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November 12, 2015

By Overnight delivery
Gregory Sheffer, Esq.
Sheffer Law Firm
81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941

RE: Proposition 65 60-day Notices Nos. 1094, 1096, 1097, 1098, 1099, 1100, 1101, 1102

Dear Mr. Sheffer:

This letter is to provide notice of deficiencies in the following 60-day Notices/Certificates of Merit regarding the allegation of occupational exposures to certain chemicals listed under Health and Safety Code section 25249.5 et seq. ("Proposition 65"):

AG 2015-01094: Occupational Notice to Apex Tool Group, Sparks, MD; Ace Hardware Corporation, Oak Brook IL

AG 2015-01095: Occupational Notice to West Chester Marketing, Inc., West Chester Holdings, Inc. WCM Holdings, Inc. West Chester Protective Gear, Sharonville, OH; LG Sourcing, Inc., Wilkesboro, NC; Lowe's Companies, Inc., Mooresville, NC

AG 2015-01096: Occupational Notice to Hillman Companies, Inc., Hillman Group, Cincinnati, Ohio; Jackson's Hardware, Inc., San Rafael, CA

AG 2015-01097: Occupational Notice to Home Depot, Inc., Home Depot USA, Inc., Atlanta, GA; HD Supply Inc. Atlanta, GA; HD Supply Distribution Services, LLC, Aliso Viejo, CA

AG 2015-01098: Occupational Notice to Protective Industrial Products, Inc., Latham, NY; Golden State Lumber, Petaluma, CA

AG 2015-01099: Occupational Notice to Bass Direct, Bass Pro Shops, Springfield, MO; Bass Pro Shops, Springfield, MO

AG 2015-01100: Occupational Notice to Apex Tool Group, LLC, Sparks, MD; Ace Hardware Corp., Oak Brook, IL

AG 2015-01101: Occupational Notice to Acc Hardware Corp., Oak Brook, IL; Klein Tools, Inc., Lincolnshire, IL

AG 2015-1102: Occupational Notice to VOXX International (dba RCA), Hauppauge, NY; VOXX Accessories Corp., Carmel, IN; LG Sourcing, Inc., Wilkesboro, NC; Lowe's Companies, Inc., Mooresville, NC

Based on our review of the notices and the supporting information, we have concluded that all of the above notices are invalid as to occupational exposures. In our opinion, any lawsuit alleging occupational violations of Proposition 65 based on these notices would have no legal basis.

Out of State Occupational Exposures: To the extent that your notices allege occupational violations against out-of state manufacturers, they are in violation of California Code of Regulations, title 8, section 338 and the *Approval; California State Standard on Hazard Communication Incorporating Proposition* (62 Federal Register 31159-31181 (June 6, 1997)), both of which provide that Proposition 65 may not be enforced against out-of-state manufacturers for occupational exposures that occur outside the State of California. The regulations incorporating Proposition 65 into the State Plan state that "This approval specifically placed certain conditions with regard to occupational exposures on Proposition 65, including that it does not apply to the conduct of manufacturers occurring outside the State of California. The approval also provides that an employer may use the means of compliance in the general hazard communication requirements to comply with Proposition 65." (Cal. Code Regs., tit. 8, § 338, subd. (b).) These regulations are based on OSHA's explicit determination that "Proposition 65 as incorporated into the State plan may only be enforced against in-State employers" (62 Fed. Reg. 31167 (June 6, 1997), and the "State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State." (*Id.* at 31159)

Your occupational allegations against ULINE Corporation, Boss Manufacturing, and Alliance Mercantile are not valid under Proposition 65 because they do not allege or present evidence of conduct by those companies occurring within the State of California.

In-State Occupational Exposures: Further, to the extent that you attempt to allege conduct by an in-state company, the Certificate of Merit provided with your notice does not provide evidence sufficient to support the allegations. In order to bring an action to enforce Proposition 65's warning requirements in the public interest, the plaintiff must, among other things, include a Certificate of Merit demonstrating that a sufficient basis exists for the claim. (Health & Saf. Code, §25249.7, subd. (d).) Specifically, the certifier must have "a basis to conclude that there is merit to *each element of the action on which the plaintiff will have the burden of proof*," and "*must certify that the information relied upon does not prove that any affirmative defense has merit.*" (Cal. Code Regs., tit. 11, §3101, subd. (a) (emphasis added).) The copy of the Certificate of Merit served on the Attorney General's Office must include "factual information sufficient to establish the basis for th[e] certificate" (*id.*, §3101, subd.

(b)(5)), including the “facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action’ sufficient to establish . . . that there is merit to *each element of the claim on which the plaintiff will have the burden of proof.* . . .” (*Id.*, § 3102, subd. (c).) For occupational exposures, “sufficient facts, studies, or other data shall be submitted for each occupational exposure [. . .] whether described by location of the employees, type of task performed, or product used by the employees.” (*Id.*, §3102(c)(2).) Where a 60-day Notice “does not attach a copy of the Certificate of Merit meeting the requirements of subsection 3101(b), the noticing party has no authority to commence an action pursuant to Health and Safety Code section 25249.7(d).” (Cal. Code Regs., tit. 11, § 3103, subd. (a).)

Our office is required to maintain the information provided in support of a Certificate of Merit in confidence. (Health & Saf. Code, § 25249.7, subd. (i).) Therefore, we will not disclose any of the supporting information you provided for the Certificate of Merit. However, nothing prevents our office from disclosing the absence of evidence to support an allegation in the 60-day notice, or from disclosing our opinion that the supporting information you provided concerning in-state occupational exposures is not adequate. In this case, as we already have informed you, we have concluded that the allegations of in-state occupational exposures in the above notices are not adequately supported, and that you therefore have no authority to commence an action based on the occupational allegations in these notices.

To summarize, (1) you may not file an action against out-of-state manufacturers based on the occupational exposures alleged in the above notices, and (2) in our view, the allegations of in-state occupational exposures in those notices are not adequately supported, and do not provide the authority to commence an action under Proposition 65 based on these occupational exposures.

Sincerely,



SUSAN S. FIERING
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

cc: See attached list of noticed companies

ATTACHED LIST OF NOTICED COMPANIES

Craig Menear, President & CEO
The Home Depot, Inc.
Francis S. Blake, CEO
Home Depot USA, Inc.
2455 Paces Ferry Road, N.W.
Atlanta, GA 30339

Joseph DeAngelo, CEO & President
HD Supply Inc.
3100 Cumberland Boulevard, Suite 1480
Atlanta, GA 30339

Raymond Taccolini, CEO
HD Supply Distribution Services, LLC
Crown Bolt, Inc.
26940 Aliso Viejo Parkway
Aliso Viejo, CA 92656-2617

Thomas Wroe, CEO
Apex Tool Group, LLC
14600 York Road, Suite A
Sparks, MD 21152

John Venhuizen, President & CEO
Ace Hardware Corporation
2200 Kensington Court
Oak Brook, IL 60523

Douglas Cahill
The Hillman Companies, Inc.
The Hillman Group
10590 Hamilton Avenue
Cincinnati, OH 45231

Matthew Olson
Jackson's Hardware, Inc.
435 Dubois Street
San Rafael, CA 94912

ATTACHED LIST OF NOTICED COMPANIES – Contd.

Tim Fogarty, President & CEO
West Chester Marketing, Inc.
West Chester Holdings, Inc.
WCM Holdings, Inc.
West Chester Protective Gear
11500 Canal Road
Sharonville, OH 45241

Mike Menser, President
LG Sourcing, Inc.
1605 Curtis Bridge Road
Wilkesboro, NC 28697

Robert A. Niblock, President & CEO
Lowe's Companies, Inc.
1000 Lowe's Blvd.
Mooresville, NC 28117

Joseph A. Milot, Jr., President
Protective Industrial Products, Inc.
968 Albany Shaker Road
Latham, NY 12110

Jessica Scerri, CEO
Golden State Lumber
855 Lakeville Street, Suite 200
Petaluma, CA 94952

James Hagale, President
BPS Direct, L.L.C.
Bass Pro Shops
2500 East Kearney Street
Springfield, MO 65898

Thomas R. Klein, President
Klein Tools, Inc.
450 Bond Street
P. O. Box 1418
Lincolnshire, IL 60069-1418

ATTACHED LIST OF NOTICED COMPANIES – Contd.

Patrick M. Lavelle, President
VOXX International (dba RCA)
180 Marcus Boulevard
Hauppauge, NY 11788

C. David Geise, President
VOXX Accessories Corporation
111 Congressional Boulevard, Suite 350
Carmel, IN 46032