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Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiff,

v.

BOSS MANUFACTURING COMPANY, a
Delaware Corporation, ORCHARD SUPPLY
HARDWARE STORES CORPORATION, a
Delaware Corporation, and DOES 1-20;

Defendants.

CASE NO. **RG12625429**

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)
FILE BY FAX

ENDORSED
FILED
ALAMEDA COUNTY

APR 12 2012

CLERK OF THE SUPERIOR COURT
By PTUNGOLAN Deputy

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

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

25
26 **BACKGROUND AND PRELIMINARY FACTS**

- 27 12. In 1986, California voters approved an initiative to address growing concerns about
28 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to

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

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

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

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

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

25 16. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
26 Phthalate ("DEHP") and Dibutyl phthalate ("DBP")-bearing products, of exposing,
27 knowingly and intentionally, persons in California to the Proposition 65-listed chemicals
28 of such products without first providing clear and reasonable warnings of such to the

1 exposed persons prior to the time of exposure. Plaintiff later discerned that Defendants
2 engaged in such practice.

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

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

16 **SATISFACTION OF PRIOR NOTICE**

17 19. On or about October 6, 2011, Plaintiff gave notice of alleged violations of Health and
18 Safety Code section 25249.6, concerning consumer products exposures, subject to a
19 private action to Defendants and to the California Attorney General, County District
20 Attorneys, and City Attorneys for each city containing a population of at least 750,000
21 people in whose jurisdictions the violations allegedly occurred, concerning the product
22 Boots.

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

27 21. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
28 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for

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

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

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

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

18 **FIRST CAUSE OF ACTION**

19 **(By Consumer Advocacy Group, Inc. and against BOSS MANUFACTURING COMPANY,**
20 **ORCHARD SUPPLY HARDWARE STORES CORPORATION, and Does 1-20 for**
21 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
22 **(*Health & Safety Code*, §§ 25249.5, *et seq.*))**

23 **Boots**

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

26 26. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
27 distributor, promoter, or retailer of Boots, an exemplar of which includes but is not
28

1 limited to "Men's Over the Sock Black PVC Knee Boot", a consumer product designed
2 for use as footwear.

3 27. Plaintiff is informed, believes, and thereon alleges that Boots contain DEHP and DBP.

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

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

15 30. Plaintiff is informed, believes, and thereon alleges that between October 6, 2008 and the
16 present, each of the Defendants knowingly and intentionally exposed California
17 consumers and users of Boots, which Defendants manufactured, distributed, or sold as
18 mentioned above, to DEHP and DBP, without first providing any type of clear and
19 reasonable warning of such to the exposed persons before the time of exposure.

20 Defendants have distributed and sold the Boots in California. Defendants know and
21 intend that California consumers will use and consume the Boots thereby exposing them
22 to DEHP and DBP. Defendants thereby violated Proposition 65.

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

28

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

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

11 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
12 \$2,500.00 per day per individual exposure to DEHP and DBP from the Boots, pursuant to
13 Health and Safety Code section 25249.7(b).

14 35. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
15 filing this Complaint.

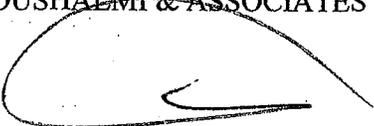
16 **PRAYER FOR RELIEF**

17 Plaintiff demands against each of the Defendants as follows:

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

23
24 Dated: Apr 11/12, 2012

YEROUSHALMI & ASSOCIATES

25
26 BY: 
27 Reuben Yeroushalmi
28 Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.