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AS YOU SOW

ENDORSED
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Superior Court of California
County of San Francisco

Case Management Conference
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DEPARTMENT 212

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SAN FRANCISCO

CGC-09-485921

12 AS YOU SOW)

13 Plaintiff,)

14 vs.)

15 PET FOOD EXPRESS, LTD.; VO-TOYS)
16 INCORPORATED; MULTIPET)
INTERNATIONAL, INC.; and DOES 1 through)
100, inclusive,)

17 Defendants.)
/

Case No.

COMPLAINT FOR CIVIL
PENALTIES AND DECLARATORY
AND INJUNCTIVE RELIEF

1 Plaintiff, AS YOU SOW, alleges as follows:

2 **INTRODUCTION**

3 1. This complaint seeks civil penalties and declaratory and injunctive relief to remedy the
4 continuing failure of PET FOOD EXPRESS, LTD.; VO-TOYS INCORPORATED; MULTIPET
5 INTERNATIONAL, INC.; and DOES 1 through 100 (“Defendants”) to give clear and reasonable
6 warnings to residents of California prior to exposing those residents to products (pet toys for dogs and
7 cats) which contain Di(2-ethylhexyl) phthalate (“DEHP”) and/or Di-*n*-butyl phthalate (“DBP”).

8 2. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code
9 section 25249.5 et seq. (hereinafter, “Proposition 65”), businesses must provide persons with a “clear
10 and reasonable warning” before exposing them to chemicals known to the State to cause cancer or
11 reproductive harm. (Health & Saf. Code, § 25249.6.)

12 3. In this case, exposures to DEHP and/or DBP occur when individuals handle or otherwise
13 come into contact with pet toys manufactured, marketed, sold, and/or distributed by Defendants.

14 4. Plaintiff brings this action in the public interest pursuant to section 25249.7, subdivision (d),
15 of the Health & Safety Code. Plaintiff seeks declaratory and injunctive relief (Health & Saf. Code,
16 § 25249.7, subd. (a)), in addition to statutory civil penalties (Health & Saf. Code, § 25249.7, subd.
17 (b)), to remedy these violations of Proposition 65.

18 **PARTIES**

19 5. Plaintiff AS YOU SOW (“AYS”) is a non-profit foundation organized under California’s
20 Non-Profit Public Benefit Corporation Law. (Cal. Corp. Code, § 5110 et seq.) AYS is dedicated to
21 ensuring that corporations and other institutions act responsibly and in the long-term best interests
22 of the environment and the human condition. To achieve these goals, AYS seeks to: (i) engage and
23 challenge corporations through direct dialogue and shareholder advocacy; (ii) refine economic
24 arguments to move corporations, other institutions, and financial markets toward environmentally and
25 socially responsible practices; (iii) enforce environmental, consumer protection, and right to know
26 laws; (iv) provide grants to non-profit organizations primarily focused on toxics reduction,
27 remediation, and prevention, and environmental education. AYS is a “person” pursuant to section
28 25249.11(a) of the Health & Safety Code, and is located at 311 California Street, Suite 510, San

1 Francisco, California 94104.

2 6. Defendant PET FOOD EXPRESS, LTD. is a business entity with ten or more employees that
3 has manufactured, marketed, sold, and/or distributed pet toys containing DEHP and/or DBP to
4 individuals in California. PET FOOD EXPRESS, LTD. is a "person in the course of doing business"
5 in California within the meaning of Health & Safety Code sections 25249.5 and 25249.11,
6 subdivision (b).

7 7. Defendant VO-TOYS INCORPORATED is a business entity with ten or more employees that
8 has manufactured, marketed, sold, and/or distributed pet toys containing DEHP and/or DBP to
9 individuals in California. VO-TOYS INCORPORATED is a "person in the course of doing business"
10 in California within the meaning of Health & Safety Code sections 25249.5 and 25 249.11,
11 subdivision (b).

12 8. Defendant MULTIPET INTERNATIONAL, INC. is a business entity with ten or more
13 employees that has manufactured, marketed, sold, and/or distributed pet toys containing DEHP and/or
14 DBP to individuals in California. MULTIPET INTERNATIONAL, INC. is a "person in the course
15 of doing business" in California within the meaning of Health & Safety Code sections 25249.5 and
16 25249.11, subdivision (b).

17 9. The true names and/or capacities of Defendants DOES 1 through 100 are unknown to
18 Plaintiff who therefore sues them by fictitious names pursuant to Code of Civil Procedure section
19 474. Plaintiff will amend this complaint to allege the true names and capacities of these Defendants
20 when they have been determined. Each of the fictitiously named Defendant has manufactured,
21 marketed, sold, and/or distributed pet toys containing DEHP and/or DBP to individuals in California.

22 JURISDICTION

23 10. This Court has subject matter jurisdiction over this action pursuant to subdivisions (a) and (b)
24 of Health & Safety Code section 25249.7, and article VI, section 10 of the California Constitution.
25 Health & Safety Code section 25249.7, subdivisions (a) and (b), allows enforcement of Proposition
26 65 by injunction and civil penalties "in any court of competent jurisdiction." Article VI, section 10,
27 of the state Constitution grants the superior courts original jurisdiction over all causes other than those
28 expressly given by statute to other trial courts. This case is not given by statute to other trial courts.

1 11. The Court has personal jurisdiction over each of the Defendants named above, because each
2 is a business entity that has sufficient minimum contacts in California, or otherwise intentionally
3 avails itself of the California market, through the manufacture, marketing, sale, and/or distribution
4 of pet toys, to render the exercise of jurisdiction over it by the California courts consistent with
5 traditional notions of fair play and substantial justice.

6 12. On November 26, 2008, Plaintiff mailed a "Notice of Violation of California Health & Safety
7 Code, § 25249.5 et seq." to (i) the California Attorney General, (ii) the District Attorneys of each
8 county in California, and (iii) the City Attorneys of each California city with a population of over
9 750,000 persons, pursuant to Health & Safety Code section 25249.7, subdivision (d). On the same
10 day, Plaintiff mailed a "Notice of Violation of California Health & Safety Code, § 25249.5 et seq."
11 to each of the known Defendants. The notice included a statement that AYS has documented
12 violations by Defendants of Proposition 65 as well as information regarding (i) the identities of the
13 alleged violators, (ii) the chemicals alleged to be contained in their products, (iii) descriptions of the
14 consumer products alleged to violate Proposition 65, (iv) the route of exposure of the chemicals to
15 individuals in California, (v) the minimum duration of the violations, and (vi) summary information
16 regarding Proposition 65 in the form of a document entitled "The Safe Drinking Water and Toxic
17 Enforcement Act of 1986: a Summary." Each Defendant received the notice on either November 28,
18 2008, December 1, 2008, or December 2, 2008.

19 13. Each Notice of Violation also included a Certificate of Merit that Plaintiff's attorneys had
20 consulted with one or more persons with relevant and appropriate experience or expertise who has
21 reviewed facts, studies, or other data regarding exposure to DEHP and/or DBP from the pet toys
22 manufactured, marketed, sold, and/or distributed by Defendants and that, based on these
23 consultations, Plaintiff's attorneys believe that there is a reasonable and meritorious case for this
24 private action.

25 14. Each Notice of Violation included a Certificate of Service.

26 15. In compliance with section 25249.7, subsection (d), and title 11, section 3102 of the California
27 Code of Regulations, Plaintiff served the Attorney General with a Notice of Violation and Certificate
28 of Merit that included confidential factual information sufficient to establish the basis of the

1 Certificate of Merit, including the identity of individual(s) with whom Plaintiff consulted and the
2 facts, studies, or other data that was reviewed by such person(s).

3 16. As of the date this Complaint is filed, more than 60 days have elapsed since November 26,
4 2008, as required by section 25249.7, subdivision (d)(1), of the Health & Safety Code. During the
5 60-day notice period, none of the public prosecutors who received the Notice of Violation have
6 commenced or begun diligently prosecuting an action against these named Defendants for the
7 violations alleged in this complaint.

8 VENUE

9 17. Venue is proper in this Court because this action seeks, inter alia, to recover a penalty imposed
10 by statute, and the cause or some part of the cause, arose in this County. (Code Civ. Proc., §§ 393,
11 subd. (a), 395.5.)

12 18. Defendants manufacture, market, sell, and/or distribute pet toys containing DEHP and/or DBP
13 in this County, the County of San Francisco, causing individuals to be exposed to those chemicals
14 while they are physically present here without warning them, in violation of section 25249.6 of the
15 Health & Safety Code.

16 STATUTORY BACKGROUND

17 19. In November 1986, the voters of California passed The Safe Drinking Water and Toxic
18 Enforcement Act of 1986 as an initiative statute designated as "Proposition 65." Proposition 65 has
19 been codified in Health & Safety Code, sections 25249.2 – 25249.13.

20 20. Proposition 65 establishes a procedure by which the State of California is to develop a list of
21 chemicals "known to the state to cause cancer or reproductive toxicity." (Health & Saf. Code, §
22 25249.8.)

23 21. Section 25249.6 of the Health & Safety Code contains Proposition 65's warning requirement
24 which provides: "No person in the course of doing business shall knowingly and intentionally expose
25 any individual to a chemical known to the state to cause cancer or reproductive toxicity without first
26 giving clear and reasonable warning to such individual, except as provided in Section 25249.10."

27 22. An exposure to a chemical in a consumer product is one which "results from a person's
28 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good,

1 or any exposure that results from receiving a consumer service.” (Cal. Code Regs., tit. 27, § 12602,
2 subd. (b).)

3 23. Any person who “violates or threatens to violate” the warning requirement in section 25249.6
4 of the Health & Safety Code “may be enjoined in any court of competent jurisdiction.” (Health & Saf.
5 Code, § 25249.7, subd. (a).) The term “threaten to violate” means “to create a condition in which
6 there is a substantial probability that a violation will occur.” (Health & Saf. Code, § 25249.11, subd.
7 (e).)

8 24. Any person who violates the warning requirement in section 25249.6 of the Health & Safety
9 Code is liable for civil penalties of up to \$2,500 per day for each violation, which penalties are
10 recoverable in a civil action brought in any court of competent jurisdiction. (Health & Saf. Code, §
11 25249.7, subd. (b)(1).)

12 25. A private party may bring suit “in the public interest” to enforce Proposition 65, provided: (i)
13 that party first provides 60-day prior notice of the alleged violation to the Attorney General, every
14 district attorney (or city prosecutor consented to thereby) in whose jurisdiction the violation is alleged
15 to have occurred, and every city attorney of a city having a population in excess of 750,000 in whose
16 jurisdiction the violation is alleged to have occurred; and (ii) neither the Attorney General, nor any
17 district attorney, city attorney, or city prosecutor has commenced and begun diligently prosecuting
18 an action against the violation prior to notification by the private party. (Health & Saf. Code, §
19 25249.7, subd. (d).)

20 26. Proposition 65 provides exemptions from liability for exposures which (i) are subject to
21 federal warning requirements that preempts state authority, (ii) take place less than twelve months
22 after the listing of the chemical in question, or (iii) pose “no significant risk” as that term is defined
23 in the statute. (Health & Saf. Code, § 25249.10.) In addition, Proposition 65 does not apply to
24 persons employing fewer than 10 employees. (Health & Saf. Code, § 25249.11, subd. (b).)

25 FACTS

26 27. The State of California listed DEHP on its list of chemicals known by the State to cause
27 cancer on January 1, 1988. On October 24, 2003, the State also listed DEHP as a chemical known
28 to cause male reproductive toxicity. (Health & Saf. Code, § 25249.8; Cal. Code Regs., tit. 27, §

1 27001.)

2 28. The State of California listed DBP on its list of chemicals known by the State to cause male
3 and female reproductive toxicity on December 2, 2005. (Health & Saf. Code, § 25249.8; Cal. Code
4 Regs., tit. 27, § 27001.)

5 29. Defendants PET FOOD EXPRESS, LTD. and VO-TOYS INCORPORATED manufacture,
6 market, sell, and/or distribute pet toys containing the chemical DEHP, listed under Proposition 65 as
7 known by the State to cause cancer and reproductive toxicity. (Cal. Code Regs., tit. 27, § 27001.)
8 Specifically, products containing DEHP include the “Glo Toy” pet toy, identified with UPC No.
9 075726495645, manufactured by VO-TOYS INCORPORATED and sold by PET FOOD EXPRESS,
10 LTD.

11 30. Defendants PET FOOD EXPRESS, LTD. and MULTIPET INTERNATIONAL, INC.
12 manufacture, market, sell, and/or distribute pet toys containing the chemical DBP, listed under
13 Proposition 65 as known by the State to cause reproductive toxicity. (Cal. Code Regs., tit. 27, §
14 27001.) Specifically, products containing DBP include the “Purrr-fection balls” cat toy, identified
15 with UPC No. 784369200416, manufactured by MULTIPET INTERNATIONAL, INC. and sold by
16 PET FOOD EXPRESS, LTD.

17 31. Defendants DOES 1 through 100 manufacture, market, sell, and/or distribute pet toys
18 containing the chemicals DEHP and/or DBP, listed under Proposition 65 as known by the State to
19 cause cancer and/or reproductive toxicity. (Cal. Code Regs., tit. 27, § 27001.)

20 32. Use of the products identified in this notice results in human exposures to DEHP and/or DBP.
21 The routes of exposure include, but are not limited to, (i) direct ingestion when consumers, including
22 children, put the product directly into their mouths; (ii) ingestion via hand-to-mouth contact when
23 consumers, including children, touch or handle the product; (iii) ingestion via hand-to-mouth contact
24 or pet saliva-to-mouth contact when consumers, including children, come into contact with a pet that
25 has played with the product or held the product in its mouth; and (iv) dermal absorption directly
26 through the skin and eyes when consumers, including children, touch or handle the product.

27 33. Each Defendant knew, or reasonably should have known, that the pet toys it manufactured,
28 marketed, sold, and/or distributed contained DEHP and/or DBP.

1 34. Each Defendant has intended that individuals, including both children and adults, use and
2 handle the pet toys, containing DEHP and/or DBP, that it manufactured, marketed, sold, and/or
3 distributed.

4 35. Each Defendant knew, or reasonably should have known, that individuals, including both
5 children and adults, use and handle the toys it manufactured, marketed, sold, and/or distributed
6 containing DEHP and/or DBP.

7 36. Each Defendant has knowingly and intentionally exposed individuals to chemicals known by
8 the State of California to cause cancer and/or reproductive toxicity by its deliberate act(s) of
9 manufacturing, marketing, selling, and/or distributing its pet toy products containing DEHP and/or
10 DBP.

11 37. Each Defendant has failed to provide a clear and reasonable warning to individual consumers
12 that handling and using the products in question results in exposure to chemical(s) known to the State
13 of California to cause cancer and/or reproductive toxicity.

14 38. No federal law governs warnings on pet toys such as those at issue in such a manner that
15 would preempt state authority.

16 39. Exposure of individual consumers to DEHP and/or DBP through the handling and use of pet
17 toys manufactured, marketed, sold, and/or distributed by Defendants has occurred more than twelve
18 months after the listing of those chemicals as known by the State of California to cause cancer and/or
19 reproductive toxicity.

20 40. Individual consumers handling and using the pet toys manufactured, marketed, sold, and/or
21 distributed by Defendants have been exposed to significant amounts of DEHP and/or DBP, posing
22 a significant risk to such consumers, assuming lifetime exposure to those chemicals at the levels
23 present in Defendants' products.

24 41. Each of the Defendants employed 10 or more employees during the time Defendants
25 knowingly and intentionally exposed individual consumers to DEHP and/or DBP without first giving
26 clear and reasonable warning to such consumers of the risk that those chemicals cause cancer and/or
27 reproductive toxicity.

28 42. An actual and present controversy exists between Plaintiff and Defendants as to whether

1 Proposition 65 required, and continues to require, Defendants to give clear and reasonable warnings
2 to individual consumers, prior to their purchase of Defendants' pet toy products containing DEHP
3 and/or DBP, alerting such consumers to the risk that those chemicals cause cancer and/or reproductive
4 toxicity.

5 43. Plaintiff has no adequate remedy in the ordinary course of law to obtain relief from the
6 consequences of said actions by Defendants for the harms alleged herein.

7 44. Defendants' manufacturing, marketing, selling, and/or distributing of pet toy products
8 containing DEHP and/or DBP, without clear and reasonable warnings to individual consumers,
9 irreparably harms and will continue to irreparably harm the people of California in whose interest this
10 suit is filed

11 45. Unless restrained by this Court, Defendants will continue to violate Proposition 65.

12 **FIRST CAUSE OF ACTION**
13 **(Violation of Proposition 65 by Plaintiff Against All Defendants)**

14 46. Plaintiffs re-allege and re-plead the allegations of the preceding paragraphs of this Complaint
15 as though fully set forth herein.

16 47. By committing the acts alleged herein, each Defendant has, within the previous twelve
17 months, in the course of doing business, knowingly and intentionally exposed individuals to
18 chemicals known to the State of California to cause cancer and/or reproductive toxicity without first
19 giving clear and reasonable warning to such individuals, within the meaning of section 25249.6 of
20 the Health and Safety Code.

21 48. Said violations render each Defendant liable to Plaintiff for civil penalties of up to \$2,500 per
22 day for each violation in addition to any other remedy established by law.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff prays that the Court provide for relief as follows:

25 49. Pursuant to Health and Safety Code section 25249.7, subdivision (b), assess civil penalties
26 against each Defendant in the amount of \$2,500 per day for each violation of Proposition 65,
27 according to proof;

28 50. Pursuant to Health and Safety Code section 25249.7, subdivision (a), enter such temporary

1 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting
2 Defendants from exposing persons within the State of California to DEHP and/or DBP caused by the
3 handling and use by such persons of Defendants' pet toy products, without providing a clear and
4 reasonable warning, as Plaintiff shall specify in a further application to the Court;

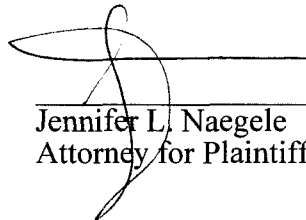
5 51. Pursuant to Code of Civil Procedure section 1060, judicially determine and declare that
6 Defendants are required by Proposition 65 to give clear and reasonable warnings to individual
7 consumers, prior to their purchase of Defendants' pet toy products containing DEHP and/or DBP,
8 alerting such consumers to the risk that those chemicals cause cancer and/or reproductive toxicity;

9 52. Pursuant to section 1021.5 of the Code of Civil Procedure, award attorney fees and costs
10 incurred by Plaintiff in bringing this enforcement action, in an amount the Court determines to be
11 reasonable; and

12 53. Grant such other relief that the Court deems just and proper.

13 Dated: March 5, 2009

LIPPE GAFFNEY WAGNER LLP

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15 _____
16 Jennifer L. Naegele
17 Attorney for Plaintiff AS YOU SOW

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