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FILED  
SAN FRANCISCO COUNTY  
SUPERIOR COURT

2013 OCT 16 PM 1:39

CLERK OF THE COURT

BY: \_\_\_\_\_  
DEPUTY CLERK

Nehorah Stepp

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7 Consumer Advocacy Group, Inc.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

10  
11 CONSUMER ADVOCACY GROUP, INC.,  
12 in the public interest,

13 Plaintiff,

14 v.

15  
16 BED, BATH & BEYOND INC., a New York  
Corporation; and DOES 1-20;

17 Defendants.  
18  
19

COC-13-534909  
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)

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21 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
22 defendants BED, BATH & BEYOND INC., and DOES 1-20 as follows:

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**BY FAX**

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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 BED, BATH & BEYOND, INC." ("BED, BATH & BEYOND") is incorporated in New York, doing business in the State of California at all relevant times herein.
3. 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.
4. At all times mentioned herein, the term "Defendants" includes BED, BATH & BEYOND and DOES 1-20.
5. 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.
6. 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 the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing agents.

1 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged  
2 wrongful conduct of each of the other Defendants.

- 3 7. 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 8. 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 9. 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 10. Venue is proper in the County of San Francisco because one or more of the instances of  
22 wrongful conduct occurred, and continues to occur, in the County of San Francisco  
23 and/or because Defendants conducted, and continue to conduct, business in the County of  
24 San Francisco with respect to the consumer product that is the subject of this action.

1 BACKGROUND AND PRELIMINARY FACTS

- 2 11. 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 12. 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 13. 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 14. 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).
- 28

- 1 15. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl  
2 Phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons  
3 in California to the Proposition 65-listed chemicals of such products without first  
4 providing clear and reasonable warnings of such to the exposed persons prior to the time  
5 of exposure. Plaintiff later discerned that Defendants engaged in such practice.
- 6 16. On January 1, 1988, the Governor of California added DEHP to the list of chemicals  
7 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP  
8 to the list of chemicals known to the State to cause developmental male reproductive  
9 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)  
10 months after addition of DEHP to the list of chemicals known to the State to cause cancer  
11 and reproductive toxicity, DEHP became fully subject to Proposition 65 warning  
12 requirements and discharge prohibitions.

13  
14 **SATISFACTION OF PRIOR NOTICE**

- 15 17. On or about February 11, 2013 Plaintiff gave notice of alleged violations of Health and  
16 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
17 private action to BED, BATH & BEYOND INC., and to the California Attorney General,  
18 County District Attorneys, and City Attorneys for each city containing a population of at  
19 least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning  
20 the products Vinyl Shower Curtain Liner containing DEHP.
- 21 18. On or about May 10, 2013, Plaintiff gave notice of alleged violations of Health and  
22 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
23 private action to BED, BATH & BEYOND INC., and to the California Attorney General,  
24 County District Attorneys, and City Attorneys for each city containing a population of at  
25 least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning  
26 the products Shower Curtain Liners containing DEHP.

- 1 19. 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 20. Plaintiff's notices 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 21. 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 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
17 gave notices of the alleged violations to BED, BATH & BEYOND, and the public  
18 prosecutors referenced in Paragraph 17 and 18.
- 19 23. 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.

22  
23 **FIRST CAUSE OF ACTION**

24 **(By CONSUMER ADVOCACY GROUP, INC. and against BED, BATH &**  
25 **BEYOND INC., AND DOES 1-20 for Violations of Proposition 65, The Safe**  
26 **Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§**  
27 **25249.5, *et seq.*))**

28 **Vinyl Shower Curtain Liner**

- 1 24. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
2 reference paragraphs 1 through 23 of this complaint as though fully set forth herein.
- 3 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
4 distributor, promoter, or retailer of Vinyl Shower Curtain Liner, which includes but is not  
5 limited to 1) "Bed, Bath & Beyond ®, 8 Gauge Shower Curtain Liner W/Grommets,  
6 72"x72" Clear"; and 2) "Bed, Bath & Beyond ®, Vinyl Shower Curtain Liner (with  
7 magnets), 70"x72" Clear." ("VINYL SHOWER CURTAIN LINER")
- 8 26. VINYL SHOWER CURTAIN LINER contains DEHP.
- 9 27. Defendants knew or should have known that DEHP has been identified by the State of  
10 California as a chemical known to cause cancer and reproductive toxicity and therefore  
11 was subject to Proposition 65 warning requirements. Defendants were also informed of  
12 the presence of DEHP in VINYL SHOWER CURTAIN LINER within Plaintiff's notice  
13 of alleged violations further discussed above at Paragraph 17.
- 14 28. Plaintiff's allegations regarding VINYL SHOWER CURTAIN LINER concern  
15 "[c]onsumer products exposure[s]," which "is an exposure that results from a person's  
16 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a  
17 consumer good, or any exposure that results from receiving a consumer service." *Cal.*  
18 *Code Regs. tit. 27, § 25602(b)*. VINYL SHOWER CURTAIN LINER are consumer  
19 products, and, as mentioned herein, exposures to DEHP took place as a result of such  
20 normal and foreseeable consumption and use.
- 21 29. Plaintiff is informed, believes, and thereon alleges that between February 11, 2010 and  
22 the present, each of the Defendants knowingly and intentionally exposed the California  
23 consumers and users of VINYL SHOWER CURTAIN LINER, which Defendants  
24 manufactured, distributed, or sold as mentioned above, to DEHP, without first providing  
25 any type of clear and reasonable warning of such to the exposed person before the time of  
26 exposure. Defendants have distributed and sold VINYL SHOWER CURTAIN LINER in  
27 California. Defendants know and intend that California consumers will use and consume  
28

1 VINYL SHOWER CURTAIN LINER thereby exposing them to DEHP. Defendants  
2 thereby violated Proposition 65.

3 30. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
4 Persons sustain exposures by handling VINYL SHOWER CURTAIN LINER without  
5 wearing gloves or any other personal protective equipment, or by touching bare skin or  
6 mucous membranes with gloves after handling VINYL SHOWER CURTAIN LINER, as  
7 well as through direct and indirect hand to mouth contact, hand to mucous membrane, or  
8 breathing in particulate matter dispersed from VINYL SHOWER CURTAIN LINER.

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

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

20 33. Based on the allegations herein, Defendants are liable for civil penalties of up to  
21 \$2,500.00 per day per individual exposure to DEHP from VINYL SHOWER CURTAIN  
22 LINER, pursuant to Health and Safety Code section 25249.7(b).

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

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1 **SECOND CAUSE OF ACTION**

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

6 **Shower Curtain Liners**

- 7 35. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
8 reference paragraphs 1 through 33 of this complaint as though fully set forth herein.
- 9 36. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
10 distributor, promoter, or retailer of Shower Curtain Liners, which include but are not  
11 limited to "Premium Weight Vinyl Shower Curtain Liners, Bed, Bath & Beyond ®,  
12 "100% Vinyl", "72 in x 72 in", barcode: 4 44444 39610 5." ("SHOWER CURTAIN  
13 LINERS")
- 14 37. SHOWER CURTAIN LINERS contain DEHP.
- 15 38. 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 SHOWER CURTAIN LINERS within Plaintiff's notice of  
19 alleged violations further discussed above at Paragraph 18.
- 20 39. Plaintiff's allegations regarding SHOWER CURTAIN LINERS concern "[c]onsumer  
21 products exposure[s]," which "is an exposure that results from a person's acquisition,  
22 purchase, storage, consumption, or other reasonably foreseeable use of a consumer good,  
23 or any exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27,*  
24 *§ 25602(b)*. SHOWER CURTAIN LINERS are consumer products, and, as mentioned  
25 herein, exposures to DEHP took place as a result of such normal and foreseeable  
26 consumption and use.
- 27 40. Plaintiff is informed, believes, and thereon alleges that between May 10, 2010 and the  
28 present, each of the Defendants knowingly and intentionally exposed the California  
consumers and users of SHOWER CURTAIN LINERS, which Defendants

1 manufactured, distributed, or sold as mentioned above, to DEHP, without first providing  
2 any type of clear and reasonable warning of such to the exposed person before the time of  
3 exposure. Defendants have distributed and sold SHOWER CURTAIN LINERS in  
4 California. Defendants know and intend that California consumers will use and consume  
5 SHOWER CURTAIN LINERS thereby exposing them to DEHP. Defendants thereby  
6 violated Proposition 65.

7 41. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
8 Persons sustain exposures by handling SHOWER CURTAIN LINERS without wearing  
9 gloves or any other personal protective equipment, or by touching bare skin or mucous  
10 membranes with gloves after handling SHOWER CURTAIN LINERS, as well as through  
11 direct and indirect hand to mouth contact, hand to mucous membrane, or breathing in  
12 particulate matter dispersed from SHOWER CURTAIN LINERS.

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

20 43. 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 44. 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 CURTAIN  
25 LINERS, pursuant to Health and Safety Code section 25249.7(b).

26 45. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
27 filing this Complaint.  
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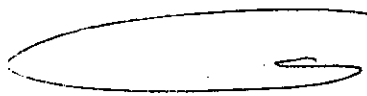
**PRAYER FOR RELIEF**

Plaintiff demands against each of the Defendants as follows:

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: 10/10/13

YEROUSHALMI & ASSOCIATES

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