

ENDORSED
FILED
San Francisco County Superior Court

OCT 11 2012

CLERK OF THE COURT
BY: DEBORAH STEPPE
Deputy Clerk

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

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

13 Plaintiff,

14 v.

15
16 ANNA'S LINENS, INC., a Delaware
Corporation, CREATIVE BATH
17 PRODUCTS, INC., a New York
Corporation, and DOES 1-20;

18 Defendants.
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CGC-12-525079
CASE NO.

BY FAX

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
22 defendants ANNA'S LINENS, INC., CREATIVE BATH PRODUCTS, INC., and DOES 1-20 as
23 follows:

24 THE PARTIES

- 25 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
26 organization qualified to do business in the State of California. CAG is a person within
27 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
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1 as a private attorney general, brings this action in the public interest as defined under
2 Health and Safety Code section 25249.7, subdivision (d).

3 2. Defendant ANNA'S LINENS, INC. ("ANNA'S LINENS") is a Delaware corporation,
4 qualified to do business and doing business in the State of California at all relevant times
5 herein.

6 3. Defendant CREATIVE BATH PRODUCTS, INC. ("CREATIVE BATH") is a New
7 York corporation, qualified to do business and doing business in the State of California at
8 all relevant times herein.

9 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
10 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
11 complaint to allege their true names and capacities when ascertained. Plaintiff is
12 informed, believes, and thereon alleges that each fictitiously named defendant is
13 responsible in some manner for the occurrences herein alleged and the damages caused
14 thereby.

15 5. At all times mentioned herein, the term "Defendants" includes ANNA'S LINENS,
16 CREATIVE BATH, and DOES 1-20.

17 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
18 times mentioned herein have conducted business within the State of California.

19 7. At all times relevant to this action, each of the Defendants, including DOES 1-20, was an
20 agent, servant, or employee of each of the other Defendants. In conducting the activities
21 alleged in this Complaint, each of the Defendants was acting within the course and scope
22 of this agency, service, or employment, and was acting with the consent, permission, and
23 authorization of each of the other Defendants. All actions of each of the Defendants
24 alleged in this Complaint were ratified and approved by every other Defendant or their
25 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
26 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

1 8. 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 9. 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 10. 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 11. Venue is proper in the County of San Francisco because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of San Francisco
21 and/or because Defendants conducted, and continue to conduct, business in the County of
22 San Francisco with respect to the consumer product that is the subject of this action.

23 **BACKGROUND AND PRELIMINARY FACTS**

24 12. 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
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1 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
2 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
3 from contamination, to allow consumers to make informed choices about the products
4 they buy, and to enable persons to protect themselves from toxic chemicals as they see
5 fit.

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

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

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

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

9 18. On or about August 1, 2011, Plaintiff gave notice of alleged violations of Health and
10 Safety Code section 25249.6, concerning consumer products exposures and occupational
11 exposures, subject to a private action to ANNA'S LINENS, CREATIVE BATH, and to
12 the California Attorney General, County District Attorneys, and City Attorneys for each
13 city containing a population of at least 750,000 people in whose jurisdictions the
14 violations allegedly occurred, concerning the product Tub Mats.

15 19. On or about April 10, 2012, Plaintiff gave notice of alleged violations of Health and
16 Safety Code section 25249.6, concerning consumer products exposures and occupational
17 exposures, subject to a private action to ANNA'S LINENS, CREATIVE BATH, and to
18 the California Attorney General, County District Attorneys, and City Attorneys for each
19 city containing a population of at least 750,000 people in whose jurisdictions the
20 violations allegedly occurred, concerning the product Shower Curtains.

21 20. On or about April 23, 2012, Plaintiff gave notice of alleged violations of Health and
22 Safety Code section 25249.6, concerning consumer products exposures and occupational
23 exposures, subject to a private action to ANNA'S LINENS, CREATIVE BATH, and to
24 the California Attorney General, County District Attorneys, and City Attorneys for each
25 city containing a population of at least 750,000 people in whose jurisdictions the
26 violations allegedly occurred, concerning the product Vinyl Bath Tub Appliques.

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

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

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

16 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
17 gave notices of the alleged violations to ANNA'S LINENS, CREATIVE BATH, and the
18 public prosecutors referenced in Paragraphs 18, 19, and 20.

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

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1 **FIRST CAUSE OF ACTION**

2 (By CONSUMER ADVOCACY GROUP, INC. and against ANNA'S LINENS,
3 CREATIVE BATH, and DOES 1-20 for Violations of Proposition 65, The Safe
4 Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§
5 25249.5, *et seq.*))

6 **Tub Mats**

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

9 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
10 distributor, promoter, or retailer of Tub Mats ("Tub Mats"), including but not limited to
11 Tub Mat with Anti-Bacterial Agent, 595 Clear, Size: 27.5" x 17.75," a consumer product
12 designed for use in the bath tub during bathing.

13 28. Plaintiff is informed, believes, and thereon alleges that Tub Mats contains DEHP.

14 29. Defendants knew or should have known that DEHP has been identified by the State of
15 California as a chemical known to cause cancer and reproductive toxicity and therefore
16 was subject to Proposition 65 warning requirements. Defendants were also informed of
17 the presence of DEHP in Tub Mats within Plaintiff's notice of alleged violations further
18 discussed above at Paragraph 18.

19 30. Plaintiff's allegations regarding Tub Mats concerns "[c]onsumer products exposure[s],"
20 which "is an exposure that results from a person's acquisition, purchase, storage,
21 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
22 that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, § 25602(b). Tub
23 Mats are consumer products, and, as mentioned herein, exposures to DEHP took place as
24 a result of such normal and foreseeable consumption and use.

25 31. Plaintiff is informed, believes, and thereon alleges that between August 1, 2008 and the
26 present, each of the Defendants knowingly and intentionally exposed their employees and
27 California consumers and users of Tub Mats, which Defendants manufactured,
28 distributed, or sold as mentioned above, to DEHP, without first providing any type of
clear and reasonable warning of such to the exposed persons before the time of exposure.

1 Defendants have distributed and sold Tub Mats in California. Defendants know and
2 intend that California consumers will use and consume Tub Mats, thereby exposing them
3 to DEHP. Defendants thereby violated Proposition 65.

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

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

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

21 35. Based on the allegations herein, Defendants are liable for civil penalties of up to
22 \$2,500.00 per day per individual exposure to DEHP from Tub Mats, pursuant to Health
23 and Safety Code section 25249.7(b).

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1 clear and reasonable warning of such to the exposed persons before the time of exposure.
2 Defendants have distributed and sold Shower Curtains in California. Defendants know
3 and intend that California consumers will use and consume Shower Curtains, thereby
4 exposing them to DEHP. Defendants thereby violated Proposition 65.

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

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

20 44. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
21 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
22 violations alleged herein will continue to occur into the future.

23 45. Based on the allegations herein, Defendants are liable for civil penalties of up to
24 \$2,500.00 per day per individual exposure to DEHP from Shower Curtains, pursuant to
25 Health and Safety Code section 25249.7(b).

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1 **THIRD CAUSE OF ACTION**

2 (By CONSUMER ADVOCACY GROUP, INC. and against ANNA'S LINENS,
3 CREATIVE BATH, and DOES 1-20 for Violations of Proposition 65, The Safe
4 Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§
5 25249.5, *et seq.*))

6 **Vinyl Bath Tub Appliques**

7 46. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
8 reference paragraphs 1 through 45 of this complaint as though fully set forth herein.

9 47. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
10 distributor, promoter, or retailer of Vinyl Bath Tub Appliques ("Tub Appliques"),
11 including but not limited to Creative Bath Products, Inc. 100% Vinyl Bath Tub Applique,
12 Set of 6 Pcs., Size: 5 1/8" Dia., 490 Clear, a consumer product designed for use in the
13 bath tub during bathing.

14 48. Plaintiff is informed, believes, and thereon alleges that Tub Appliques contains DEHP.

15 49. Defendants knew or should have known that DEHP has been identified by the State of
16 California as a chemical known to cause cancer and reproductive toxicity and therefore
17 was subject to Proposition 65 warning requirements. Defendants were also informed of
18 the presence of DEHP in Tub Appliques within Plaintiff's notice of alleged violations
19 further discussed above at Paragraph 20.

20 50. Plaintiff's allegations regarding Tub Appliques concerns "[c]onsumer products
21 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
22 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
23 exposure that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, §
24 25602(b). Tub Appliques are consumer products, and, as mentioned herein, exposures to
25 DEHP took place as a result of such normal and foreseeable consumption and use.

26 51. Plaintiff is informed, believes, and thereon alleges that between April 23, 2009 and the
27 present, each of the Defendants knowingly and intentionally exposed their employees and
28 California consumers and users of Tub Appliques, which Defendants manufactured,
distributed, or sold as mentioned above, to DEHP, without first providing any type of

1 clear and reasonable warning of such to the exposed persons before the time of exposure.
2 Defendants have distributed and sold Tub Appliques in California. Defendants know and
3 intend that California consumers will use and consume Tub Appliques, thereby exposing
4 them to DEHP. Defendants thereby violated Proposition 65.

5 52. The principal routes of exposure are through dermal contact, ingestion and inhalation.

6 Persons sustain exposures by handling Tub Appliques without wearing gloves or any
7 other personal protective equipment, or by touching bare skin or mucous membranes with
8 gloves after handling Tub Appliques, as well as through direct and indirect hand to mouth
9 contact, hand to mucous membrane, or breathing in particulate matter dispersed from Tub
10 Appliques. And as to Defendants' employees, employees may be exposed to DEHP in the
11 course of their employment by handling, distributing, and selling Tub Appliques.

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

19 54. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
20 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
21 violations alleged herein will continue to occur into the future.

22 55. Based on the allegations herein, Defendants are liable for civil penalties of up to
23 \$2,500.00 per day per individual exposure to DEHP from Tub Appliques, pursuant to
24 Health and Safety Code section 25249.7(b).

25 56. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
26 filing this Complaint.
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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.

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9 Dated: _____, 2012

YEROUSHALMI & ASSOCIATES

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11 BY: _____

12 Reuben Yeroushalmi

13 Attorneys for Plaintiff,

14 Consumer Advocacy Group, Inc.

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