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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 sixty-day notices from your office, on behalf of Consumer Advocacy Group, Inc., in which you allege that the following companies have failed to provide required Proposition 65 warnings for certain products alleged to cause exposures to "formaldehyde."

John Paul Mitchell Systems
Bristol-Meyers Squibb
Hawaiian Tropic
Calvin Klein, Inc.
Maybelline, Inc., L'Oreal USA Inc., and/or L'Oreal Products USA Inc.
Clairol Inc.
Procter & Gamble
L'Oreal USA Inc. and/or L'Oreal Products USA Inc.

These notices were served on December 31, 2001, some 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

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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 notices, the provisions of the Code of Civil Procedure and other legal remedies already exist to address 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 identified 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? 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 notices to determine whether they comply with the regulatory requirements for notices, set forth in the Code of California Regulations, Title 22, section 12903. We have noted certain problems with the notices:

1. The chemical noticed is not a Proposition 65 chemical. The notice states that "formaldehyde" is the chemical in question. The listing under Proposition 65 is only for "formaldehyde (gas)." Furthermore, the notices state that the exposure is caused in a variety of ways including ingestion, application, and dermal. These routes of exposure would not apply to a gas.
2. Regarding the occupational exposure, the notices state 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.
3. 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.
4. There is confusion in some of the notices as to what products are being noticed. The notices below listed the following products:

Company Noticed

Product

John Paul Mitchell Systems	John Paul Mitchell Shampoo one
Calvin Klein Inc.	Obsession Calvin Klein Lotion
Maybelline Inc., L'Oreal USA Inc. L'Oreal Products USA Inc.	Jade Maybelline Great Lash Mascara
Clairol Inc.	Clair Herbal Essences Shampoo for Fine Hair
Procter & Gamble	Head and Shoulder Dandruff Shampoo
L'Oreal USA Inc., L'Oreal Products USA	L'Oreal Longitude Mascara

On page one or two of each of the above notices, however, 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.” We do not understand the reference to “Tanning Lotion.”

In addition in the notice to Hawaiian Tropic, you state that the product is Tanning Lotion, but then refer to “Hawaiian Tropic Self Tanning Lotion Shampoo for fine hair.” Again, the product designations appear to be inconsistent.

4. On page two of the notices, under occupational exposure, you state, that the “violator(s) has been and is knowingly and intentionally exposing employees of the violator(s) to [product name] and other chemicals listed below and designated by the State of California to cause cancer. . . .” As you are aware, the products themselves are not Proposition 65 chemicals.
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. In some instances the notices above were served on “CEO/President/Owner” of the company, without designating a named individual.

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If the corporation has a designated name 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
Bristol-Meyers Squibb
9707 Chapel Hill Road
Morrisville, NC 27560-9394
Attn: Peter R. Dolan

CEO/President/Owner
Hawaiian Tropic
1190 North US Highway 1
Ormond Beach, FL 32174-8733
Attn: Ron Rice

CEO/President/Owner
John Paul Mitchell System
9701 Wilshire Blvd.
Beverly Hills, CA 90212

CEO/President/Owner
John Paul Mitchell System
P.O. Box 10597
Beverly Hills CA 90213-3597

CEO/President/Owner
Calvin Klein Inc.
75 Liverty Vlg
Flemington, NJ 08822-1564

CEO/President/Owner
Calvin Klein Inc.
7300 West Side Avenue
North Bergen, NH 07047-6428

CEO/President/Owner
L'Oreal USA Inc.
575 Fifth Avenue
New York, NY 10017
Attn: Jean-Paul Agon

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CEO/President/Owner
L'Oreal USA Inc.
81 New England Avenue
Piscataway, NJ 08854-4142

CEO/President/Owner
L'Oreal USA Inc.
133 Terminal Avenue
Clark, NJ 07066-1320
Attn: Gui Peyrelongue

CEO/President/Owner
GESPAREL
81 New England Avenue
Piscataway, NJ 08854-4142

CEO/President/Owner
Maybelline Inc.
11500 Maybelline Road
Little Rock, AR 72331-2231

CEO/President/Owner
Clairol Inc.
1 Blachley Road
Stamford, CT. 06922-003

CEO/President/Owner
Procter & Gamble Distribution
2301 Dupont Drive
Irvine, CA 92612-7500

CEO/President/Owner
Procter & Gamble District Co.
2400 Camino Ramon
San Ramon, CA 94583-3888

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CEO/President/Owner
Procter & Gamble Mfg. Co.
8201 Fruitridge Road
Sacramento, CA 95826-4716

CEO/President/Owner
Proctor & Gamble Productions
9200 West Sunset Blvd. # 524
Los Angeles, CA 90069-3507