

SIXTY-DAY NOTICE OF INTENT TO SUE FOR VIOLATION OF THE SAFE DRINKING WATER  
AND TOXIC ENFORCEMENT ACT OF 1986

(*Cal. Health & Safety Code § 25249.5, et seq.*) (“Proposition 65”)

May 10, 2013

Clayton Wahll, President or  
Current President/CEO  
Kmart Store 7225  
6310 W. 3rd Street  
Los Angeles, CA 90036

Edward Lampert, CEO, or  
Current President/CEO  
Sears Holding Corporation  
3333 Beverly Road  
Hoffman Estates, IL 60179

Clayton Wahll, President or  
Current President/CEO  
Kmart Corporation  
3333 Beverly Road  
Hoffman Estates, IL 60179

John Heppner, President  
Or Current President/CEO  
Master Lock Company, LLC  
137 W. Forest Hill Ave  
Oak Creek, WI 53154

John Heppner, President  
Or Current President/CEO  
Master Lock Company, LLC  
2600 N. 32<sup>nd</sup> St  
Milwaukee, WI 53210

Christopher Klein, CEO  
Or Current President/CEO  
Fortune Brands Home & Security,  
Inc.  
520 Lake Cook Rd  
Deerfield, IL 60015

Alice Tillett, President  
Or Current President/CEO  
Pacific Cycle, Inc.  
4902 Hammersley Road  
Madison, WI 53711

AND THE PUBLIC PROSECUTORS LISTED ON THE DISTRIBUTION LIST ACCOMPANYING THE  
ATTACHED CERTIFICATE OF SERVICE

Re: Violations of Proposition 65 concerning **Bicycle Locks containing Diethyl Hexyl Phthalate**  
**(“DEHP”)**

To whom this may concern:

**Consumer Advocacy Group, Inc.** (“CAG”), the noticing entity, located at **9903 Santa Monica Boulevard #225, Beverly Hills, California 90212**, serves this Notice of Violation (“Notice”) on Sears Holding Corporation, Kmart Corporation, Kmart Store 7225, Master Lock Company, LLC, Fortune Brands Home & Security, Inc., and Pacific Cycle, Inc. (collectively “Violators”) pursuant to and in compliance with Proposition 65. Violators may contact CAG concerning this Notice through its designated person within the entity, its attorney, Reuben Yeroushalmi 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, CA 90212, telephone no. (310) 623-1926, facsimile no. (310) 623-1930. This Notice satisfies a prerequisite for CAG to commence an action against Violators in any Superior Court of California to enforce Proposition 65. The violations addressed by this Notice occurred at numerous locations in each county in California as reflected in the district attorney addresses listed in the attached distribution list. CAG is serving this Notice upon each person or entity responsible for the alleged violations, the California Attorney General, the district attorney for each county where alleged violations occurred, and the City Attorney for each city with a population (according to the most recent decennial census) of over 750,000 located within counties where the alleged violations occurred.

- CAG is an organization based in California. CAG is an entity dedicated to protecting the environment, improving human health, and supporting environmentally sound practices. By sending this Notice, CAG is acting “in the public interest” pursuant to Proposition 65.
- This Notice concerns violations of the warning prong of Proposition 65, which states that “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . .” *Cal. Health & Safety Code* § 25249.6.
- **Bicycle Locks (“Locks”)** contain **Di (2-ethylhexyl) phthalate (DEHP)**, also known as Diethyl Hexyl Phthalate and Bis (2-ethylhexyl) phthalate, which is known to the State of California to cause both cancer and reproductive toxicity, developmental, male. On January 1, 1988, the Governor of California added DEHP to the list of chemicals known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP to the list of chemicals known to the State to cause developmental male reproductive toxicity.
  - An Exemplar of the violations caused by **Locks** includes but is not limited to:
    - **Master Lock™ Bike Security, “Key U-Lock”, “7 ½ in x 9 ¾”, “ML292”, barcode: 0 26599 70709 0**
- This Notice addresses consumer products exposures. A “[c]onsumer products exposure’ is an exposure which results from a person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.” *Cal. Code Regs.* 27 tit. § 25602(b).

Violators caused consumer product exposures in violation of Proposition 65 by producing or making available for distribution or sale in California to consumers **Locks**. The packaging for **Locks** (meaning any label or other written, printed or graphic matter affixed to or accompanying the product or its container or wrapper) contains no Proposition 65-compliant warning. Nor did Violators, with regard to **Locks** provide a system of signs, public advertising identifying the system and toll-free information services, or any other system, which provided clear and reasonable warnings. Nor did Violators, with regard to **Locks**, provide identification of the product at retail outlets in a manner that provided a warning through shelf labeling, signs, menus, or a combination thereof.

- This Notice also concerns occupational exposures. An “[o]ccupational exposure’ means an exposure to any employee in his or her employer’s workplace.” *Cal. Code Regs.* tit. 27, § 25602(f).

Violator, Kmart, caused occupational exposures in violation of Proposition 65 by allowing employees to handle the **Locks** in the course of packaging, shipping, distributing, promoting, and selling **Locks** without having first given clear and reasonable warnings to such employees that by handling the **Locks** such employees would suffer exposures to **DEHP**. Violators’ employees were exposed to **DEHP** by touching **Locks** with their bare skin at Violators’ premises located at Kmart, Store 7225, 6310 W. 3<sup>rd</sup> St., Los Angeles, CA 90036, among other locations where these activities take place including but not limited to other distributing, shipping, warehousing, packaging and retail centers. Violators did not provide any Proposition 65-compliant warnings on either the products or any substance present or any sign or system of signs within the workplace.

***This notice alleges the violation of Proposition 65*** with respect to occupational exposures 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 (a) the conduct of manufacturers occurring outside the State of California; and (b) employers with less than ten (10) employees. The approval also provides that an employer may use any means of compliance in the general hazard communication requirements to comply with Proposition 65. It also requires that supplemental enforcement be 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.

These violations occurred each day between May 10, 2010 and May 10, 2013, and are ever continuing thereafter.

The principal routes of exposure with regard to **Locks** are and were through dermal contact, ingestion, and inhalation. Persons sustain exposures by handling **Locks** without wearing gloves or any other personal protective equipment, or by touching bare skin or mucous membranes with gloves after handling **Locks** as well as through direct and indirect hand to mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed from **Locks**.

Proposition 65 requires that notice of intent to sue be given to the violator(s) sixty (60) days before the suit is filed. *Cal. Health & Safety Code* § 25249.7(d)(1). With this letter, CAG gives notice of the alleged violations to Violators and the appropriate governmental authorities. In absence of any action by the appropriate governmental authorities within sixty (60) calendar days of the sending of this notice (plus ten (10) calendar days because the place of address is beyond the State of California but within the United States), CAG may file suit. *See Cal. Code Civ. Proc.* § 1013; *Cal. Health & Safety Code* § 25249.7(d)(1); and *Cal. Code Regs.* tit. 27 § 25903(d)(1). CAG remains willing and open to discussing the possibility of resolving its grievances short of formal litigation.

With the copy of this notice submitted to the Violators, a copy of the following is attached: The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary.

Dated: May 10/13

  
Reuben Yeroushalmi  
Yeroushalmi & Associates  
Attorneys for Consumer Advocacy Group, Inc.

## Appendix A

### OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

#### THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACTION 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the Office of Environmental Health Hazard Assessment, the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and its implementing regulations (see citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, Sections 25000 through 27000.

#### WHAT DOES PROPOSITION 65 REQUIRE?

**The "Governor's List."** Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 735 chemicals have been listed as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release, or otherwise engage in activities involving those chemicals must comply with the following:

**Clear and Reasonable Warnings.** A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is

exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of listing of the chemical.

**Prohibition from discharges into drinking water.** A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of listing of the chemical.

#### DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts:

**Governmental agencies and public water utilities.** All agencies of the federal, State or local government, as well as entities operating public water systems, are exempt.

**Businesses with nine or fewer employees.** Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees.

**Exposures that pose no significant risk of cancer.** For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "no significant risk" levels for more than 250 listed carcinogens.

**Exposures that will produce no observable reproductive effect at 1,000 times the level in question.** For chemicals known to the State to cause birth defects or other reproductive harm ("reproductive toxicants"), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000

times the level in question. In other words, the level of exposure must be below the “no observable effect level (NOEL),” divided by a 1,000-fold safety or uncertainty factor. The “no observable effect level” is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

***Discharge that do not result in a “significant amount” of the listed chemical entering into any source of drinking water.*** The prohibition from discharges into drinking water does not apply If the discharger is able to demonstrate that a “significant amount” of the list chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the “no significant risk” or “no observable effect” test if an individual were exposed to such an amount in drinking water.

#### **HOW IS PROPOSITION 65 ENFORCED?**

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys(those in cities with a population exceeding 750,000). Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 27, California Code of Regulations, Section 25903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

#### ***FOR FURTHER INFORMATION...***

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900.

**Bicycle Locks containing DEHP**

**CERTIFICATE OF MERIT**

Pursuant to Health and Safety Code Section 25249.7(d)

I, Reuben Yeroushalmi, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice(s) in which it is alleged the party(s) identified in the notice(s) 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 at least one person with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the 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 the information identified in Health and Safety Code section 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: May 10/13

By: REUBEN YERUSHALMI

