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Los Angeles Superior Court

OCT 10 2012

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By SHAUNYA WESLEY Deput

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

BC 493596

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

13 Plaintiff,

14 v.

15 SEARS HOLDINGS CORPORATION, a
16 Delaware Corporation, SEARS BRANDS
17 MANAGEMENT CORPORATION, a
18 Delaware Corporation, SEARS BRANDS,
19 LLC, an Illinois Corporation, KMART
CORPORATION, a Michigan Corporation
and DOES 1-20;

20 Defendants.

CASE NO.

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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23 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
24 defendants SEARS HOLDINGS CORPORATION, SEARS BRANDS MANAGEMENT
25 CORPORATION, SEARS BRANDS, LLC, KMART CORPORATION, and DOES 1-20 as
26 follows:

27 ///

COPY

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 SEARS HOLDINGS CORPORATION (“SEARS HOLDINGS”) is a
8 Delaware corporation, qualified to do business and doing business in the State of
9 California at all relevant times herein.
- 10 3. Defendant SEARS BRANDS MANAGEMENT CORPORATION (“SEARS
11 MANAGEMENT”) is a Delaware corporation, qualified to do business and doing
12 business in the State of California at all relevant times herein.
- 13 4. Defendant SEARS BRANDS LLC (“SEARS BRANDS”) is an Illinois corporation,
14 qualified to do business and doing business in the State of California at all relevant times
15 herein.
- 16 5. Defendant KMART CORPORATION (“KMART”) is a Michigan corporation, qualified
17 to do business and doing business in the State of California at all relevant times herein.
- 18 6. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
19 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
20 complaint to allege their true names and capacities when ascertained. Plaintiff is
21 informed, believes, and thereon alleges that each fictitiously named defendant is
22 responsible in some manner for the occurrences herein alleged and the damages caused
23 thereby.
- 24 7. At all times mentioned herein, the term “Defendants” includes SEARS HOLDINGS,
25 SEARS MANAGEMENT, SEARS BRANDS, KMART, and DOES 1-20.
- 26 8. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
27 times mentioned herein have conducted business within the State of California.
28

- 1 9. At all times relevant to this action, each of the Defendants, including DOES 1-20, was an
2 agent, servant, or employee of each of the other Defendants. In conducting the activities
3 alleged in this Complaint, each of the Defendants was acting within the course and scope
4 of this agency, service, or employment, and was acting with the consent, permission, and
5 authorization of each of the other Defendants. All actions of each of the Defendants
6 alleged in this Complaint were ratified and approved by every other Defendant or their
7 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
8 and/or facilitated the alleged wrongful conduct of each of the other Defendants.
- 9 10. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
10 Defendants was a person doing business within the meaning of Health and Safety Code
11 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
12 employees at all relevant times.

13 JURISDICTION

- 14 11. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
15 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
16 those given by statute to other trial courts. This Court has jurisdiction over this action
17 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
18 violations of Proposition 65 in any Court of competent jurisdiction.
- 19 12. This Court has jurisdiction over Defendants named herein because Defendants either
20 reside or are located in this State or are foreign corporations authorized to do business in
21 California, are registered with the California Secretary of State, or who do sufficient
22 business in California, have sufficient minimum contacts with California, or otherwise
23 intentionally avail themselves of the markets within California through their manufacture,
24 distribution, promotion, marketing, or sale of their products within California to render
25 the exercise of jurisdiction by the California courts permissible under traditional notions
26 of fair play and substantial justice.

1 13. Venue is proper in the County of Los Angeles because one or more of the instances of
2 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
3 because Defendants conducted, and continue to conduct, business in the County of Los
4 Angeles with respect to the consumer product that is the subject of this action.

5 **BACKGROUND AND PRELIMINARY FACTS**

6 14. In 1986, California voters approved an initiative to address growing concerns about
7 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
8 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
9 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
10 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
11 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
12 from contamination, to allow consumers to make informed choices about the products
13 they buy, and to enable persons to protect themselves from toxic chemicals as they see
14 fit.

15 15. Proposition 65 requires the Governor of California to publish a list of chemicals known to
16 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
17 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
18 chemicals and chemical families. Proposition 65 imposes warning requirements and
19 other controls that apply to Proposition 65-listed chemicals.

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

26 17. Proposition 65 provides that any person "violating or threatening to violate" the statute
27 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.

1 "Threaten to violate" means "to create a condition in which there is a substantial
2 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

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

5 18. Plaintiff identified certain practices of manufacturers and distributors of DEHP-bearing
6 products of exposing, knowingly and intentionally, persons in California to the
7 Proposition 65-listed chemicals of such products without first providing clear and
8 reasonable warnings of such to the exposed persons prior to the time of exposure.
9 Plaintiff later discerned that Defendants engaged in such practice.

10 19. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
11 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
12 to the list of chemicals known to the State to cause developmental male reproductive
13 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
14 months after addition of DEHP to the list of chemicals known to the State to cause
15 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
16 requirements and discharge prohibitions.

17 **SATISFACTION OF PRIOR NOTICE**

18 20. On or about March 20, 2012, Plaintiff gave notice of alleged violations of Health and
19 Safety Code section 25249.6, concerning consumer products exposures and occupational
20 exposures, subject to a private action to SEARS HOLDINGS, SEARS MANAGEMENT,
21 SEARS BRANDS, KMART, and to the California Attorney General, County District
22 Attorneys, and City Attorneys for each city containing a population of at least 750,000
23 people in whose jurisdictions the violations allegedly occurred, concerning the product
24 Tongs.

25 21. Before sending the notices of alleged violation, Plaintiff investigated the consumer
26 products involved, the likelihood that such products would cause users to suffer
27 significant exposures to DEHP, and the corporate structure of each of the Defendants.
28

1 22. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
2 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
3 Plaintiff who executed the certificate had consulted with at least one person with relevant
4 and appropriate expertise who reviewed data regarding the exposures to DEHP, the
5 subject Proposition 65-listed chemical of this action. Based on that information, the
6 attorney for Plaintiff who executed the Certificate of Merit believed there was a
7 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
8 to the Certificate of Merit served on the Attorney General the confidential factual
9 information sufficient to establish the basis of the Certificate of Merit.

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

13 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
14 gave notices of the alleged violations to SEARS HOLDINGS, SEARS MANAGEMENT,
15 SEARS BRANDS, KMART, and the public prosecutors referenced in Paragraph 20.

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

19
20 **FIRST CAUSE OF ACTION**

21 **(By CONSUMER ADVOCACY GROUP, INC. and against SEARS HOLDINGS**
22 **CORPORATION, SEARS BRAND MANAGEMENT CORPORATION, SEARS**
23 **BRANDS, LLC, KMART CORPORATION and DOES 1-20 for Violations of**
24 **Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
25 **(Health & Safety Code, §§ 25249.5, et seq.)**

26
27 **Tongs**

28 26. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
reference paragraphs 1 through 25 of this complaint as though fully set forth herein.

1 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
2 distributor, promoter, or retailer of Tongs (“Tongs”), including but not limited to
3 Essential Home™ Tongs 2 Pack Dept: 11, Cat: 21, KSN: 0-01005102-7, a consumer
4 product specifically designed for the handling of food.

5 28. Plaintiff is informed, believes, and thereon alleges that Tongs contains DEHP.

6 29. Defendants knew or should have known that DEHP has been identified by the State of
7 California as a chemical known to cause cancer and reproductive toxicity and therefore
8 was subject to Proposition 65 warning requirements. Defendants were also informed of
9 the presence of DEHP in Tongs within Plaintiff’s notice of alleged violations further
10 discussed above at Paragraph 20.

11 30. Plaintiff’s allegations regarding Tongs concerns “[c]onsumer products exposure[s],”
12 which “is an exposure that results from a person’s acquisition, purchase, storage,
13 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
14 that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, § 25602(b)*.
15 Tongs are consumer products, and, as mentioned herein, exposures to DEHP took place
16 as a result of such normal and foreseeable consumption and use.

17 31. Plaintiff is informed, believes, and thereon alleges that between March 20, 2009 and the
18 present, each of the Defendants knowingly and intentionally exposed their employees and
19 California consumers and users of Tongs, which Defendants manufactured, distributed,
20 or sold as mentioned above, to DEHP, without first providing any type of clear and
21 reasonable warning of such to the exposed persons before the time of exposure.
22 Defendants have distributed and sold Tongs in California. Defendants know and intend
23 that California consumers will use and consume Tongs, thereby exposing them to DEHP.
24 Defendants thereby violated Proposition 65.

25 32. The principal routes of exposure are through dermal contact, ingestion and inhalation.
26 Persons sustain exposures by handling Tongs without wearing gloves or any other
27 personal protective equipment, or by touching bare skin or mucous membranes with
28

1 gloves after handling Tongs, as well as through direct and indirect hand to mouth contact,
2 hand to mucous membrane, or breathing in particulate matter dispersed from Tongs. And
3 as to Defendants' employees, employees may be exposed to DEHP in the course of their
4 employment by handling, distributing, and selling Tongs.

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

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

15 35. Based on the allegations herein, Defendants are liable for civil penalties of up to
16 \$2,500.00 per day per individual exposure to DEHP from Tongs, pursuant to Health and
17 Safety Code section 25249.7(b).

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

20 **PRAYER FOR RELIEF**

21 Plaintiff demands against each of the Defendants as follows:

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

1 Dated: 10/9/_____, 2012

YEROUSHALMI & ASSOCIATES

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3
4 BY: _____

5 Reuben Yeroushalmi
6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.
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