

# 60-DAY NOTICE OF VIOLATION

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

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Date: November 19, 2007

To: Toni Ko, President – NYX, Los Angeles, Inc.  
California Attorney General's Office;  
District Attorney's Office for 58 Counties; and  
City Attorneys for San Francisco, San Diego, San Jose, Sacramento and Los Angeles

From: Whitney R. Leeman, Ph. D.

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## I. INTRODUCTION

My name is Whitney R. Leeman. I hold a Doctor of Philosophy degree in Environmental Engineering. I am a citizen of the State of California acting in the interest of the general public. I seek to promote awareness of exposures to toxic chemicals found 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 violator, NYX, Los Angeles, Inc. (the "Violator"). The violations covered by this Notice consist of the product exposures, routes of exposures and types of harm potentially resulting from exposure to the toxic chemical ("listed chemical") identified below, as follows:

Product Exposure: See Section VI. Exhibit A  
Listed Chemical: Lead  
Routes of Exposure: Inhalation, Ingestion, Dermal, Ocular  
Types of Harm: Birth Defects and Other Reproductive Harm

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

The specific types of products that are causing consumer and occupational exposures in violation of Proposition 65, and that are covered by this Notice, is listed under "Product Category/Type" in Exhibit A in Section VI below. The Violator's sales of these products dating as far back as November 19, 2006 are subject to this notice. As a result of the sales of these products, exposures to the listed chemical 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 chemical resulting from use of 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 chemical from the reasonably foreseeable use of the products.

## A. CONSUMER PRODUCT EXPOSURE

California consumers who purchase or acquire the products are exposed to the listed chemical contained in the products. By way of example, but not limitation, exposures occur when California citizens sample, apply, wear, smooth, smear, blot or utilize the cosmetic products on the lips, eyelids and/or face of themselves or others. These tasks cause consumers to be exposed directly to the listed chemical in the products. Additionally, exposures can occur indirectly through the routine touching of facial features (*i.e.* the lips, cheeks and eyes) with hands and fingers that become contaminated with the listed chemical, which is then transferred to the mouth through hand to mouth contact, including fingernail biting, eating, drinking and other frequent activities, resulting in ingestion. People likely to be exposed include both children and adults.

## B. OCCUPATIONAL EXPOSURE

Similarly, California citizens use or otherwise handle the products as a part of their jobs and are, therefore, subject to occupational exposures to the listed chemical. Employees are exposed at any 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 chemical are, by way of example but not limitation, used, modeled, demonstrated, applied, arranged, displayed, cleaned, or otherwise handled. These tasks cause employee exposure directly and/or indirectly to the listed chemical through the routine touching of the parts or portions of the products containing readily available amounts of the listed chemical. Additionally, exposure can occur through the routine touching of facial features (*i.e.* the lips, cheeks and eyes) with hands and fingers that become contaminated with the listed chemical, which is then transferred to the mouth through hand to mouth contact, including nail biting, eating, and other frequent activities, resulting in ingestion. These products are also used by sole proprietors and other persons in settings not covered by the Occupational Safety Health Act ("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 contained 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 California Attorney General.

### III. CONTACT INFORMATION

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

Whitney R. Leeman, Ph. D.  
c/o David Bush  
Hirst & Chanler LLP  
2674 Main Street, Suite D  
PMB 139  
Ventura, CA 93003  
Telephone: (800) 935-8116

### 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 ("OEHHA") Proposition 65 Implementation Office at (916) 445-6900. For the Violator's 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 products recently purchased and witnessed as being available for purchase or use in California that are within the categories or types of offending product covered by this Notice. Based on publicly available information, the retailers, distributors and/or manufacturers of these examples within the categories or types of product are also provided below. I believe and allege that the sale of the offending products also has occurred without the requisite Proposition 65 "clear and reasonable warnings at one or more locations and/or via other means including, but not limited to, transactions made over-the-counter, business-to-business, through the internet and/or via a catalog by the Violator and other retailers and distributors of the manufacturer.

<i>Product*</i>	<i>Retailer(s)</i>	<i>Manufacturer(s)/Distributor(s)</i>
NYX Single Eye Shadow, ES150 Eutopia (#0 00897 12593 6)	<a href="http://www.cherryculture.com">http://www.cherryculture.com</a>	NYX, Los Angeles, Inc.
NYX Long Lip Pencil, LPL15 Toast (#0 00897 11928 7)	<a href="http://www.cherryculture.com">http://www.cherryculture.com</a>	NYX, Los Angeles, Inc.

## VI. EXHIBIT A

<i>Product Category/Type</i>	<i>Such As*</i>	<i>Toxins</i>
Eye Shadows containing lead	NYX Single Eye Shadow, ES150 Eutopia (#0 00897 12593 6)	Lead
Lip Liners containing lead	NYX Long Lip Pencil, LPL15 Toast (#0 00897 11928 7)	Lead

\*The specifically identified examples of the types of products which are 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 chemical from other items within the product categories listed in Exhibit A. It is important to note that these examples are not meant to be an exhaustive or comprehensive identification of each specific offending product of the types listed under "Product Category/Type" in Exhibit A. Further, it is this citizen's position that the alleged Violator is obligated to continue to conduct in good faith an investigation into other specific products within the types or categories described above that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the notice recipient's custody or control) during the relevant period so as to ensure that the requisite toxic warnings are provided to California citizens prior to purchase.

# 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 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, CA 94710.

On November 19, 2007, I served the following documents:

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

**PROPOSITION 65: A SUMMARY;**

**CERTIFICATE OF MERIT; AND**

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

on the Violator listed below via First Class Certified Mail through the United States Postal Service by placing a true and correct copy in a sealed envelope, addressed to the Violator and providing such envelope to a United States Postal Service Representative:

Toni Ko, President  
NYX, Los Angeles, Inc.  
2230 S. Tubeway Avenue  
Los Angeles, CA 90040

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 November 19, 2007, at Berkeley, California.

  
Mark Langford

## CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7(d)

I, David Bush, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the party identified in the notice has violated Health and Safety Code §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 chemical that is 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 plaintiff's 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: 11/19/07

  
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David Bush

## SERVICE LIST

The Honorable Tom Orloff  
Alameda County District Attorney  
1225 Fallon Street, Room 900  
Oakland, CA 94612

The Honorable William Richmond  
Alpine County District Attorney  
270 Laramie Street, PO BOX 248  
Markleeville, CA 96120

The Honorable Todd Riebe  
Amador County District Attorney  
708 Court Street, #202  
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The Honorable Michael Ramsey  
Butte County District Attorney  
25 County Center Drive,  
Administration Building  
Oroville, CA 95965

The Honorable Jeffrey Tuttle  
Calaveras County District Attorney  
891 Mountain Ranch Road  
San Andreas, CA 95249

The Honorable John R. Poyner  
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547 Market Street  
Colusa, CA 95932

The Honorable Robert J. Kochly  
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725 Court Street, 4<sup>th</sup> Floor, Rm. 402  
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The Honorable Michael Riese  
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The Honorable Paul Gallegos  
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939 West Main Street  
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The Honorable Arthur Maillat  
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P.O. Drawer D  
Independence, CA 93526

The Honorable Edward R. Jagels  
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The Honorable Ronald Calhoun  
Kings County District Attorney  
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The Honorable Gerhard Luck  
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The Honorable Robert Burns  
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Madera, CA 93637

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Ukiah, CA 95482

The Honorable Gordon Spencer  
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Modoc County District Attorney  
204 S. Court Street, Room 202  
Alturas, CA 96101

The Honorable George Booth  
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Old Court House, Main Street  
Bridgeport, CA 93517

The Honorable Dean Flippo  
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240 Church Street, #101  
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Napa, CA 94559

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201 Church Street, Suite 8  
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401 Civic Center Drive West  
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520 Main Street, Room 404  
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The Honorable Grover Trask II  
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Riverside, CA 92501

The Honorable Jan Scully  
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Sacramento, CA 95814

The Honorable John Sarsfield  
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419 4<sup>th</sup> Street, Second Floor  
Hollister, CA 95203

The Honorable Michael Ramos  
San Bernardino County District Attorney  
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San Bernardino, CA 92415

The Honorable Bonnie Dumanis  
San Diego County District Attorney  
330 W. Broadway Street, Suite 1320  
San Diego, CA 92101

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San Francisco County District Attorney  
850 Bryant Street, Room 325  
San Francisco, CA 94103

The Honorable James Willett  
San Joaquin County District Attorney  
222 E. Weber Avenue, 2<sup>nd</sup> Floor, Room 202  
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  
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Redwood City, CA 94063

The Honorable Thomas Sneddon, Jr.  
Santa Barbara County District Attorney  
1112 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  
100 Courthouse Square, Second Floor  
Downieville, CA 95936

The Honorable James Andrus  
Siskiyou County District Attorney  
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800 South Victoria Avenue  
Ventura, CA 93009

The Honorable David C. Henderson  
Yolo County District Attorney  
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San Diego, CA 92101

The Honorable Samuel Jackson  
Office of the City Attorney, Sacramento  
915 I Street, 4<sup>th</sup> Floor  
Sacramento, CA 95814

The Honorable Dennis J. Herrera  
Office of the City Attorney, San Francisco  
City Hall, Room 234  
San Francisco, CA 94102

The Honorable Richard Doyle  
Office of the City Attorney, San Jose  
200 East Santa Clara Street  
San Jose, CA 95113

Office of the California Attorney General  
Proposition 65 Enforcement Reporting  
ATTN: Prop 65 Coordinator  
1515 Clay Street, Suite 2000  
Oakland, CA 94612-0550