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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

MAY 2 - 2012

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

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & ASSOCIATES**
5 9100 Wilshire Boulevard, Suite 610E
6 Beverly Hills, California 90212
7 Telephone: 310.623.1926
8 Facsimile: 310.623.1930

9 Attorneys for Plaintiff,
10 Consumer Advocacy Group, Inc.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF LOS ANGELES - CENTRAL DISTRICT

13 BC 48 3843

14 CONSUMER ADVOCACY GROUP, INC.,
15 in the public interest,

16 Plaintiff,

17 v.

18 ORLY SHOE CORPORATION, a New York
19 Corporation, NATIONAL STORES, INC., a
20 California Corporation, and DOES 1-20;

21 Defendants.

22 CASE NO.

23 COMPLAINT FOR PENALTY,
24 INJUNCTION, AND RESTITUTION

25 Violation of Proposition 65, the Safe
26 Drinking Water and Toxic Enforcement
27 Act of 1986 (*Health & Safety Code*, §
28 25249.5, *et seq.*)

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

29 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendant
30 ORLY SHOE CORPORATION, NATIONAL STORES, INC., and Does 1-20 as follows:

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THE PARTIES

- 1
2 1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" or "CAG") is an organization
3 qualified to do business in the State of California. CAG is a person within the meaning
4 of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private
5 attorney general, brings this action in the public interest as defined under Health and
6 Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant ORLY SHOE CORPORATION ("ORLY") is a New York corporation doing
8 business in the State of California at all relevant times herein.
- 9 3. Defendant NATIONAL STORES, INC. ("NATIONAL STORES") is a California
10 corporation, qualified to do business and doing business in the State of California at all
11 relevant times herein.
- 12 4. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,
13 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
14 complaint to allege their true names and capacities when ascertained. Plaintiff is
15 informed, believes, and thereon alleges that each fictitiously named defendant is
16 responsible in some manner for the occurrences herein alleged and the damages caused
17 thereby.
- 18 5. At all times mentioned herein, the term "Defendants" includes ORLY, NATIONAL
19 STORES and Does 1-20.
- 20 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
21 times mentioned herein have conducted business within the State of California.
- 22 7. At all times relevant to this action, each of the Defendants, including Does 1-20, was an
23 agent, servant, or employee of each of the other Defendants. In conducting the activities
24 alleged in this Complaint, each of the Defendants was acting within the course and scope
25 of this agency, service, or employment, and was acting with the consent, permission, and
26 authorization of each of the other Defendants. All actions of each of the Defendants
27 alleged in this Complaint were ratified and approved by every other Defendant or their
28

1 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
2 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

7 JURISDICTION

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

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

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

25 BACKGROUND AND PRELIMINARY FACTS

26 12. In 1986, California voters approved an initiative to address growing concerns about
27 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
28 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,

1 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
2 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
3 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
4 from contamination, to allow consumers to make informed choices about the products
5 they buy, and to enable persons to protect themselves from toxic chemicals as they see
6 fit.

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

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

18 15. Proposition 65 provides that any person "violating or threatening to violate" the statute
19 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
20 "Threaten to violate" means "to create a condition in which there is a substantial
21 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

22 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
23 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

24 16. Plaintiff identified certain practices of manufacturers and distributors of DEHP and DBP-
25 bearing products of exposing, knowingly and intentionally, persons in California to the
26 Proposition 65-listed chemicals of such products without first providing clear and
27 reasonable warnings of such to the exposed persons prior to the time of exposure.

28 Plaintiff later discerned that Defendants engaged in such practice.

1 17. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
2 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
3 to the list of chemicals known to the State to cause developmental male reproductive
4 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
5 months after addition of DEHP to the list of chemicals known to the State to cause
6 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
7 requirements and discharge prohibitions.

8 18. On December 2, 2005, the Governor of California added DBP to the list of chemicals
9 known to the State to cause developmental, female, and male reproductive toxicity.
10 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
11 after addition of DBP to the list of chemicals known to the State to cause reproductive
12 toxicity, DBP became fully subject to Proposition 65 warning requirements and discharge
13 prohibitions.

14
15 **SATISFACTION OF PRIOR NOTICE**

16 19. On or about July 19, 2011, Plaintiff gave notice of alleged violations of Health and Safety
17 Code section 25249.6, concerning consumer products exposures and occupational
18 exposures, subject to a private action to Orly Shoe Corporation, National Stores, Inc., and
19 to the California Attorney General, County District Attorneys, and City Attorneys for
20 each city containing a population of at least 750,000 people in whose jurisdictions the
21 violations allegedly occurred, concerning the product Sandals.

22 20. Before sending the notices of alleged violation, Plaintiff investigated the consumer
23 products involved, the likelihood that such products would cause users to suffer
24 significant exposures to DEHP and DBP, and the corporate structure of each of the
25 Defendants.

26 21. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
27 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
28 Plaintiff who executed the certificate had consulted with at least one person with relevant

1 and appropriate expertise who reviewed data regarding the exposures to DEHP and DBP,
2 respectively, which are the subject Proposition 65-listed chemicals of this action. Based
3 on that information, the attorney for Plaintiff who executed the Certificate of Merit
4 believed there was a reasonable and meritorious case for this private action. The attorney
5 for Plaintiff attached to the Certificate of Merit served on the Attorney General the
6 confidential factual information sufficient to establish the basis of the Certificate of
7 Merit.

8 22. Plaintiff's notices of alleged violations also included a Certificate of Service and a
9 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
10 (Proposition 65) A Summary." *Health & Safety Code § 25249.7(d)*.

11 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
12 gave notices of the alleged violations to ORLY and NATIONAL STORES, and the
13 public prosecutors referenced in Paragraph 19.

14 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
15 any applicable district attorney or city attorney has commenced and is diligently
16 prosecuting an action against the Defendants.

17 FIRST CAUSE OF ACTION

18 (By Consumer Advocacy Group, Inc. and against ORLY, NATIONAL STORES, and Does
19 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act
20 of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))

21 **Sandals**

22 25. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
23 paragraphs 1 through 24 of this complaint as though fully set forth herein.

24 26. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
25 distributor, promoter, or retailer of Sandals, including but not limited to Charles Albert
26 Sport Sandals, Style N304, Size 10 (hereinafter "Sandals"), a consumer product designed
27 for use for footwear.

28 27. Plaintiff is informed, believes, and thereon alleges that Sandals contain DEHP and DBP.

1 28. Defendants knew or should have known that DEHP and DBP has been identified by the
2 State of California as chemicals known to cause cancer and reproductive toxicity and
3 therefore was subject to Proposition 65 warning requirements. Defendants were also
4 informed of the presence of DEHP and DBP in Sandals within Plaintiff's notice of
5 alleged violations further discussed above at Paragraph 19.

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

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

19 31. Plaintiff's allegations regarding Sandals also concern Environmental Exposures. An
20 "[e]nvironmental exposure' is an exposure which may foreseeably occur as the result of
21 contact with an environmental medium, including, but not limited to, ambient air, indoor
22 air, drinking water, standing water, running water, soil, vegetation, or manmade or
23 natural substances, either through inhalation, ingestion, skin contact or otherwise.
24 Environmental exposures include all exposures which are not consumer products
25 exposures, or occupational exposure." *Cal. Code Regs. tit. 27, § 25602(c)*. Defendants
26 failed to provide clear and reasonable Proposition 65-compliant warnings to exposed
27 persons prior to the knowing and intentional exposures to DEHP and DBP as described
28 herein, and thereby violated Proposition 65.

1 32. Plaintiff is informed, believes, and thereon alleges that between July 19, 2008 and the
2 present, each of the Defendants knowingly and intentionally exposed their employees and
3 California consumers and users of Sandals, which Defendants manufactured, distributed,
4 or sold as mentioned above, to DEHP and DBP, without first providing any type of clear
5 and reasonable warning of such to the exposed persons before the time of exposure.
6 Defendants have distributed and sold Sandals in California. Defendants know and intend
7 that California consumers will use and consume Sandals, thereby exposing them to
8 DEHP and DBP. Defendants thereby violated Proposition 65.

9 33. The principal routes of exposure are through dermal contact, ingestion and inhalation.
10 Persons sustain exposures by handling Sandals without wearing gloves or any other
11 personal protective equipment, or by touching bare skin or mucous membranes with
12 gloves after handling Sandals, as well as through direct and indirect hand to mouth
13 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
14 Sandals. And as to Defendants' employees, employees may be exposed to DEHP and
15 DBP in the course of their employment by handling, distributing, and selling Sandals.

16 34. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
17 Proposition 65 as to Sandals have been ongoing and continuous to the date of the signing
18 of this complaint, as Defendants engaged and continue to engage in conduct which
19 violates Health and Safety Code section 25249.6, including the manufacture, distribution,
20 promotion, and sale of Sandals, so that a separate and distinct violation of Proposition 65
21 occurred each and every time a person was exposed to DEHP and DBP by Sandals as
22 mentioned herein.

23 35. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
24 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
25 violations alleged herein will continue to occur into the future.

26 36. Based on the allegations herein, Defendants are liable for civil penalties of up to
27 \$2,500.00 per day per individual exposure to DEHP and DBP from Sandals, pursuant to
28 Health and Safety Code section 25249.7(b).

1 37. In the absence of equitable relief, the general public and Defendants' employees will
2 continue to be involuntarily exposed to DEHP and DBP that is contained in Sandals,
3 creating a substantial risk of irreparable harm. Thus, by committing the acts alleged
4 herein, Defendants have caused irreparable harm for which there is no plain, speedy, or
5 adequate remedy at law.

6 38. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
7 filing this Complaint.

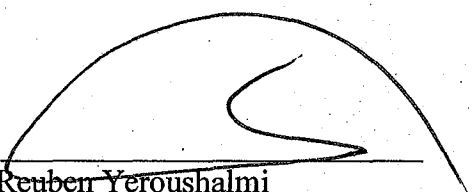
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9 **PRAYER FOR RELIEF**

10 Plaintiff demands against each of the Defendants as follows:

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

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17 Dated: April 30, 2012

YEROUSHALMI & ASSOCIATES

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20 BY: 
21 Reuben Yeroushalmi
22 Attorneys for Plaintiff,
23 Consumer Advocacy Group, Inc.
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