

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.

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

AUG 06 2013

John A. Clarke, Executive Officer/Clerk
By Amber Hayes, Deputy

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

12 **COUNTY OF LOS ANGELES**

13 BC517434

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

16 Plaintiff,

17 v.

18 PILOT AUTOMOTIVE INC., a California
19 Corporation; SEARS HOLDING
20 CORPORATION, a Delaware Corporation;
21 KMART CORPORATION, a Michigan
22 Corporation; and DOES 1-20;

23 Defendants.

CASE NO.

COMPLAINT FOR PENALTY AND
INJUNCTION

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)

24 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
25 defendants PILOT AUTOMOTIVE, INC., SEARS HOLDING CORPORATION, KMART
26 CORPORATION, and DOES 1-20 as follows:

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THE PARTIES

1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an organization qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant PILOT AUTOMOTIVE, INC. ("PILOT AUTOMOTIVE") is a California corporation, doing business in the State of California at all relevant times herein.
3. Defendant SEARS HOLDING CORPORATION ("SEARS") is a Delaware corporation, doing business in the State of California at all relevant times herein.
4. Defendant KMART CORPORATION ("KMART") is a Michigan corporation, doing business in the State of California at all relevant times herein.
5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
6. At all times mentioned herein, the term "Defendants" includes PILOT AUTOMOTIVE, SEARS, KMART, and DOES 1-20.
7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
8. Upon information and belief, at all times relevant to this action, each of the Defendants, including DOES 1-20, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of

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

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

9 JURISDICTION

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

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

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

1 BACKGROUND AND PRELIMINARY FACTS

2 13. 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 14. 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 15. 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 16. 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 17. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
2 Phthalate ("DEHP") and Di-*n*-butyl Phthalate ("DBP")-bearing products of exposing,
3 knowingly and intentionally, persons in California to the Proposition 65-listed chemicals
4 of such products without first providing clear and reasonable warnings of such to the
5 exposed persons prior to the time of exposure. Plaintiff later discerned that Defendants
6 engaged in such practice.

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

14 19. On December 2, 2005, the Governor of California added DBP to the list of chemicals
15 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).
16 DBP is known to the State to cause developmental, female, and male reproductive
17 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty
18 (20) months after addition DBP to the list of chemicals known to the State to cause
19 reproductive toxicity, DBP became fully subject to Proposition 65 warning requirements
20 and discharge prohibitions.

21 **SATISFACTION OF PRIOR NOTICE**

22 20. On or about December 11, 2012, Plaintiff gave notice of alleged violations of Health and
23 Safety Code section 25249.6, concerning consumer products exposures, subject to a
24 private action to PILOT AUTOMOTIVE, SEARS, KMART, and to the California
25 Attorney General, County District Attorneys, and City Attorneys for each city containing
26 a population of at least 750,000 people in whose jurisdictions the violations allegedly
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1 occurred, concerning the product Terminal Kit with Crimp Tool containing DEHP and
2 DBP.

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

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

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

19 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
20 gave notices of the alleged violations to PILOT AUTOMOTIVE, SEARS, KMART, and
21 the public prosecutors referenced in Paragraph 20.

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

1 **FIRST CAUSE OF ACTION**

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

6 **Terminal Kit with Crimp Tool**

- 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 Terminal Kit with Crimp Tool, which includes but is
11 not limited to "Pilot™ Automotive Terminal Kit w/Crimp Tool, '25 Assorted', 'EL-118',
12 UPC #757558046041" ("TERMINAL KIT").
- 13 28. TERMINAL KIT contains DEHP and DBP.
- 14 29. Defendants knew or should have known that DEHP and DBP have been identified by the
15 State of California as a chemical known to cause reproductive toxicity and therefore was
16 subject to Proposition 65 warning requirements. Defendants were also informed of the
17 presence of DEHP and DBP in TERMINAL KIT within Plaintiff's notice of alleged
18 violations further discussed above at Paragraph 20.
- 19 30. Plaintiff's allegations regarding TERMINAL KIT concern "[c]onsumer products
20 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
21 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
22 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §
23 25602(b)*. TERMINAL KIT are consumer products, and, as mentioned herein, exposures
24 to DEHP and DBP took place as a result of such normal and foreseeable consumption
25 and use.
- 26 31. Plaintiff is informed, believes, and thereon alleges that between December 11, 2009 and
27 the present, each of the Defendants knowingly and intentionally exposed California
28 consumers and users of TERMINAL KIT, which Defendants manufactured, distributed,
or sold as mentioned above, to DEHP and DBP, without first providing any type of clear

1 and reasonable warning of such to the exposed persons before the time of exposure.

2 Defendants have distributed and sold TERMINAL KIT in California. Defendants know
3 and intend that California consumers will use and consume TERMINAL KIT, thereby
4 exposing them to DEHP and DBP. Defendants thereby violated Proposition 65.

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

6 Persons sustain exposures by handling TERMINAL KIT without wearing gloves or any
7 other personal protective equipment, or by touching bare skin or mucous membranes with
8 gloves after handling TERMINAL KIT, as well as through direct and indirect hand to
9 mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed
10 from TERMINAL KIT.

11 33. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
12 Proposition 65 as to TERMINAL KIT have been ongoing and continuous to the date of
13 the 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 TERMINAL KIT, so that a separate and distinct
16 violation of Proposition 65 occurred each and every time a person was exposed to DEHP
17 and DBP by TERMINAL KIT 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 and DBP from TERMINAL KIT,
23 pursuant to Health and Safety Code section 25249.7(b).

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

26 **PRAYER FOR RELIEF**

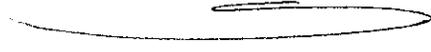
27 Plaintiff demands against each of the Defendants as follows:

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

Dated: 8-05-13, 2013

YEROUSHALMI & ASSOCIATES

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