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January 22, 2002

Reuben Yeroushalmi, Esq.  
3700 Wilshire Boulevard, Suite 480  
Los Angeles, CA 90010

RE: Proposition 65 Sixty Day Notice

Dear Mr. Yeroushalmi:

The Attorney General recently received a sixty-day notice from your office, on behalf of the Consumer Advocacy Group, Inc., in which you allege that Alberto Culver USA Inc., Tresemme, and Alberto Culver failed to provide required Proposition 65 warnings for certain products alleged to cause exposures to phenacetin.

This notice was served on December 31, 2001, one of roughly 3,500 notices served on the Attorney General between December 21, 2001 and December 31, 2001.

As you know, the Legislature passed, and the Governor approved, SB 471, which adopted certain changes in Proposition 65. These changes include the new requirement that notices alleging violations of the warning requirement include a certificate of merit, which provides certain information substantiating the claims made in the notice. This requirement took effect for notices served on or after January 1, 2002. The Attorney General supported this legislation, because it helps assure that noticing parties have adequately investigated their claims before providing the notice.

In our experience, we have found that responsible groups doing this type of work had engaged in an investigation similar to that required by SB 471, and therefore would not be especially burdened by the new requirements. Unfortunately, some groups have not always performed sufficient investigation before providing these notices. You have provided a large volume of notices very shortly before the effective date of the new certificate of merit requirements. We certainly hope that this was not done in an effort to avoid conducting the type of investigation that would be necessary to provide an adequate certificate of merit, but the timing and volume of your notices could support that inference.

Although the Certificate of Merit requirement was not in effect on the date of your

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notices, the provisions of the Code of Civil Procedure and other legal remedies already exist to address an civil actions that are filed without adequate basis to proceed. For example, Code of Civil Procedure section 128.7(b)(3) provides that your signature on a complaint constitutes certification, among other things, that the “allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Any actions filed pursuant to the notices in question, must meet all applicable legal standards.

Moreover, if actions are filed pursuant to these notices, they will be subject to the newly-required settlement review procedures. Under these provisions, no settlements can be approved unless the court finds that any warning complies with the law, any civil penalty is reasonable, and any award of attorney’s fees is reasonable under California law. Any settlements must be provided to the Attorney General for review, and the Attorney General may appear in court concerning the settlements. In addition, the Attorney General has authority to investigate matters within his jurisdiction through administrative subpoenas promulgated pursuant to Government Code section 11181 et seq.

We have a number of questions concerning the support for the allegations in your notice, the answers to which are important to our ability to evaluate whether the Attorney General should commence enforcement action on them. We trust that you have obtained this information as part of your investigation, and will provide it to us:

Regarding the consumer exposures alleged, is the identified chemical a listed ingredient of the products? If it is not a listed ingredient, do you have test data showing that the products contain the chemical and will you provide that test data to us? If there is no test data, please provide us with the evidence on which you have based your claim of exposure.

Regarding each of the occupational exposures alleged, as you are aware, it is the plaintiff’s burden to prove that there has been an exposure and that no warning was provided. What is your basis for stating that the company has caused an exposure to a listed chemical and failed to provide the Proposition 65 warning in the occupational context? What is your factual basis for stating that there is an occupational exposure to employees inside the storage facilities where the finished product is stored, or to employees inside stores where the finished product is sold.

In addition to the above, we have begun to review the notice to determine whether it complies with the regulatory requirements for notices, set forth in the Code of California Regulations, Title 22, section 12903. We believe that there are certain problems with the notice:

1. Regarding the occupational exposure, the notice states that the violations take place, in part, in stores where the product is sold and/or used and/or displayed. In *As You Sow v. Shell Oil Company* (No. 975116), Judge Pollak of the San Francisco Superior Court ruled that a manufacturer is not liable under Proposition 65 for failure to provide the warning to employees of downstream employers. Please inform us if you are alleging that the stores where the product is sold are owned by the noticed companies, and the employees are therefore employees of the noticed companies. If this is not the allegation, then the party being noticed for those particular violations may not be correct.
2. Also in regard to the occupational exposure, you state that the exposure occurs to factory workers, product testers, in-store sales persons, product demonstrators, contractors, maintenance workers, service personnel, and security personnel. The locations include factories, storage facilities, and shops and stores. The category of workers and the locations appears to be so broad and general as to encompass every conceivable type of worker in every conceivable location. Therefore it is questionable whether the notice informs the company of where the actual exposures are occurring and to whom.
3. There is confusion in the notice as to what products are being noticed. The notice listed Tresemme' Color Creations Tone and/or Tresemme' Color Generator in some sections, but on page two of the notice, you have the following sentence:  
  
"Specifically, the violator(s) has been manufacturing, producing, handling, distributing, storing or otherwise transferring including Tanning Lotion, but without limitation in violation of Health & Safety Code Section 25249.6."
4. There is confusion in what chemical is being noticed. On page two of the notice, you state, that the "violator(s) has been and is knowingly and intentionally exposing employees of the violator(s) to Tresemme' Color Creations Tone and/or Tresemme' Color Generator and other chemicals listed below and designated by the State of California to cause cancer. . . ." As you are aware, Tresemme' Color Creations Tone and/or Tresemme' Color Generator is not a Proposition 65 chemical.
5. The regulations require that where the alleged violator has a current registration with the California Secretary of State that identifies a Chief Executive Officer, President, or General Counsel, the notice must be addressed to one of those persons. The notice above was served on "CEO/President/Owner" of the

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company, without designating a named individual. If the noticed company has identified names on file with the Secretary of State, the notice must be served on the named individual.

The above list of problems in the notice is not intended to be exhaustive or to imply that all other aspects of the notice are adequate.

We would appreciate receiving answers to the questions set forth above. If you wish to discuss any of the above, please feel free to call me.

Sincerely,

SUSAN S. FIERING  
Deputy Attorney General

For BILL LOCKYER  
Attorney General

cc: Noticed Companies

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NOTICED COMPANIES

CEO/President/Owner  
Alberto Culver USA Inc.  
25525 Armitage Avenue  
Melrose Park, IL 60160

CEO/President/Owner  
TREMME  
25525 Armitage Avenue  
Melrose Park, IL 60160

Alberto Culver  
Hampshire Business Park  
Basingstoke, Hampshire, RG24 8WH  
United Kingdom