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ORIGINAL FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

SEP 1 2011

John A. Clarke, Executive Officer/Clerk
BY Mary Flores, Deputy
Mary Flores

6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
10 COUNTY OF LOS ANGELES - CENTRAL DISTRICT

11
12 CONSUMER ADVOCACY GROUP, INC.,
13 in the public interest,

14 Plaintiff,

15 v.

16 NATIONAL STORES, INC., a California
17 Corporation, and DOES 1-20;

18 Defendants.

CASE NO.

BC 468635

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

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21 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendant,

22 NATIONAL STORES, INC., as follows:

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COMPLAINT FOR VIOLATION OF PROPOSITION 65, THE SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986 (HEALTH AND SAFETY CODE § 25249.5, ET SEQ.)

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THE PARTIES

1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" or "CAG") is an organization qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant NATIONAL STORES, INC. ("NATIONAL STORES") is a California corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
4. At all times mentioned herein, the term "Defendants" includes NATIONAL STORES and Does 1-20.
5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
6. At all times relevant to this action, each of the Defendants, including Does 1-20, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each of the other Defendants.

1 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
2 Defendants was a person doing business within the meaning of Health and Safety Code
3 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
4 employees at all relevant times.

5 **JURISDICTION**

6 8. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
7 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
8 those given by statute to other trial courts. This Court has jurisdiction over this action
9 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
10 violations of Proposition 65 in any Court of competent jurisdiction.

11 9. This Court has jurisdiction over Defendants named herein because Defendants either
12 reside or are located in this State or are foreign corporations authorized to do business in
13 California, are registered with the California Secretary of State, or who do sufficient
14 business in California, have sufficient minimum contacts with California, or otherwise
15 intentionally avail themselves of the markets within California through their manufacture,
16 distribution, promotion, marketing, or sale of their products within California to render
17 the exercise of jurisdiction by the California courts permissible under traditional notions
18 of fair play and substantial justice.

19 10. Venue is proper in the County of Los Angeles because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
21 because Defendants conducted, and continue to conduct, business in the County of Los
22 Angeles with respect to the consumer product that is the subject of this action.

23 **BACKGROUND AND PRELIMINARY FACTS**

24 11. In 1986, California voters approved an initiative to address growing concerns about
25 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
26 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
27 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
28 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections

1 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
2 from contamination, to allow consumers to make informed choices about the products
3 they buy, and to enable persons to protect themselves from toxic chemicals as they see
4 fit.

5 12. Proposition 65 requires the Governor of California to publish a list of chemicals known to
6 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
7 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
8 chemicals and chemical families. Proposition 65 imposes warning requirements and
9 other controls that apply to Proposition 65-listed chemicals.

10 13. All businesses with ten (10) or more employees that operate or sell products in California
11 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
12 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
13 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
14 reasonable" warnings before exposing a person, knowingly and intentionally, to a
15 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

16 14. Proposition 65 provides that any person "violating or threatening to violate" the statute
17 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
18 "Threaten to violate" means "to create a condition in which there is a substantial
19 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
20 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
21 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

22 15. Plaintiff identified certain practices of manufacturers and distributors of lead-bearing
23 products of exposing, knowingly and intentionally, persons in California to the
24 Proposition 65-listed chemicals of such products without first providing clear and
25 reasonable warnings of such to the exposed persons prior to the time of exposure.
26 Plaintiff later discerned that Defendants engaged in such practice.

27 16. On October 1, 1992, the Governor of California added Lead and Lead compounds to the
28 list of chemicals known to the State to cause cancer (*Cal. Code Regs.* tit. 27, § 27001(b)).

1 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
2 after addition of Lead and lead compounds to the list of chemicals known to the State to
3 cause cancer, Lead and lead compounds became fully subject to Proposition 65 warning
4 requirements and discharge prohibitions.

- 5 17. On February 27, 1987, the Governor of California added Lead to the list of chemicals
6 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).
7 Lead is known to the State to cause developmental, female, and male reproductive
8 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
9 months after addition of Lead to the list of chemicals known to the State to cause
10 reproductive toxicity, Lead became fully subject to Proposition 65 warning requirements
11 and discharge prohibitions.

12 **SATISFACTION OF PRIOR NOTICE**

- 13 18. On or about September 7, 2010, Plaintiff gave notice of alleged violations of Health and
14 Safety Code section 25249.6, concerning consumer products exposures and occupational
15 exposures, subject to a private action to National Stores, Inc. and to the California
16 Attorney General, County District Attorneys, and City Attorneys for each city containing
17 a population of at least 750,000 people in whose jurisdictions the violations allegedly
18 occurred, concerning the product Fallas Parades Shopping Bag, Number 0724.
- 19 19. Before sending the notices of alleged violation, Plaintiff investigated the consumer
20 products involved, the likelihood that such products would cause users to suffer
21 significant exposures to lead, and the corporate structure of each of the Defendants.
- 22 20. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
23 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
24 Plaintiff who executed the certificate had consulted with at least one person with relevant
25 and appropriate expertise who reviewed data regarding the exposures to lead,
26 respectively, which are the subject Proposition 65-listed chemicals of this action. Based
27 on that information, the attorney for Plaintiff who executed the Certificate of Merit
28 believed there was a reasonable and meritorious case for this private action. The attorney

1 for Plaintiff attached to the Certificate of Merit served on the Attorney General the
2 confidential factual information sufficient to establish the basis of the Certificate of
3 Merit.

- 4 21. Plaintiff's notices of alleged violations also included a Certificate of Service and a
5 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
6 (Proposition 65) A Summary." *Health & Safety Code § 25249.7(d)*.
- 7 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
8 gave notices of the alleged violations to NATIONAL STORES, and the public
9 prosecutors referenced in Paragraph 18.
- 10 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
11 any applicable district attorney or city attorney has commenced and is diligently
12 prosecuting an action against the Defendants.

13
14 **FIRST CAUSE OF ACTION**

15 **(By Consumer Advocacy Group, Inc. and against NATIONAL STORES, and Does 1-20 for**
16 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
17 **(Health & Safety Code, §§ 25249.5, et seq.))**

18 **Fallas Parades Shopping Bag, Number 0724**

- 19 24. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
20 paragraphs 1 through 23 of this complaint as though fully set forth herein.
- 21 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
22 distributor, promoter, or retailer of Fallas Parades Shopping Bag, Number 0724
23 (hereinafter "Shopping Bag"), a consumer product designed for use for transporting
24 products and goods from Defendant's stores.
- 25 26. Plaintiff is informed, believes, and thereon alleges that Shopping Bag contains Lead.
- 26 27. Defendants knew or should have known that Lead has been identified by the State of
27 California as a chemical known to cause cancer and reproductive toxicity and therefore
28 was subject to Proposition 65 warning requirements. Defendants were also informed of

1 the presence of Lead in Shopping Bag within Plaintiff's notice of alleged violations
2 further discussed above at Paragraph 18.

3 28. Plaintiff's allegations regarding Shopping Bag concern "[c]onsumer products
4 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
5 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
6 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
7 *25602(b)*. Shopping Bag is a consumer product, and, as mentioned herein, exposures to
8 Lead took place as a result of such normal and foreseeable consumption and use.

9 29. Plaintiff's allegations regarding Shopping Bag also concern "[o]ccupational exposure[s],"
10 which are exposures "to any employees in his or her employer's workplace." *Cal. Code*
11 *Reg. tit. 27, § 25602(f)*. As mentioned herein, employees were exposed to Lead in their
12 employer's workplace as a result of handling Shopping Bag, in conjunction with
13 packaging, shipping, distributing and/or selling Shopping Bag, among other activities,
14 without having first been given clear and reasonable warnings that such handling would
15 cause exposures to Lead.

16 30. Plaintiff is informed, believes, and thereon alleges that between September 1, 2007 and
17 the present, each of the Defendants knowingly and intentionally exposed their employees
18 and California consumers and users of Shopping Bag, which Defendants manufactured,
19 distributed, or sold as mentioned above, to Lead, without first providing any type of clear
20 and reasonable warning of such to the exposed persons before the time of exposure.
21 Defendants have distributed and sold Shopping Bag in California. Defendants know and
22 intend that California consumers will use and consume Shopping Bag thereby exposing
23 them to Lead. Defendants thereby violated Proposition 65.

24 31. The principal routes of exposure are through dermal contact, ingestion and inhalation.
25 Persons sustain exposures by handling Shopping Bag without wearing gloves or any
26 other personal protective equipment, or by touching bare skin or mucous membranes with
27 gloves after handling Shopping Bag, as well as through hand to mouth contact, hand to
28 mucous membrane, or breathing in particulate matter dispersed from Shopping Bag.

1 And as to Defendants' employees, employees may be exposed to lead in the course of
2 their employment by handling, distributing, and selling Shopping Bag.

3 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
4 Proposition 65 as to Shopping Bag have been ongoing and continuous to the date of the
5 signing of this complaint, as Defendants engaged and continue to engage in conduct
6 which violates Health and Safety Code section 25249.6, including the manufacture,
7 distribution, promotion, and sale of Shopping Bag, so that a separate and distinct
8 violation of Proposition 65 occurred each and every time a person was exposed to Lead
9 by Shopping Bag as mentioned herein.

10 33. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
11 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
12 violations alleged herein will continue to occur into the future.

13 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
14 \$2,500.00 per day per individual exposure to Lead from Shopping Bag, pursuant to
15 Health and Safety Code section 25249.7(b).

16 35. In the absence of equitable relief, the general public and Defendants' employees will
17 continue to be involuntarily exposed to Lead that is contained in Shopping Bag, creating
18 a substantial risk of irreparable harm. Thus, by committing the acts alleged herein,
19 Defendants have caused irreparable harm for which there is no plain, speedy, or adequate
20 remedy at law.

21 36. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
22 filing this Complaint.

1 **PRAYER FOR RELIEF**

2 Plaintiff demands against each of the Defendants as follows:

- 3 1. A permanent injunction mandating Proposition 65-compliant warnings;
- 4 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
- 5 3. Costs of suit;
- 6 4. Reasonable attorney fees and costs; and
- 7 5. Any further relief that the court may deem just and equitable.

8

9 Dated: September 1, 2011

YEROUSHALMI & ASSOCIATES

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12 BY: 

13 ~~Reuben Yeroushalmi~~
14 Attorneys for Plaintiff,
15 Consumer Advocacy Group, Inc.

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