

# 60-DAY NOTICE OF VIOLATION

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

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**DATE:** June 10, 2013

**TO:** Roman Ferber, President – FKA Distributing Co., LLC  
Roman Ferber, President – HoMedics USA, LLC  
Roman Ferber, President – SI Products, LLC  
Gregory Wasson, President – Walgreen Co.  
Arthur Stark, President – Bed Bath & Beyond Inc.  
Kevin Mansell, Chief Executive Officer – Kohl’s Corporation  
Kevin Mansell, Chief Executive Officer – Kohl’s Department Stores, 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:** Peter Englander

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## I. INTRODUCTION

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My name is Peter Englander. 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 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 public agencies listed above pursuant to California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”). As noted above, notice is also being provided to the alleged violators, FKA Distributing Co., LLC, HoMedics USA, LLC, SI Products, LLC, Walgreen Co., Bed Bath & Beyond Inc., Kohl’s Corporation and Kohl’s Department Stores, Inc. (the “Violators”). The violations covered by this Notice consist of the product exposures, routes of exposure, and types of harm potentially resulting from exposure to the toxic chemical (“listed chemical”) identified below, as follows:

Product Exposure:	See Section VII. Exhibit A
Listed Chemical:	Tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”)
Routes of Exposure:	Ingestion, Dermal, Inhalation
Types of Harm:	Cancer

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

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The specific type of product that is causing consumer and occupational exposures in violation of Proposition 65, and that is covered by this Notice, is listed under “Product Category/Type” in Exhibit A in Section VII below. All products within the type covered by this Notice shall be referred to hereinafter as the “products.” Exposures to the listed chemical from the use of the products have been occurring without clear and reasonable warnings as required by Proposition 65, dating as far back as October 28, 2012. Without proper warnings regarding the toxic effects of exposure to the listed chemical resulting from contact with 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.

California citizens, including infants and children, through the act of buying, acquiring or utilizing the products, are exposed to the listed chemical. California citizens, including infants and children, ingest the listed chemical when they, among other activities, touch the products, and transfer the listed chemical from the products to their mouths through hand-to-mouth activities that may continue to occur for a significant period after contact with the products stops. California citizens, including infants and children, are exposed to the listed chemical through direct dermal contact when they, among other activities, handle, touch or otherwise use the products. California citizens, including infants and children, inhale the listed chemical when, among other activities, they breathe indoor air with airborne particles that are released from the products containing the listed chemical.

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### **III. CONTACT INFORMATION**

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Please direct all questions concerning this notice to me through my counsel's office at the following address:

Peter Englander  
c/o Josh Voorhees  
The Chanler Group  
Parker Plaza  
2560 Ninth Street, Suite 214  
Berkeley, CA 94710  
Telephone: (510) 848-8880

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### **IV. PROPOSITION 65 INFORMATION**

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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 Violators' reference, I have attached a copy of "Proposition 65: A Summary" which has been prepared by OEHHA.

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### **V. RESOLUTION OF NOTICED CLAIMS**

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Based on the allegations set forth in this Notice, I intend to file a citizen enforcement lawsuit against the alleged Violators unless such Violators enter into a binding written agreement to: (1) recall products already sold or undertake best efforts to ensure that the requisite health hazard warnings are provided to those who have received such products; (2) provide clear and reasonable warnings for products sold in the future or reformulate such products to eliminate the TDCPP exposures; and (3) pay an appropriate civil penalty based on the factors enumerated in California Health & Safety Code § 25249.7(b). If the alleged Violators are interested in resolving this dispute without resorting to time-consuming and expensive litigation, please feel free to contact my counsel identified in Section III above. It should be noted that neither my counsel nor I can: (1) finalize any settlement until after the 60-day notice period has expired; nor (2) speak for the Attorney General or any District or City Attorney who received this Notice. Therefore, while reaching an agreement with me will resolve my claims, such agreement may not satisfy the public prosecutors.

## VI. ADDITIONAL NOTICE INFORMATION

Identified below are specific examples of products recently purchased and witnessed as being available for purchase or use in California that are within the category or type of offending product covered by this Notice. Based on publicly available information, the retailers, distributors and/or manufacturers of the examples within the category or type 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 Violators and other retailers and distributors of the manufacturer.

<i>Product*</i>	<i>Retailer(s)</i>	<i>Manufacturer(s)/Distributor(s)</i>
HoMedics Portable Foot Massage Pillow, Model# FM-4CWA (#0 31262 04446 4)	Walgreen Co. Alameda County, Northern California	FKA Distributing Co., LLC; HoMedics USA, LLC
HoMedics Shiatsu + Vibration Massage Pillow, SP-25HA (#0 31262 04597 3)	Bed Bath & Beyond Inc. Contra Costa County, Northern California	FKA Distributing Co., LLC; HoMedics USA, LLC
The Sharper Image Shiatsu Massage Pillow with Heat, Model # MSG-P110D (#8 45516 00017 1)	Kohl’s Corporation; Kohl’s Department Stores, Inc. Alameda County, Northern California	FKA Distributing Co., LLC; HoMedics USA, LLC; SI Products, LLC

## VII. EXHIBIT A

<i>Product Category/Type</i>	<i>Such As*</i>	<i>Toxins</i>
Massage Pillows with Foam Padding containing Tris(1,3-dichloro-2-propyl) phosphate	HoMedics Portable Foot Massage Pillow, Model# FM-4CWA (#0 31262 04446 4)  HoMedics Shiatsu + Vibration Massage Pillow, SP-25HA (#0 31262 04597 3)	Tris(1,3-dichloro-2-propyl) phosphate

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**VII. EXHIBIT A (continued)**

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<i>Product Category/Type</i>	<i>Such As*</i>	<i>Toxins</i>
Massage Pillows with Foam Padding containing Tris(1,3-dichloro-2-propyl) phosphate	The Sharper Image Shiatsu Massage Pillow with Heat, Model # MSG-P110D (#8 45516 00017 1)	Tris(1,3-dichloro-2-propyl) phosphate

\*The specifically identified examples of the type of product that is subject to this Notice are for the recipients' benefit to assist in their investigation of, among other things, the magnitude of potential exposure to the listed chemical from other items within the product category/type 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 type listed under "Product Category/Type" in Exhibit A. Further, it is this citizen's position that the alleged Violators are obligated to continue to conduct in good faith an investigation into other specific products within the type or category described above that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the notice recipients' custody or control) during the relevant period so as to ensure that the requisite toxic warnings were and 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 Parker Plaza, 2560 Ninth Street, Suite 214, Berkeley, CA 94710.

On June 10, 2013, 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 alleged Violators 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 entities listed below and providing each envelope to a United States Postal Service Representative:

Roman Ferber, President  
FKA Distributing Co., LLC  
3000 North Pontiac Trail  
Commerce Township, MI 48390

Roman Ferber, President  
HoMedics USA, LLC  
3000 North Pontiac Trail  
Commerce Township, MI 48390

Roman Ferber, President  
SI Products, LLC  
3000 North Pontiac Trail  
Commerce Township, MI 48390

Gregory Wasson, President  
Walgreen Co.  
200 Wilmot Road  
Deerfield, IL 60015

Kevin Mansell, Chief Executive Officer  
Kohl's Corporation  
N56 W17000 Ridgewood Drive  
Menomonee Falls, WI 53051

Kevin Mansell, Chief Executive Officer  
Kohl's Department Stores, Inc.  
N56 W17000 Ridgewood Drive  
Menomonee Falls, WI 53051

Arthur Stark, President  
Bed Bath & Beyond Inc.  
650 Liberty Avenue  
Union, NJ 07083

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, 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 June 10, 2013, at Berkeley, California.



Eleanor Chen-Ranstrom


# 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 that the parties identified in the notice have 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 Violators 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: June 10, 2013

  
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Clifford A. Chanler