

# 60-DAY NOTICE OF VIOLATION

SENT IN COMPLIANCE WITH CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)

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Date: August 24, 2004

To: Bob Donekgan, President – Perky Pet Products Inc.  
Bill Pelon, President – Lowe’s HIW, Inc.  
Robert L. Tillman, Chief Executive Officer – Lowe’s Companies Inc.

California Attorney General’s Office;  
District Attorney’s Office for 58 Counties;  
City Attorneys for San Francisco, San Diego, San Jose, Sacramento and Los Angeles;

From: Russell Brimer

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## I. INTRODUCTION

My name is Russell Brimer. I am a citizen of California acting in the interest of the general public. I seek to promote awareness of exposures to toxic chemicals in products sold in California and, if possible, to improve human health by reducing hazardous substances contained in such items. This notice is provided to the parties listed above pursuant to California Health & Safety Code §25249.6 et seq. ("Proposition 65"). As noted above, notice is being provided to the violators, Perky Pet Products Inc., Lowe’s HIW, Inc. and Lowe’s Companies Inc. (the "Violators"). The violations covered by this notice consist of the product exposures, routes of exposures and types of harm potentially resulting from such exposure to the following toxic chemical or chemicals ("listed chemicals" or "lead"):

Product Exposure: See Section VI. Exhibit A  
Listed Chemicals: Lead and lead compounds  
Routes of Exposure: Ingestion, Dermal  
Types of Harm: Birth Defects and Other Reproductive Harm

## II. NATURE OF ALLEGED VIOLATION (PRODUCT EXPOSURE)

The specific type or types of products (hereafter the "products") that are causing consumer and occupational exposures in violation of Proposition 65 (and that are covered by this notice) are listed on Exhibit A in section VI below. The Violators’ sales of these glass and metal bird feeders have been occurring from August 25, 2001 to the present. As a result of the sales of these products, exposures to the listed chemicals have been occurring without clear and reasonable warnings as required by Proposition 65. Without proper warnings regarding the toxic effects of exposures to the listed chemicals produced by the products, California citizens lack the information necessary to make

informed decisions on whether and how to eliminate (or reduce) the risk of exposure to the toxic chemicals from reasonably foreseeable use of the products.

#### **A. CONSUMER PRODUCT EXPOSURE**

California consumers, through the act of buying, acquiring or utilizing the products, are exposed to the listed chemicals. By way of example but not limitation, exposures occur when California citizens use, display, clean, repair, pack, unpack, arrange, store or otherwise handle the products. These tasks cause consumers to be exposed through the routine touching of the parts or portions of the products containing readily available surface lead/lead compounds. Additionally, exposure can occur through the routine touching of other materials that are contaminated with the lead/lead compounds from the products as a result of these tasks. People likely to be exposed include both children and adults.

#### **B. OCCUPATIONAL EXPOSURE**

Similarly, men and women in California use the products as a part of their jobs and are, therefore, subject to occupational exposures to the listed chemicals. Employees are exposed at the California business locations of the apparent manufacturer, distributor and retailer (and their agents, assigns and divisions) as well as all other California locations where the products, or the component parts thereof that include the listed chemicals, are by way of example but not limitation used, packed, unpacked, labeled, arranged, displayed, cleaned, stocked, stored, repaired or otherwise handled. These tasks cause employee exposure through the routine touching of the parts or portions of the products containing readily available surface lead/lead compounds. Additionally, exposure can occur through the routine touching of other materials that are contaminated with the lead/lead compounds from the products as a result of these tasks. These products are also used by sole proprietors and other persons in settings not covered by the OSH Act. This notice alleges the violation of Proposition 65 with respect to occupational exposure governed by the California State Plan for Occupational Safety and Health. The State Plan incorporates the provisions of Proposition 65, as approved by Federal OSHA on June 6, 1997. 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 requirement to comply with Proposition 65. It also requires that supplemental enforcement is subject to the supervision of the California Occupational Safety and Health Administration. Accordingly, any settlement, civil complaint, or substantive court orders in this matter must be submitted to the Attorney General.

### **III. CONTACT INFORMATION**

Please direct all questions concerning this notice to my counsel at the following address:

Clifford A. Chanler, Esq.  
Chanler Law Group  
655 Redwood Highway, Suite 216

Mill Valley, California 94941  
 Telephone: (415) 380-9222  
 Facsimile: (415) 380-9223

**IV. PROPOSITION 65 INFORMATION**

For general information concerning the provisions of Proposition 65, please feel free to contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900. For the Violators' reference, I have attached a copy of "Proposition 65: A Summary" which has been prepared by OEHHA.

**V. ADDITIONAL NOTICE INFORMATION**

*THIS INFORMATION IS NOT REQUIRED TO BE PROVIDED UNDER CAL. CODE REGS., TITLE 22 § 12903(b)(4).*

Identified below are specific examples of the type of offending products recently purchased and witnessed being available for purchase or use in California. Based on publicly available information, the retailers, distributors and/or manufacturers of the products at issue are also provided below. Brimer believes and alleges that the sale of the offending products has also occurred without the requisite warning at other locations including, but not limited to, transactions made over-the-counter, between business-to-business, through the internet and/or via a catalogue by the Violators and other distributors and retailers of the manufacturer.

<i>Products</i>	<i>Retailer(s)</i>	<i>Manufacturer(s)/Distributors</i>
Garden Treasures Hummingbird Feeder, Item #193411 (#0 78978 26740 4)	Lowe's; Lowe's HIW, Inc. Lowe's Companies Inc. San Bernardino County, Southern California	Perky Pet Products Inc.

**VI. EXHIBIT A**

<i>Category of Products</i>	<i>Such As*</i>	<i>Toxins</i>
Glass and Metal (containing lead) Bird Feeders	Garden Treasures Hummingbird Feeder, Item #193411 (#0 78978 26740 4)	Lead and lead compounds

\*The specifically identified example of the type of products subject to this Notice are for the recipient's benefit to assist in its investigation of, among other things, the magnitude of potential exposure to the listed chemicals from other items within the product category listed in Exhibit A. It is important to note that this example is not meant to be an exhaustive or comprehensive identification of each specific offending product of the type listed in the category of products in Exhibit A.

# CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7(d)

I, Clifford A. Chanler, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice has violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.
2. I am the attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the *alleged* exposure to the listed chemicals that are the subject of this action.
4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.
5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including information identified in Health and Safety Code §25249.7(h)(2) (i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.)

Dated: 8-25-04

The Honorable Tom Orloff	Alameda County District Attorney	1225 Fallon Street, #900	Oakland	CA	94612
The Honorable William A. Richmond	Alpine County District Attorney	270 Laramie Street, Annex Building, PO BOX 248	Markleeville	CA	96120
The Honorable Todd Riebe	Amador County District Attorney	708 Court Street	Jackson	CA	95642
The Honorable Michael Ramsey	Butte County District Attorney	25 County Center Drive	Oroville	CA	95965
The Honorable Jeffrey Tuttle	Calaveras County District Attorney	891 Mountain Ranch Road	San Andreas	CA	95249
The Honorable John R. Poyner	Colusa County District Attorney	547 Market Street	Colusa	CA	95832
The Honorable Robert J. Kochly	Contra Costa County District Attorney	651 Pine Street FL 12	Martinez	CA	94553
The Honorable Michael Riese	Del Norte County District Attorney	450 H Street	Crescent City	CA	95531
The Honorable Gary Lacy	El Dorado County District Attorney	515 Main Street	Placerville	CA	95667
The Honorable Elizabeth Egan	Fresno County District Attorney	2220 Tulare Street, #1000	Fresno	CA	93721
The Honorable Robert Holzapfel	Glenn County District Attorney	PO BOX 430	Willows	CA	95988
The Honorable Paul Gallegos	Humboldt County District Attorney	825 5th Street	Eureka	CA	95501
The Honorable Gilbert Otero	Imperial County District Attorney	939 West Main Street	El Centro	CA	92243
The Honorable Arthur Maillet	Inyo County District Attorney	PO Drawer D	Independence	CA	93526
The Honorable Edward R. Jagels	Kern County District Attorney	1215 Truxtun Avenue	Bakersfield	CA	93301
The Honorable Ronald Calhoun	Kings County District Attorney	1400 West Lacey Boulevard	Hanford	CA	93230
The Honorable Gerhard Lounk	Lake County District Attorney	255 North Forbes Street	Lakeport	CA	95453
The Honorable Robert Burns	Lassen County District Attorney	220 S. Lassen Street, Ste. 8	Susanville	CA	96130
The Honorable Steve Cooley	Los Angeles County District Attorney	210 West Temple Street	Los Angeles	CA	90012
The Honorable Ernests LiCalsi	Madera County District Attorney	209 West Yosemite Avenue	Madera	CA	93637
The Honorable Paula Camena	Marin County District Attorney	3501 Civic Center Drive	San Rafael	CA	94903
The Honorable Robert Brown	Mariposa County District Attorney	PO BOX 730	Mariposa	CA	95338
The Honorable Norman Vroman	Mendocino County District Attorney	PO BOX 1000	Ukiah	CA	95462
The Honorable Gordon Spencer	Merced County District Attorney	2222 M Street	Merced	CA	95340
The Honorable Jordan Funk	Modoc County District Attorney	204 S. Court Street, Room 202	Alturas	CA	96101
The Honorable George Booth	Mono County District Attorney	PO BOX 617	Bridgeport	CA	93517
The Honorable Dean Flippo	Monterey County District Attorney	240 Church Street, #101	Salinas	CA	93901
The Honorable Gary Lieberstein	Napa County District Attorney	931 Parkway Mall	Napa	CA	94559
The Honorable Michael Ferguson	Nevada County District Attorney	231 Church Street, Suite 6	Nevada City	CA	95959
The Honorable Tony Rackaukas	Orange County District Attorney	401 Civic Center Drive West	Santa Ana	CA	92701
The Honorable Bradford Fenocchio	Placer County District Attorney	11562 B Avenue	Auburn	CA	95603
The Honorable Jeff Cunan	Plumas County District Attorney	520 Main Street, Room 404	Quincy	CA	95971
The Honorable Grover Trask II	Riverside County District Attorney	4075 Main Street	Riverside	CA	92501
The Honorable Jan Scully	Sacramento County District Attorney	901 G Street	Sacramento	CA	95814
The Honorable John Sarsfield	San Benito County District Attorney	419 4th Street, Second Floor	Hollister	CA	95203
The Honorable Michael Ramos	San Bernardino County District Attorney	316 N. Mountain View Avenue	San Bernardino	CA	92415
The Honorable Bonnie Dumanis	San Diego County District Attorney	330 W. Broadway Street, Suite 1320	San Diego	CA	92101
The Honorable Kamala Harris	San Francisco County District Attorney	880 Bryant Street, Room 325	San Francisco	CA	94103
The Honorable John Phillips	San Joaquin County District Attorney	PO BOX 990	Stockton	CA	95201
The Honorable Gerald Shea	San Luis Obispo County District Attorney	1050 Monterey Street, Room 450	San Luis Obispo	CA	93408
The Honorable James Fox	San Mateo County District Attorney	400 County Center, Third Floor	Redwood City	CA	94063
The Honorable Thomas Sneddon, Jr.	Santa Barbara County District Attorney	1105 Santa Barbara Street	Santa Barbara	CA	93101
The Honorable George Kennedy	Santa Clara County District Attorney	70 West Hedding Street, West Wing	San Jose	CA	95110
The Honorable Bob Lee	Santa Cruz County District Attorney	701 Ocean Street, Room 200	Santa Cruz	CA	95060
The Honorable Gerald Benito	Shasta County District Attorney	1525 Court Street, Third Floor	Redding	CA	96001
The Honorable Lawrence Allen	Sierra County District Attorney	PO BOX 457	Downville	CA	95936
The Honorable Peter Knoll	Siskiyou County District Attorney	PO BOX 986	Yreka	CA	96097
The Honorable David Paulson	Solano County District Attorney	600 Union Avenue	Fairfield	CA	94533
The Honorable Stephan Passalacqua	Sonoma County District Attorney	600 Administration Drive, Room 212J	Santa Rosa	CA	95403
The Honorable James Brazelton	Stanislaus County District Attorney	800 11th Street, Room 200 PO BOX 442	Modesto	CA	95353
The Honorable Carl Adam	Sutter County District Attorney	446 Second Street	Yuba City	CA	95991
The Honorable Gregg Cohen	Tehama County District Attorney	PO BOX 519	Red Bluff	CA	96080
The Honorable David Cross	Trinity County District Attorney	PO BOX 1310	Weaverville	CA	96093
The Honorable Phillip Cline	Tulare County District Attorney	221 South Mooney Boulevard, Suite 224	Visalia	CA	93291
The Honorable Donald Segerstrom, Jr.	Tuolumne County District Attorney	423 No. Washington Street	Sonora	CA	95370
The Honorable Gregory Totten	Ventura County District Attorney	800 South Victoria Avenue	Ventura	CA	93009
The Honorable David C. Henderson	Yolo County District Attorney	301 Second Street	Woodland	CA	95695
The Honorable Patrick McGrath	Yuba County District Attorney	215 Fifth Street	Marysville	CA	95901
The Honorable Jack L. White	City of Anaheim City Attorney	200 S. Anaheim Boulevard	Anaheim	CA	92805
The Honorable Bart J. Thiltgen	City of Bakersfield City Attorney	1501 Truxtun Avenue	Bakersfield	CA	93301
The Honorable Rockard Delgado	City of Los Angeles City Attorney	200 N. Main Street	Los Angeles	CA	90012
	San Jose City Attorney's Office	151 West Mission Street	San Jose	CA	95110
The Honorable Casey Gwinn	San Diego City Attorney's Office	1200 Third Avenue, 3rd Floor	San Diego	CA	92101
The Honorable Samuel Jackson	Sacramento City Attorney's Office	960 Ninth Street, Tenth Floor	Sacramento	CA	95814
The Honorable Dennis J. Herrera	San Francisco City Attorney's Office	1380 Market Street, Fifth Floor	San Francisco	CA	94102
The Honorable Bill Lockyer	California Attorney General's Office	1515 Clay Street	Oakland	CA	94612

## PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my business address is 11501 Dublin Blvd., Suite 200, Dublin, CA 94568.

On August 25, 2004, I served the following document:

**60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH  
& SAFETY CODE §25249.7(d);**

**CERTIFICATE OF MERIT; AND**

**CERTIFICATE OF MERIT ATTACHMENTS (SERVED ONLY ON THE  
ATTORNEY GENERAL)**

served on the Violators listed below via 2<sup>nd</sup> Day Air Service by placing a true and correct copy in each sealed envelope, addressed to each Violator and placing such envelope in a Federal Express Drop-Off Box:

Bob Donekgan, President  
Perky Pet Products Inc.  
2201 S. Wabash Street  
Denver, CO 80231  
Tel: (303) 751-9000

Bill Pelon, President  
Lowe's HIW, Inc.  
101 Andover Park E,  
Suite 200  
Tukwila, WA 98188-2902

Robert L. Tillman, Chief  
Executive Officer  
Lowe's Companies Inc.  
1605 Curtis Bridge Road  
Wilkesboro, NC 28697  
Tel: (336) 658-4766

as well as providing copies of the notice to the public enforcers by placing a true and correct copy in a sealed envelope, addressed to each party listed below, and served as follows:

<i>Via 2<sup>nd</sup> Day Air Service by placing such envelope in a Federal Express Drop-Off Box:</i>	The Attorney General of the State of California;
<i>By placing each envelope in a United States Postal Service mailbox, first class postage prepaid:</i>	The District Attorney for Each of the 58 counties in California; and  The City Attorney for Los Angeles, San Diego, San Jose, San Francisco and Sacramento;

*A list of addresses for each of these recipients is attached.*

Executed on August 25, 2004, at Dublin, California.