

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 05/28/2021

TIME: 02:00:00 PM

DEPT: 27

JUDICIAL OFFICER PRESIDING: Steven M Gevercer

CLERK: D. Ward

REPORTER/ERM: K. Zurawski CSR# 7479

BAILIFF/COURT ATTENDANT: G. Avenell

CASE NO: **34-2020-80003354-CU-WM-GDSC** CASE INIT.DATE: 03/11/2020

CASE TITLE: **Physicians Committee for Responsible Medicine vs. Gavin Newsom Governor of the State of California**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Writ of Mandate

APPEARANCES

Corey Evans, counsel, present for Petitioner(s).

Donald D Forrester, Petitioner is present.

Laura J Zuckerman, counsel, present for Respondent(s).

Mark Kennedy, present

Carol Monahan, present

All appearances were present via Zoom

Nature of Proceedings: Petition for Writ of Mandate- Demurrer Hearing

The above-entitled matter came before this Court with the above-named counsel present.

The Court heard argument from the respective parties with regard to the tentative ruling issued on 05/26/21 (see separate filing).

Following argument, the Court affirmed the tentative ruling as amended below:

The demurrer is overruled. Respondent shall answer the Petition within 30 days. (California Rule of Court, Rule 3.1320(g).)

No further order is required.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME:	May 28, 2021 2:00 p.m.	DEP. NO.:	27
JUDGE:	HON. STEVEN M. GEVERCER	CLERK:	D. WARD
PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE, DONALD D. FORRESTER, M.D., AND ANNA HERBY, R.D., C.D.E., Petitioners/Plaintiffs, v. LAUREN ZEISE, PH.D., DIRECTOR OF THE OFFICE OF ENVIRONMENTALHEALTH HAZARD ASSESSMENT,¹ Defendants/Respondents.		Case No. 34-2020-80003354	
Nature of Proceedings:		Demurrer	

I. TENTATIVE RULING.

The following shall constitute the Court’s tentative ruling on the above matter, set for hearing in Department 27, on Friday, May 28, 2021, at 2:00 p.m. This tentative ruling shall become the court’s final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its request for hearing.

The Court remains closed to the public. If a hearing is requested, it will be conducted remotely through the Zoom application and live-streamed on the court’s YouTube page. The parties may join the Zoom session by audio and/or video through the following link/telephone number:

https://saccourt.zoom.us/my/dept27a	(888) 475-4499 ID: 553-829-7195
---	--

Lauren Zeise, in her capacity as Director of the Office of Environmental Health Hazard Assessment (OEHHA) demurs to the petition and complaint (collectively, Petition). The demurrer is overruled.

¹ The Petition originally named Governor Gavin Newsom and various other defendants and respondents. As Lauren Zeise, Director of OEHHA, is the only remaining defendant and respondent, the Court has changed the caption accordingly.

1. Background.

In 2015, the World Health Agency, through the International Agency for Research on Cancer (IARC) released a report finding that "consumption of processed meat [was] 'carcinogenic to humans'...on the basis of sufficient evidence for colorectal cancer." (Petition, ¶27.)

In June 2017, Petitioners notified OEHHA of IARC's finding and urged OEHHA to list "processed meat" on the "Proposition 65 list." (*Id.*, ¶30.) The Safe Drinking Water and Toxic Enforcement Act of 1986, or "Proposition 65," requires the Governor to annually publish a list of those chemicals known to the State to cause cancer or reproductive toxicity. (*AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425, 430; Health & Saf. Code, § 25249.8(a).) OEHHA is the agency charged with implementing the law and creating the Proposition 65 list. (Health & Saf. Code, § 25249.12 (a); 27 Cal. Code Regs., § 25102(o).)

In response, OEHHA told Petitioners that it was waiting for IARC to publish its "Monograph" addressing processed meat. (Petition, ¶30.) A "Monograph" is a publication, issued after IARC's carcinogen listing, which details the scientific review and evaluation of evidence on why a particular agent is carcinogenic. (*Id.*, ¶35.)

In 2018, IARC published a Monograph entitled "Red Meat and Processed Meat," which detailed the scientific justifications for classifying these substances as carcinogenic to humans (Monograph). (Petition, ¶35; OEHHA's RJN, Exh. 9.)

Following IARC's publication of its Monograph, OEHHA did not list "processed meat" on the Proposition 65 list. (Petition, ¶¶35, 40.) The Petition alleges numerous communications between Petitioner and OEHHA, and that OEHHA informed Petitioner that it was completing its review of the Monograph and determining its applicability to the Proposition 65 list. (*Id.* ¶¶36-40.)

On March 11, 2020, the instant Petition was filed. The Petition seeks 1) a writ of mandate and related declaratory relief directing OEHHA to list "processed meat" on the Proposition 65 list, and a 2) declaration that OEHHA may not delay listing an item declared by IARC to be a carcinogen on the grounds that it is waiting for IARC to publish this declaration in a Monograph.

On March 12, 2020, OEHHA determined that it was not required to list "processed meats" on the Proposition 65 list. (RJN, Exh. 1.)

2. Discussion.

a. Standard of Review for Demurrer.

A petition for writ of mandate is subject to a demurrer on the same grounds as a civil complaint. (Code Civ. Proc., § 1109; *Rodriguez v. Municipal Court* (1972) 25

Cal.App.3d 521, 526.) In reviewing a demurrer, the trial court considers the properly pleaded material facts and matters that may be judicially noticed and tests their sufficiency. (*Cedar Fair, L.P. v. County of Santa Clara* (2011) 194 Cal.App.4th 1150, 1158-1159.) A demurrer tests only the sufficiency of the pleading. (*Id.* at p. 1159.) The court assumes the truth of "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[T]he... plaintiff's ability to prove [the pleading's] allegations, or the possible difficulty in making such proof does not concern the reviewing court" (*Cedar Fair, L.P. v. County of Santa Clara, supra*, 194 Cal.App.4th at p. 1159.)

b. Requests for Judicial Notice.

Petitioners and OEHHA have each requested judicial notice of exhibits in support of their demurrer. Petitioners object to OEHHA's requests for judicial notice primarily on the grounds that OEHHA is improperly introducing them to prove disputed issues of fact. OEHHA responds that it is seeking judicial notice of these exhibits, not to prove disputed issues of fact, but to establish that particular statements were made or that events happened. The court rules as follows.

Petitioner's request for judicial notice as to Exhibits 1, 2, 5 is granted. Petitioner's request as to Exhibit 3 and 4 is denied.

OEHHA's request for judicial notice as to Exhibits 1, 2, 3, 5, 6, 9, 10, and 12 is granted. OEHHA's request as to Exhibits 4, 7, 8, and 11 is denied.

In judicially noticing these documents, the Court judicially notices the existence of the documents, not the truth of their contents. (*Unruh Haxton v. Regents of the Univ. of Calif.* (2008) 162 Cal.App.4th 343, 364-365.)

c. OEHHA is improperly seeking a merits hearing via a demurrer.

OEHHA's demurrer essentially seeks an adjudication of the merits of the Petition. In support of its demurrer, OEHHA advances arguments that would address the merits of the Petition. This practice is inconsistent with the Court's Guide to the Procedures for Prosecuting Petitions for Prerogative Writs (Guide). The Guide states: "Motions addressing the merits of the petition in whole or in part should be calendared for a hearing at the same time as the hearing on the merits. Motions directed at resolving issues preliminary to and distinct from the issues related to the merits of the petition, such as untimeliness of the petition under an applicable statute of limitations, should be calendared before the hearing on the merits of a writ petition." (Guide, p. 6.)

d. OEHHA's demurrer requires the Court to resolve issues of fact.

OEHHA's demurrer is also improper because it requires the Court to resolve issues of fact.

OEHHA must publish a list of chemicals known to the state to cause cancer or reproductive toxicity. (Health & Saf. Code, § 25249.8, subd. (a).) This “list shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and those substances identified additionally by reference in Labor Code Section 6382(d).” (*Ibid.*)

Pertinent here, Labor Code section 6382(b)(1), requires listing of :

(1) Substances listed as human or animal carcinogens by [IARC].

- (2) Those substances designated by the Environmental Protection Agency pursuant to Section 307 (33 U.S.C. Sec. 1317) and Section 311 (33 U.S.C. Sec. 1321) of the federal Clean Water Act of 1977 (33 U.S.C. Sec. 1251 et seq.) or as hazardous air pollutants pursuant to Section 112 of the federal Clean Air Act, as amended (42 U.S.C. Sec. 7412) which have known, adverse human health risks.
- (3) Substances listed by the Occupational Safety and Health Standards Board as an airborne chemical contaminant pursuant to Section 142.3.
- (4) Those substances designated by the Director of Food and Agriculture as restricted materials pursuant to Section 14004.5 of the Food and Agricultural Code which have known, adverse human health risks.
- (5) Substances for which an information alert has been issued by the repository of current data established pursuant to Section 147.2.”

(Labor Code, § 6382, subd. (b) [emphasis added].)

OEHHA argues that it has no duty to list “processed meat” because “processed meat” is not a “chemical,” but rather, a heterogeneous collection of meats, which come from different sources, and are “processed” or prepared with different methods. Stated another way, OEHHA argues that “processed meats” are akin to “air pollution”—something that the IARC has found to be carcinogenic (OEHHA RJN, Exh. 6), but because “air pollution” may be comprised of so many diverse chemicals, some of which may or may not be carcinogenic, it can have no duty to list them. OEHHA also contends that IARC has not sufficiently “identified” “processed meat” because the Monograph stated that “the available cancer data do not allow a distinction to be made between...different types of processed meat products.” (Opening Brief, p. 6: 16-17.)

However, as Petitioners point out, OEHHA has listed other substances on the Proposition 65 list that may be comprised of different constituents. These substances include, “alcoholic beverages,” “salted fish—Chinese Style,” and “wood dust.” (OEHHA’s RJN, Exh. 3, pp. 1, 19, 22)

Determining whether OEHHA has a duty to list “processed meat” is a question of fact. This is because the nature of OEHHA’s duty hinges upon whether “processed meat” is a “substance” within the meaning of Labor Code section 6382, subdivision (a). If it is a “substance” within the meaning of that statute, then Health & Safety Code, section 25249.8, subdivision (a) requires OEHHA to include it on the Proposition 65 list. The same reasoning applies to OEHHA’s argument that IARC did not sufficiently “identify” “processed meat,” so as to trigger a duty to list it. The Court may not resolve questions of fact upon demurrer. Accordingly, OEHHA’S demurrer is overruled.

Because the demurrer is overruled on this basis, the Court does not address OEHHA’s remaining arguments in support of demurrer. (See *Warren v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 Cal.App.3d 24, 36 [a demurrer to the entire complaint may be overruled if *any* cause of action therein is properly stated].)

3. Disposition.

The demurrer is **overruled**. Respondent shall answer the Petition within 10 days. (California Rule of Court, Rule 3.1320(g).)

If this ruling becomes the final ruling of the Court, it shall be confirmed by minute order and no further order is required.