

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.

CONFIRMED COPY
ORIGINAL FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DEC 07 2012

John A. Clarke, Executive Officer/Clerk
BY *Cristina Grimalte* Deputy
Cristina Grimalte

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **LOS ANGELES – CENTRAL DISTRICT**

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

15 Plaintiff,

16 v.

17 BETTER SLEEP, INC., a New Jersey
18 Corporation, BURLINGTON COAT
19 FACTORY WAREHOUSE
20 CORPORATION, a Delaware Corporation,
21 and DOES 1-20;

22 Defendants.

23 CASE NO. **BC497063**

24 COMPLAINT FOR PENALTY,
25 INJUNCTION, AND RESTITUTION

26 Violation of Proposition 65, the Safe
27 Drinking Water and Toxic Enforcement
28 Act of 1986 (*Health & Safety Code*, §
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
30 defendants BETTER SLEEP, INC., BURLINGTON COAT FACTORY WAREHOUSE
31 CORPORATION, and DOES 1-20 as follows:

32 ///

33 ///

34 ///

35 ///

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 BETTER SLEEP, INC. ("BETTER SLEEP") is a New Jersey Corporation,
8 qualified to do business in the State of California at all relevant times herein.
- 9 3. Defendant BURLINGTON COAT FACTORY WAREHOUSE CORPORATION
10 ("BURLINGTON") is a Delaware Corporation, doing business in the State of California
11 at all 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 BETTER SLEEP,
19 BURLINGTON, 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. Upon information and belief, at all times relevant to this action, each of the Defendants,
23 including DOES 1-20, was an agent, servant, or employee of each of the other
24 Defendants. In conducting the activities alleged in this Complaint, each of the
25 Defendants was acting within the course and scope of this agency, service, or
26 employment, and was acting with the consent, permission, and authorization of each of
27 the other Defendants. All actions of each of the Defendants alleged in this Complaint
28

1 were ratified and approved by every other Defendant or their officers or managing agents.
2 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
3 wrongful conduct of each of the other Defendants.

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

8 **JURISDICTION**

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

26 ///

27 ///

1 BACKGROUND AND PRELIMINARY FACTS

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

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

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

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

1 16. 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 17. Plaintiff identified certain practices of manufacturers and distributors of DEHP-bearing
9 products of exposing, knowingly and intentionally, persons in California to the
10 Proposition 65-listed chemicals of such products without first providing clear and
11 reasonable warnings of such to the exposed persons prior to the time of exposure.
12 Plaintiff later discerned that Defendants engaged in such practice.

13 **SATISFACTION OF PRIOR NOTICE**

14 18. On or about July 12, 2012, Plaintiff gave notice of alleged violations of Health and Safety
15 Code section 25249.6, concerning consumer products exposures and occupational
16 exposures, subject to a private action to BETTER SLEEP, BURLINGTON and to the
17 California Attorney General, County District Attorneys, and City Attorneys for each city
18 containing a population of at least 750,000 people in whose jurisdictions the violations
19 allegedly occurred, concerning the product Vinyl Bath Mats.

20 19. Before sending the notice of alleged violation, Plaintiff investigated the consumer
21 products involved, the likelihood that such products would cause users to suffer
22 significant exposures to DEHP, and the corporate structure of each of the Defendants.

23 20. Plaintiff's notices of alleged violation included Certificates of Merit executed by the
24 attorney for the noticing party, CAG. The Certificates of Merit stated that the attorney
25 for Plaintiff who executed the certificates had consulted with at least one person with
26 relevant and appropriate expertise who reviewed data regarding the exposures to DEHP,
27 the subject Proposition 65-listed chemicals of this action. Based on that information, the
28

1 attorney for Plaintiff who executed the Certificates of Merit believed there was a
2 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
3 to the Certificates of Merit served on the Attorney General the confidential factual
4 information sufficient to establish the basis of the Certificates of Merit.

5 21. Plaintiff's notices of alleged violations also included Certificates of Service and a
6 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
7 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

8 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
9 gave notices of the alleged violations to BETTER SLEEP, BURLINGTON, and the
10 public prosecutors referenced in Paragraph 18.

11 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
12 any applicable district attorney or city attorney has commenced and is diligently
13 prosecuting an action against the Defendants.

14
15 **FIRST CAUSE OF ACTION**

16 **(By CONSUMER ADVOCACY GROUP, INC. and against BETTER SLEEP,**
17 **BURLINGTON and DOES 1-20 for Violations of Proposition 65, The Safe Drinking**
18 **Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, et**
19 **seq.))**

20 **Vinyl Bath Mats**

21 24. Plaintiff CONSUMER ADVOCACY GROUP repeats and incorporates by reference
22 paragraphs 1 through 23 of this complaint as though fully set forth herein.

23 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
24 distributor, promoter, or retailer of Vinyl Bath Mats ("Bath Mats"), including but not
25 limited to Better Bath Non-Slip Bathmat, #48CLR, 27.75" x 17.5", Vinyl.

26 26. Bath Mats contain DEHP.

27 27. Defendants knew or should have known that DEHP has been identified by the State of
28 California as a chemical known to cause cancer and reproductive toxicity and therefore
was subject to Proposition 65 warning requirements. Defendants were also informed of

1 the presence of DEHP in Bath Mats within Plaintiff's notice of alleged violations further
2 discussed above at Paragraph 18.

3 28. Plaintiff's allegations regarding Bath Mats concern "[c]onsumer products exposure[s],"
4 which "is an exposure that results from a person's acquisition, purchase, storage,
5 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
6 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.

7 Bath Mats are consumer products, and, as mentioned herein, exposures to DEHP took
8 place as a result of such normal and foreseeable consumption and use.

9 29. Plaintiff's allegations regarding Bath Mats also concern Occupational Exposures, which
10 "means an exposure to any employee in his or her employer's workplace." *Cal. Code*
11 *Regs. tit. 27, § 25602(f)*. Exposures of DEHP to Defendants' employees occurred through
12 the course of their employment in their employers' workplaces.

13 30. Plaintiff is informed, believes, and thereon alleges that between July 12, 2009 and the
14 present, each of the Defendants knowingly and intentionally exposed their employees and
15 California consumers and users of Bath Mats, which Defendants manufactured,
16 distributed, or sold as mentioned above, to DEHP, without first providing any type of
17 clear and reasonable warning of such to the exposed persons before the time of exposure.
18 Defendants have distributed and sold Bath Mats in California. Defendants know and
19 intend that California consumers will use and consume Bath Mats, thereby exposing them
20 to DEHP. Defendants thereby violated Proposition 65.

21 31. The principal routes of exposure are through dermal contact, ingestion and inhalation.
22 Persons sustain exposures by handling Bath Mats without wearing gloves or any other
23 personal protective equipment, or by touching bare skin or mucous membranes with
24 gloves after handling Bath Mats, as well as through direct and indirect hand to mouth
25 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
26 Bath Mats. And as to the employees of Defendants, employees may be exposed to DEHP
27 in the course of their employment by handling, distributing, and selling Bath Mats.

1 32. Plaintiff is informed, believes, and thereon alleges that each of the violations by
2 Defendants of Proposition 65 as to Bath Mats has been ongoing and continuous to the
3 date of the signing of this complaint, as Defendants engaged and continue to engage in
4 conduct which violates Health and Safety Code section 25249.6, including the
5 manufacture, distribution, promotion, and sale of Bath Mats, so that a separate and
6 distinct violation of Proposition 65 occurred each and every time a person was exposed to
7 DEHP by Bath Mats as 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 from Bath Mats, pursuant to Health
13 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. Defendant BETTER SLEEP rejected Plaintiff's offer to enter into
16 settlement negotiations by refusing to sign tolling and confidentiality agreements sent to
17 BETTER SLEEP. Furthermore, Plaintiff received a letter from BETTER SLEEP dated
18 August 15, 2012 that contained numerous issues that were not relevant to Proposition 65
19 meant to only cause unnecessary delays. Therefore, through Defendant BETTER
20 SLEEP's own actions, Plaintiff was forced to bring this lawsuit in order to protect the
21 public.

22 **PRAYER FOR RELIEF**

23 Plaintiff demands against each of the Defendants as follows:

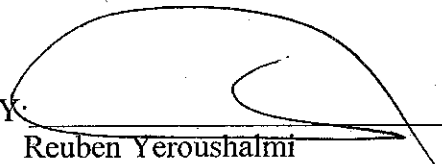
- 24 1. A permanent injunction mandating Proposition 65-compliant warnings;
25 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
26 3. Costs of suit;
27 4. Reasonable attorney fees and costs; and
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. Any further relief that the court may deem just and equitable.

Dated: December 6/, 2012

YEROUSHALMI & ASSOCIATES

BY: 
Reuben Yeroushalmi
Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.