lawrence P. Riff, and Lynn R. Levitan for Defendants and Respondents Exxon Mobil Corporation and U.S. Borax Inc.

Sheppard Mullin Richter & Hampton and Stephen J. O'Neil for Defendant and Respondent Georgia Pacific Gypsum, LLC.

Isaacs, Clouse, Crose & Oxford and John A. Crose, Jr., for Defendant and Respondent GATX Tank Storage Terminals Corp.

Munger, Tolles & Olson and Patrick J. Cafferty, Jr., for Defendant and Respondent Koch Carbon, Inc.

Wilson Elser Moskowitz Edelman & Dicker, Thomas C. Corless, and Josephine C. Lee Nozaki for Defendant and Respondent Simsmetal West LLC, formerly known as Hugo Neu Proler.

Schaffer, Lax, McNaughton & Chen, Kevin J. McNaughton, and Jill A. Franklin for Defendant and Respondent Los Angeles Export Terminal, Inc.

McNulty & Saacke and Barbara S. Kokkinakis for Defendant and Respondent Long Beach Container Terminal, Inc.

Walsworth Franklin Bevins & McCall and Lisa King Ackley for Defendant and Respondent Weyerhaeuser Company.

Alston & Bird and Kurt Weissmuller for Defendant and Respondent Mitsubishi Cement Corporation.

Lewis, Brisbois, Bisgaard & Smith, Cary Linn Wood, and Lisa Willhelm Cooney for Defendant and Respondent Pacific Coast Recycling, LLC.

Howrey and Joanne Lichtman for Defendant and Respondent National Gypsum Co.

Keesal, Young & Logan, Joseph A. Walsh III, Frances L. Keeler, and Scott E. Hinsche for Defendant and Respondent Tosco Corporation and Ultramar, Inc., erroneously sued as Ultramar Diamond Shamrock Corp.

Murchison & Cumming and Gina E. Och for Defendant and Respondent Toyota Logistics Services, Inc.

Pillsbury Winthrop Shaw Pittman, Barbara L. Croutch, and Mark E. Elliott for Defendants and Respondents Vopak Terminal Los Angeles, Inc. and Vopak Terminal Long Beach Inc.

Gallagher & Gallagher, Timothy Patrick Gallagher, and Thomas Sites for Defendant and Respondent Westway Terminal Company, Inc.

Dongell Lawrence Finney and Michael E. Gallagher, Jr., for Defendant and Respondent Seaside Transportation Services.

McKenna Long & Aldridge, Stanley W. Landfair, and Robert S. Schuda for Defendant and Respondent Morton Salt.

Edmund G. Brown, Jr., Attorney General, and Edward G. Weil, Deputy Attorney General, as Amicus Curiae.

In this action for private enforcement of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.),<sup>1</sup> we reject appellants' contentions and affirm the order of dismissal as to those defendants who have no further claims against them. As for the other defendants who remain subject to any claims in the trial court, we dismiss the appeal as premature under the one final judgment rule.

## BACKGROUND

Plaintiffs and appellants are members of the Bradfield family who live near the Ports of Los Angeles and Long Beach (the ports).<sup>2</sup> Defendants and respondents are approximately 50 owners and operators of shipping terminals that use diesel-powered machinery, trucks, ships, and other equipment in their commercial operations at the ports.<sup>3</sup>

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

<sup>2</sup> The plaintiffs are Alice J. Bradfield, Kristin Bradfield, David Bradfield, Meredith Bradfield, and Hillary Bradfield. Meredith and Hillary are minors appearing through their respective guardian ad litem.

<sup>3</sup> Defendants and respondents are: APM Terminals Pacific, Ltd., California United Terminals, China Shipping (North America) Holding Co., Ltd., Crescent Wharf & Warehouse Co. (also erroneously sued as Crescent Terminal (Stevedoring Services of America)), WWL Vehicle Services Americas, Inc., formerly known as Distribution & Auto Service, Inc., Eagle Marine Services, Ltd., Hanjin Shipping Co., International Transportation Service, Inc., Marine Terminals Corporation, Pasha Stevedoring & Terminals, LP, SSA Marine, Inc., SSA Terminals – Long Beach, LLC, Total Terminals, Inc., Trans Pacific Container Service Corporation, Yang Ming (America) Corporation, Yusen Terminals, Inc., Baker Commodities, Inc., Catalyst Paper Corporation, Cemex, Inc., Chemoil Corporation, Chemoil Terminal Corp., Petro-Diamond Terminal Company, Equilon Enterprises, LLC, Shell Oil Products U.S., Fremont Forest Group Corporation, Exxon Mobil Corporation, U.S. Borax Inc., Georgia Pacific Gypsum, LLC, GATX Tank  
(Fn. continued.)

The second amended complaint's fourth cause of action alleges that defendants failed to warn plaintiffs and the public of environmental exposure to diesel engine exhaust at the ports in violation of section 25249.6. Section 25249.6 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 clear and reasonable warning to such individual, except as provided in Section 25249.10."<sup>4</sup> Diesel engine exhaust is listed among the known carcinogens that are subject to Proposition 65's warning requirement. (§ 25249.8; <[http://oehha.ca.gov/prop65/prop65\\_list/files/P65single080709.pdf](http://oehha.ca.gov/prop65/prop65_list/files/P65single080709.pdf)> [as of 9/8/09].)

Before citizens may file a private enforcement action for a violation of section 25249.6, they must comply with the notice requirement set forth in section 25249.7, subdivision (d). At issue in this case is plaintiffs' compliance with the notice requirement. The notice requirement "serves dual purposes. It provides the public

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Storage Terminals Corp., Koch Carbon, Inc., Simsmetal West LLC, formerly known as Hugo Neu Proler, Los Angeles Export Terminal, Inc., Long Beach Container Terminal, Inc., Weyerhaeuser Company, Mitsubishi Cement Corporation, Pacific Coast Recycling, LLC, National Gypsum Co., Tosco Corporation, Ultramar, Inc., erroneously sued as Ultramar Diamond Shamrock Corp., Toyota Logistics Services, Inc., Vopak Terminal Los Angeles, Inc., Vopak Terminal Long Beach Inc., Westway Terminal Company, Inc., Seaside Transportation Services, and Morton Salt.

<sup>4</sup> Section 25249.10 provides: "Section 25249.6 shall not apply to any of the following: [¶] (a) An exposure for which federal law governs warning in a manner that preempts state authority. [¶] (b) An exposure that takes place less than twelve months subsequent to the listing of the chemical in question on the list required to be published under subdivision (a) of Section 25249.8. [¶] (c) An exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical pursuant to subdivision (a) of Section 25249.8. In any action brought to enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this subdivision shall be on the defendant."

prosecutor the means to assess whether to intervene on behalf of the public. It further affords the accused an opportunity to forestall litigation by settling with the plaintiff or by curing any violation. ([*Yeroushalmi v. Miramar Sheraton* (2001)] 88 Cal.App.4th [738,] 748.)” (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2007) 150 Cal.App.4th 953, 963-964 (*Consumer Advocacy*)). “Notice is a mandatory precondition to a lawsuit brought by a citizen to enforce Proposition 65, the outcome of which may result in severe penalties. (§ 25249.7, subd. (b)(1) [the violation may be punished by civil penalties not to exceed \$2,500 per day for each violation in addition to any other penalty established by law] . . . .)” (*Id.* at p. 963.)

In this case, the trial court sustained defendants’ demurrer to plaintiffs’ Proposition 65 claim for lack of sufficient notice. The court found that the notice of alleged violation provided by plaintiffs was inadequate under the standards set forth in *Yeroushalmi v. Miramar Sheraton, supra*, 88 Cal.App.4th 738 (*Yeroushalmi* or *Miramar*) and *Consumer Advocacy, supra*, 150 Cal.App.4th 953. In *Yeroushalmi*, we stated that “[a] notice which merely alleges that there was tobacco smoke or a cigar somewhere on or off one or more of the alleged violator’s business premises, exposing the public and all classes of employees in a given city to toxins sometime during a four-year period, gives no notice at all.” (*Id.* at p. 750.) After referring to the above-quoted passage, the trial court found the notice in this case was similarly deficient in failing to identify the area and route of the public’s exposure to diesel exhaust at the ports.

On March 17, 2008, plaintiffs filed a timely appeal from the order dismissing their section 25249.6 claim from the complaint. Plaintiffs contend that because their notice of an alleged violation was sufficient, their claim must be reinstated.

## DISCUSSION

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.

[Citation.] We also consider matters which may be judicially noticed.” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.’ (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) ‘To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court.’ (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.) ‘[W]e may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court.’ (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.)” (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999.)

## **I. Appealability**

Plaintiffs appealed from the February 26, 2008 order sustaining the demurrer and dismissing the section 25249.6 cause of action from the complaint. Defendants contend that because a nuisance claim is still pending against some of the defendants, the February 26, 2008 order is not a final judgment as to all of the parties.<sup>5</sup> We agree.

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<sup>5</sup> The original and first amended complaints contained causes of action for nuisance, negligence, strict liability, breach of warranty, and inverse condemnation. The second amended complaint, the operative pleading, contained causes of action for nuisance, negligence, inverse condemnation, violation of Proposition 65, and violation of Business and Professions Code section 17200.

(Fn. continued.)

“A judgment that disposes of fewer than all the causes of action framed by the complaint is not final in the fundamental sense as to any parties between whom another cause of action remains pending. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741.)” (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307.) “An appeal from a judgment that is not final violates the one final judgment rule and must therefore be dismissed [citations], unless the violation can be cured by amending the judgment. [Citation.]” (*Id.* at pp. 307-308.)

Plaintiffs rely on an exception to the one final judgment rule that is applicable when a plaintiff brings an action in multiple capacities. Under this exception, if a judgment determines all of a plaintiff’s rights in one capacity, the judgment may be final even though the action is still pending on a claim brought in a different capacity. (See *First Security Bank of Cal., N.A. v. Paquet* (2002) 98 Cal.App.4th 468, 474-475 (*First Security Bank*).)<sup>6</sup> Plaintiffs argue that because the dismissal of the Proposition 65 claim

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Defendants assert there is a nuisance claim pending against some of the defendants, but there are no claims pending against the other defendants. (See fn. 13, *post.*) Plaintiffs do not dispute this assertion in their reply brief.

<sup>6</sup> The court in *First Security Bank* discussed the exception as follows: “When a party brings an action in multiple capacities, a judgment determining that party’s rights in one capacity may be final even though the action is still pending on a claim brought in a different capacity. For instance, in a personal injury and wrongful death action, a judgment disposing of the claim by the surviving spouse as executor of the decedent’s estate is final even though claims by the spouse in her individual capacity and as guardian ad litem for the decedent’s minor children are still pending. (*Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 241.) In her capacity as executor, the surviving spouse ‘was a separate party as to whom there was no issue left to be determined . . . .’ (*Ibid.*)

“Similarly, an action by a workers’ compensation insurance carrier against a third party tortfeasor to recover damages for itself and for an injured employee of its insured is treated as having been brought by two separate plaintiffs. (*Aetna Cas. etc. Co. v. Pacific Gas & Elec. Co.* (1953) 41 Cal.2d 785, 789.) Therefore, a dismissal of the claim on behalf of the employee is final and appealable despite the pendency of the insurer’s individual claim. (*Ibid.*)” (*First Security Bank, supra*, 98 Cal.App.4th at p. 474.)

constituted a final determination of their rights as a representative of the public interest,<sup>7</sup> the dismissal of the claim is a final judgment notwithstanding the existence of another claim brought in a different capacity.

Defendants contend plaintiffs did not file the Proposition 65 claim in a representative capacity. They argue that plaintiffs filed the claim in a private capacity and were motivated by their potential recovery of up to 25 percent of all civil and criminal penalties imposed under section 25249.12, subdivision (d).<sup>8</sup> (Cf. *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1348 [“private attorney general doctrine . . . was not intended to reward litigants motivated by their own pecuniary interests who only coincidentally protect the public interest”].)

Plaintiffs disagree that they have a personal interest “simply because they stand to recover a portion of the civil penalties.” Plaintiffs point out that: (1) the complaint contained no request for penalties on their behalf; and (2) any public prosecutor who brings a Proposition 65 action is entitled to an award of up to 25 percent of the civil and criminal penalties imposed under section 25249.12, subdivision (d).

The complaint’s allegations do not support plaintiffs’ argument. The complaint alleged that defendants are liable “for civil penalties of up to \$2,500 per day per individual exposure to diesel engine exhaust, pursuant to Health & Safety Code § 25249.7[, subdivision] (b).” In the prayer for relief, plaintiffs requested “[a]n award of civil penalties of \$2,500 per day for each violation of Proposition 65,” and “such other and further relief as the court may deem just and proper.” Accordingly, the complaint’s

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<sup>7</sup> Plaintiffs do not claim to represent the people of the State of California. Under section 25249.7, subdivision (c), the Attorney General is the only public prosecutor who may file a Proposition 65 action “in the name of the people of the State of California.”

<sup>8</sup> “Twenty-five percent of all civil and criminal penalties collected pursuant to this chapter shall be paid to the office of the city attorney, city prosecutor, district attorney, or Attorney General, whichever office brought the action, or in the case of an action brought by a person under subdivision (d) of Section 25249.7, to that person.” (§ 25249.12, subd. (d).)

allegations are sufficient to allow plaintiffs to claim a 25 percent share of any penalties collected under section 25249.12, subdivision (d).

Moreover, we are not persuaded by plaintiffs' argument that they have no personal interest in the penalties because public prosecutors, who are clearly acting in the public interest, may also claim a 25 percent share of penalties under section 25249.12, subdivision (d). Unlike private citizens who bring a private enforcement action, public prosecutors have no personal stake in the penalties collected by their agency.

The fact that citizens may recover a 25 percent share of any penalties that are collected distinguishes this action from a cause of action under Business and Professions Code section 17200, which does not contain a similar provision. (Bus. & Prof., § 17206 [public prosecutors may recover civil penalties].) The financial incentive for bringing a private enforcement action under Proposition 65 is sufficiently large in this case that we conclude plaintiffs did not bring the claim as a representative of the public interest.

Accordingly, the appeal from the order dismissing the Proposition 65 claim violates the one final judgment rule, to the extent there is a nuisance claim still pending against some of the defendants. As for the remaining defendants, we note that “[a]n order sustaining a demurrer is not appealable absent an order dismissing the complaint.” (*Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1022.) Given that there was no order dismissing the complaint, we deem the order dismissing the Proposition 65 claim to incorporate a judgment of dismissal as to those defendants who have no further claims pending against them. (*Ibid.*)

## **II. After the Proposition 65 Claim Was Dismissed, Several Defendants Entered Into an Agreement With Plaintiffs and the Attorney General to Issue Proposition 65 Diesel Exhaust Warnings for the Ports**

Before we determine whether notice was sufficient as to those defendants who were dismissed from the case, we will first discuss a significant development in this

litigation. After the briefs were filed, we sent the parties a June 25, 2009 request for additional briefing under Government Code section 68081.<sup>9</sup> We raised several concerns regarding: (1) whether this appeal was rendered moot by the Proposition 65 port diesel exhaust warnings that were publicly disseminated in late 2008 through newspaper announcements, bus-stop posters, and website information;<sup>10</sup> and, in light of the website's reference to a settlement with the Attorney General,<sup>11</sup> (2) whether this action is now barred by section 25249.7, subdivision (d), which prohibits private enforcement actions if a public prosecuting agency has "commenced and is diligently prosecuting an action against the violation."

On July 8, 2009, we received letter briefs from the parties, as well as the Attorney General as amicus curiae. The Attorney General confirmed both the existence of an agreement with several defendants in this action and the issuance of recent warnings

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<sup>9</sup> We requested additional briefing on the following issues: "(1) did any of the defendants enter into an agreement with the Attorney General to provide Proposition 65 warnings regarding diesel [engine] exhaust from operations at the [ports]; if so, (2) identify the parties and the date of the agreement; and (3) discuss whether plaintiffs' Proposition 65 claims in this action have been rendered moot. (See *Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178-1179 [appellate courts will not render opinions on moot questions].)"

<sup>10</sup> We take judicial notice of the port diesel exhaust warnings, which can be found at <<http://prop65attheports.com/about-This-Warning.html>> (as of 9/8/09). (Evid. Code, § 452, subd. (h).) The warnings stated: "Proposition 65 [¶] Port Exhaust Warning [¶] Diesel exhaust from operations at the Ports of Los Angeles and Long Beach can cause cancer and birth defects or other reproductive harm. [¶] The ports and their tenants are working with the State of California to reduce these diesel emissions. Learn about cleaner air from our ports and our port cities: [www.prop65attheports.com](http://www.prop65attheports.com)"

<sup>11</sup> The website stated in relevant part that, "In 2008, pursuant to Proposition 65, the Attorney General of California reached an agreement to provide warnings to the community with the operators at the Ports of Long Beach and Los Angeles listed here. Proposition 65 requires a 'clear and reasonable' warning be given for listed chemicals, such as diesel engine exhaust, and the components of that exhaust, that cause cancer or reproductive harm."

regarding port diesel exhaust. The Attorney General acknowledged that the warnings comply with Proposition 65 and, as far as can be discerned from the face of the warnings, cover the entire port facilities without identifying or differentiating among the numerous entities at the ports.

The Attorney General provided the following information regarding the agreements. On October 4, 2006, only two days after the second amended complaint was filed, the Attorney General met with plaintiffs and several defendants regarding the Proposition 65 violation claim in this action. The Attorney General entered into “three separate agreements with a number of parties to this matter”: (1) on October 4, 2006, he entered into a confidentiality agreement with several defendants, which did not preclude them from advising the superior court of the settlement discussions; (2) on June 6, 2007, he entered into an agreement with several defendants that tolled “the running of the statute of limitations as of that date”; and (3) on September 4, 2008, he received confirmation from counsel of a previously negotiated agreement with several defendants that led to the dissemination of the Proposition 65 warnings in late 2008. (According to plaintiffs’ July 8, 2009 letter brief, plaintiffs were parties to the third agreement, which was reached in mid-2008.)

The Attorney General described the third agreement (the warning agreement) as follows. The warning “agreement contains extensive provisions governing the manner, content and timing of the warnings, and includes extensive and visible newspaper announcements, bus-stop posters, and website information. The Attorney General agreed that compliance with the terms of the agreement would constitute compliance with Proposition 65. One unique aspect of this warning is that it does not identify in the media warnings the facilities that are causing the exposure. This was permitted because the exposure to persons in the surrounding community cannot be distinguished based on which facility cause[d] it, and because allowing a ‘joint’ warning on behalf of all of the facilities allowed resources to be applied to expanding the scope and visibility of the warning, rather than requiring less visible warnings on behalf of each facility, or

cluttering the media warnings with the name of each facility (thereby rendering them virtually unreadable).

“The agreement also provided that the defendants could seek the participation of other facilities who would participate in the funding of the agreement, which, compared to most such warnings, is expensive. After that agreement was concluded, some other entities, which apparently had contributed to the funding of the warning program, sent letters to the Attorney General advising of their ‘voluntary participation’ in the warning program and requesting that the Attorney General sign an acknowledgement that, if future litigation should arise between the party and the Attorney General, the Attorney General agreed that the warning program complied with the law, but could not be used as evidence of a past failure to warn. . . . The Attorney General did not sign any of the requested acknowledgments, because they were received from non-parties to the negotiations with the Attorney General. Of course, regardless of whether there is an ‘agreement’ with those parties, the Attorney General agreed to the warning program based on his conclusion that it complies with the statute.”

Regarding the issue of mootness, the Attorney General argued that plaintiffs’ Proposition 65 claim was not moot because plaintiffs are entitled to a determination of their right to a share of any civil penalties that are imposed. The Attorney General stated: “The agreement in question does not purport to resolve any issue of civil penalties, and the Bradfields’ complaint requests civil penalties. Accordingly, the fact that many of the facilities at the two ports are now giving warnings in compliance with the law does not moot the case, because potential liability for penalties remains. Civil penalties are an important part of obtaining compliance with many statutes, including Proposition 65, and the resolution of that issue can be critical to the case and the achievement of the objectives of the law.” (Fn. omitted.)

The Attorney General further argued that this private enforcement action was not barred by section 25249.7, subdivision (d), which prohibits private enforcement actions if a public prosecuting agency has “commenced and is diligently prosecuting an action

against the violation.” He argued that because he has not commenced an action by filing a complaint, the prohibition does not apply.

### **III. The Appeal Is Not Moot**

Given the agreements and warnings that have been issued, we were concerned whether the appeal in this case had been rendered moot by plaintiffs’ inability to recover any further practical relief. Because the warnings, at least on their face, cover the entire port facilities, it was unclear whether this case should be allowed to proceed.

“It is settled that “the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]” [Citations.]’ (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132; see also *People v. Dail* (1943) 22 Cal.2d 642, 659 [criminal proceedings permanently abated by reason of defendant’s death pending appeal]; *People v. de St. Maurice* (1913) 166 Cal. 201, 202 [same].)” (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217.) However, “[r]eview of a moot issue is appropriate where it is “of great public import and transcend[s] the concerns of these particular parties.” [Citation.] Even when moot, a novel question of continuing public interest is often deserving of consideration by an appellate court. [Citations.]’ (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1232; see *In re William M.* (1970) 3 Cal.3d 16, 23-24.)” (*In re Sodersten, supra*, 146 Cal.App.4th at p. 1218.)

Plaintiffs argue that this appeal was not rendered moot by the warnings and the warning agreement for several reasons: (1) the issues of penalties, attorney fees, and costs remain to be determined; (2) “several defendants have not participated in the warnings agreement or the warnings”; and (3) this private enforcement action is not

barred by section 25249.7, subdivision (d) because the Attorney General's involvement in this action did not constitute the commencement of an action.

Defendants take different positions on this issue,<sup>12</sup> but agree that the warning agreement did not resolve the issues of penalties, costs, and attorney fees. Even if plaintiffs' right to recover penalties, costs, and fees is speculative at best, the warning agreement did not bar them from pursuing such relief. Accordingly, the appeal is not moot. (See *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677; *Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 746-747.)

#### **IV. The Notice of Alleged Violation Was Insufficient**

A private enforcement action under Proposition 65 may only be brought if the following conditions are met: (1) the plaintiff must serve a notice of alleged violation on the alleged violators and prosecuting agencies in whose jurisdiction the violation allegedly occurred (§ 25249.7, subd. (d)(1)); (2) in cases arising under section 25249.6

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<sup>12</sup> On the one hand, the defendants who entered into the warning agreement (or voluntarily began providing warnings without joining in the agreement) point out that there is "a significant policy argument that the case has been mooted as to them. [Fn. omitted.] Notice letters serve the dual functions of advising defendants and public prosecutors of alleged violations. Neither function is served after warnings are in place, and there is little purpose in deciding the validity of those notices where there may be no incidental matters left to resolve under the statutory scheme. There is no absolute right for private plaintiffs to obtain civil penalties or attorneys' fees. See generally Health and Safety Code Section[] 25249.7."

On the other hand, the defendants who did not enter into the warning agreement and did not provide warnings contend the agreement has no bearing on their situation in this litigation and, therefore, the plaintiffs' appeal is not moot as to them.

Defendant Morton Salt, which apparently was not a party to the warning agreement, argues that the appeal is moot because warnings are now being provided with plaintiffs' consent. Morton Salt contends that the only conceivable purpose of further litigation would be to resurrect plaintiffs' speculative claims for civil penalties and attorney fees, and that the requirements for recovering attorney fee awards in public interest actions (Code Civ. Proc., § 1021.5) have not been met in this case because, once the warnings were given pursuant to the agreement, there could be no need for private enforcement.

for failure to warn, the notice of alleged violation must include a certificate of merit (§ 25249.7, subd. (d)(1)); (3) the notice of alleged violation must be served more than 60 days before the private enforcement is filed; and (4) the action may not be filed if any public prosecutor “has commenced and is diligently prosecuting an action against the violation” (§ 25249.7, subd. (d)(2)). “Whether Proposition 65 notice complies with the statutory requirements is reviewed de novo. (*Miramar, supra*, 88 Cal.App.4th at p. 744.)” (*Consumer Advocacy, supra*, 150 Cal.App.4th at p. 962.)

The requirements that govern the notice of alleged violation are presently set forth in California Code of Regulations, title 27, section 25903 (formerly tit. 22, § 12903). In general, the notice must provide: “a specified attachment summarizing Proposition 65; description of the violation; the name of the noticing entity; the name of the alleged violator; the approximate time period for the violation; the name of each chemical involved in the alleged violation; and the route of exposure.” (*Consumer Advocacy, supra*, 150 Cal.App.4th at p. 964, citing Cal. Code Regs., tit. 27, § 25903, subd. (b) [formerly tit. 22, § 12903, subd. (b)].) Notices “involving environmental exposures must identify the location of the source of the exposure, or where numerous sources of the exposure are alleged, a description of the common characteristics that result in the exposure, “in a manner sufficient to distinguish those facilities or sources from others for which no violation is alleged.” ([Cal. Code Regs., tit. 27, § 25903, subd. (b)(2)(F), formerly tit. 22] § 12903, subd. (b)(2)(F).) The notice must also state whether the environmental exposure is occurring beyond the property owned or controlled by the alleged violators. [Citation.]’ (*Miramar, supra*, [88 Cal.App.4th] at p. 746.)” (*Ibid.*)

On October 27, 2005, plaintiffs served the notice of alleged violation on approximately 50 defendants and the applicable prosecuting agencies. Defendants argue that each notice set forth essentially identical allegations as to each defendant, even though the ports encompass “more than 7,500 acres of land along 68 miles of waterfront,” and defendants operate “approximately 50 disparate, widely varying facilities and businesses throughout the nation’s largest ports.”

In essence, the notice stated that defendants were operating diesel powered machinery, vehicles, ships, and other equipment at their respective port facilities, and were exposing “residents within the State of California including, but not limited to, the Bradfields,” to diesel exhaust without providing necessary warnings “[a]t all relevant times and continuing to the present time.” The notice stated that the route of exposure consisted of respiration and “dermal contact” with diesel engine exhaust. The notice alleged that exposure occurred beyond the port terminals and affected “many individuals . . . who reside, work or are otherwise located in proximity to the property owned, operated, or controlled by” each defendant.

In their joint demurrer, defendants contended there were numerous deficiencies that invalidated the notice. They argued that the notice was: (1) overbroad in stating that defendants had exposed, without a warning, “residents within the State of California” to diesel engine exhaust; (2) silent as to the approximate time period of the alleged violation, which purportedly occurred “[a]t all relevant times and continuing to the present time”; (3) insufficient to “provide defendants [or the public prosecutors] with a meaningful opportunity to investigate and, if warranted, cure any violations”; (4) deficient in identifying the location of some of the facilities where exposures allegedly occurred; and (5) nonexistent as to those defendants who had received no notice.

We conclude that defendants’ objections to the notice are valid. In our view, it is meaningless to provide a vague notice that defendants, at all relevant times, violated and are continuing to violate Proposition 65 by failing to warn “residents within the State of California” of their environmental exposure, through inhalation and dermal contact, to diesel engine exhaust at the ports. In addition to providing no guidance by alleging the violations occurred “[a]t all relevant times,” the notice describes a route of exposure by simply “parrot[ing] the regulation, [which] makes it difficult to discern the specific violation.” (*Consumer Advocacy, supra*, 150 Cal.App.4th at p. 968.) On its face, it is difficult to understand how “residents within the State of California” (virtually indistinguishable from all California residents) could have been exposed, by respiration

or dermal contact, to diesel engine exhaust at the ports, and how to correct such a broad violation. Even if the exposure did not extend beyond those “who reside, work or are otherwise located in proximity to the property owned, operated, or controlled by this entity,” the allegations are still vague.

According to the Attorney General, “exposure to persons in the surrounding community cannot be distinguished based on which facility cause[d] it.” The Attorney General therefore allowed “a ‘joint’ warning on behalf of all of the facilities,” which benefited the public by “expanding the scope and visibility of the warning, rather than requiring less visible warnings on behalf of each facility, or cluttering the media warnings with the name of each facility (thereby rendering them virtually unreadable).”

Although we do not base our determination on the Attorney General’s explanation quoted above, we independently conclude the notice was insufficient because it failed to draw any meaningful distinctions among the numerous entities at the ports and their activities. This case is similar to *Yeroushalmi, supra*, 88 Cal.App.4th 738, which involved claims of environmental exposure to tobacco and cigar smoke at different locations including hotels. We found the notices in that case “were insufficient because they failed to state sufficient specific facts to enable the alleged violators and the appropriate governmental agencies to undertake a meaningful investigation and remedy the alleged violations prior to citizen intervention.” (*Id.* at p. 740.) Of particular relevance, we stated: “A notice which merely alleges that there was tobacco smoke or a cigar somewhere on or off one or more of the alleged violator’s business premises, exposing the public and all classes of employees in a given city to toxins sometime during a four-year period, gives no notice at all.” (*Id.* at p. 750.) We similarly conclude in this case that the notice, which merely alleged there was diesel engine exhaust on and off the 50 alleged violators’ separate facilities at the ports, which at all relevant times exposed “residents within the State of California” to diesel exhaust through inhalation and dermal contact, gave no notice at all.

## **DISPOSITION**

The judgment of dismissal is affirmed only as to those defendants who have no further claims against them.<sup>13</sup> As for the remaining defendants who remain subject to further claims, the appeal is dismissed as premature under the one final judgment rule. The parties are to bear their own costs.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.

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<sup>13</sup> These defendants are: National Gypsum Co., Catalyst Paper Corporation (erroneously sued as Catalyst Paper (USA) Inc. at Forest Terminals Corporation), Mitsubishi Cement Corporation, Chemoil Corporation, Chemoil Terminal Corp. (erroneously sued as Chemoil Marine Terminals), Petro-Diamond Terminal Company (erroneously sued as Petro-Diamond), Weyerhaeuser Company, Long Beach Container Terminal, Inc., Marine Terminals Corporation, International Transportation Service, Inc., Shell Oil Products U.S., Pacific Coast Recycling, LLC, Baker Commodities, Inc., Toyota Logistics Services, Inc., Koch Carbon, Inc., Fremont Forest Group Corporation, and Morton Salt.