

ENDORSED
FILED
ALAMEDA COUNTY

SEP 12 2014

CLERK OF THE SUPERIOR COURT
By CHERYL CLARK Deputy

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & YEROUSHALMI***
5 9100 Wilshire Boulevard, Suite 240W
6 Beverly Hills, California 90212
7 Telephone: 310.623.1926
8 Facsimile: 310.623.1930

9 Attorneys for Plaintiff,
10 Consumer Advocacy Group, Inc.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF ALAMEDA**

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

15 Plaintiff,

16 v.

17 SEARS HOLDING CORPORATION, a
18 Delaware Corporation; KMART
19 CORPORATION, a Michigan Corporation;
20 KMART CORPORATION OF ILLINOIS,
21 INC., an Illinois Corporation; and DOES 1-
22 20;

23 Defendants.

CASE NO. *KG* 14740440

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 SEARS HOLDING CORPORATION, KMART CORPORATION, KMART
26 CORPORATION OF ILLINOIS, INC., and DOES 1-20 as follows:

27 **THE PARTIES**

- 28 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

COMPLAINT FOR VIOLATION OF PROPOSITION 65, THE SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986 (HEALTH AND SAFETY CODE § 25249.5, ET SEQ.)

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 SEARS HOLDING CORPORATION ("SEARS") is a Delaware corporation,
4 doing business in the State of California at all relevant times herein.

5 3. Defendant KMART CORPORATION ("KMART") is a Michigan corporation, doing
6 business in the State of California at all relevant times herein.

7 4. KMART CORPORATION OF ILLINOIS, INC., ("KCI") is an Illinois corporation,
8 doing business in the State of California at all relevant times herein.

9 5. 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 6. At all times mentioned herein, the term "Defendants" includes SEARS, KMART, KCI
16 and DOES 1-20.

17 7. 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 8. Upon information and belief, at all times relevant to this action, each of the Defendants,
20 including DOES 1-20, was an agent, servant, or employee of each of the other
21 Defendants. In conducting the activities alleged in this Complaint, each of the
22 Defendants was acting within the course and scope of this agency, service, or
23 employment, and was acting with the consent, permission, and authorization of each of
24 the other Defendants. All actions of each of the Defendants alleged in this Complaint
25 were ratified and approved by every other Defendant or their officers or managing agents.
26 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
27 wrongful conduct of each of the other Defendants.
28

1 9. 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 10. 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 11. 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 12. Venue is proper in the County of Alameda because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of Alameda and/or
21 because Defendants conducted, and continue to conduct, business in the County of
22 Alameda with respect to the consumer product that is the subject of this action.

23 BACKGROUND AND PRELIMINARY FACTS

24 13. 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
28 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections

25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources from contamination, to allow consumers to make informed choices about the products they buy, and to enable persons to protect themselves from toxic chemicals as they see fit.

14. Proposition 65 requires the Governor of California to publish a list of chemicals known to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code* § 25249.8. The list, which the Governor updates at least once a year, contains over 700 chemicals and chemical families. Proposition 65 imposes warning requirements and other controls that apply to Proposition 65-listed chemicals.
15. All businesses with ten (10) or more employees that operate or sell products in California must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited from knowingly discharging Proposition 65-listed chemicals into sources of drinking water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and reasonable" warnings before exposing a person, knowingly and intentionally, to a Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).
16. Proposition 65 provides that any person "violating or threatening to violate" the statute may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7. "Threaten to violate" means "to create a condition in which there is a substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e). Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation, recoverable in a civil action. *Health & Safety Code* § 25249.7(b).
17. Plaintiff identified certain practices of manufacturers and distributors of Di-*n*-butyl Phthalate ("DBP") and Di (2-ethylhexyl) phthalate, also known as Diethyl Hexyl Phthalate and Bis (2-ethylhexyl) phthalate, ("DEHP")-bearing products of exposing, knowingly and intentionally, persons in California to the Proposition 65-listed chemicals of such products without first providing clear and reasonable warnings of such to the exposed persons prior to the time of exposure. Plaintiff later discerned that Defendants engaged in such practice.

1 18. 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 19. On December 2, 2005, the Governor of California added DBP to the list of chemicals
9 known to the State to cause reproductive toxicity (*Cal. Code Regs.* tit. 27, § 27001(c)).
10 DBP is known to the State to cause developmental, female, and male reproductive
11 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty
12 (20) months after addition DBP to the list of chemicals known to the State to cause
13 reproductive toxicity, DBP became fully subject to Proposition 65 warning requirements
14 and discharge prohibitions.

15 **SATISFACTION OF PRIOR NOTICE**

16 20. On or about March 25, 2013, Plaintiff gave notice of alleged violations of Health and
17 Safety Code section 25249.6, concerning consumer products exposures, subject to a
18 private action to SEARS, KMART, and to the California Attorney General, County
19 District Attorneys, and City Attorneys for each city containing a population of at least
20 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
21 products Flip Flop Sandals containing DBP.

22 21. On or about March 25, 2013, 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 KCI, and to the California Attorney General, County District Attorneys,
25 and City Attorneys for each city containing a population of at least 750,000 people in
26 whose jurisdictions the violations allegedly occurred, concerning the products Flip Flop
27 Sandals containing DEHP and DBP.

1 22. 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 DBP, and the corporate structure of each of the
4 Defendants.

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

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

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

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

23 **FIRST CAUSE OF ACTION**

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

26 **Flip Flop Sandals**

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

1 28. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
2 distributor, promoter, or retailer of Flip Flop Sandals, which includes but is not limited to
3 "Island Club Brand Flip Flop Sandals, "021929FEB11", Girls, Pink, "10491",
4 "Rhinestone 2", DEPT 35, CAT: 08, SUBCAT: 02, SEAS: 3011, KSN: 0-029504449-5,
5 UPC 6 939894 091075" ("SANDALS (I)").

6 29. SANDALS (I) contain DBP.

7 30. Defendants knew or should have known that DBP have been identified by the State of
8 California as a chemical known to cause reproductive toxicity and therefore was subject
9 to Proposition 65 warning requirements. Defendants were also informed of the presence
10 of DBP in SANDALS (I) within Plaintiff's notice of alleged violations further discussed
11 above at Paragraph 20.

12 31. Plaintiff's allegations regarding SANDALS (I) concern "[c]onsumer products
13 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
14 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
15 exposure that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, §
16 25602(b). SANDALS (I) are consumer products, and, as mentioned herein, exposures to
17 DBP took place as a result of such normal and foreseeable consumption and use.

18 32. Plaintiff's allegations regarding SANDALS (I) also concern Occupational Exposures,
19 which "means an exposure to any employee in his or her employer's workplace." *Cal.*
20 *Code Regs.* tit. 27, § 25602(f). Exposures of DBP to Defendants' employees occurred
21 through the course of their employment in their employers' workplaces.

22 33. Plaintiff is informed, believes, and thereon alleges that between March 25, 2010 and the
23 present, each of the Defendants knowingly and intentionally exposed their employees and
24 California consumers and users of SANDALS (I), which Defendants manufactured,
25 distributed, or sold as mentioned above, to DBP, without first providing any type of clear
26 and reasonable warning of such to the exposed persons before the time of exposure.
27 Defendants have distributed and sold SANDALS (I) in California. Defendants know and
28

1 intend that California consumers will use and consume SANDALS (I), thereby exposing
2 them to DBP. Defendants thereby violated Proposition 65.

3 34. The principal routes of exposure are through dermal contact, ingestion and inhalation.

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

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

17 36. 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 37. Based on the allegations herein, Defendants are liable for civil penalties of up to
21 \$2,500.00 per day per individual exposure to DBP from SANDALS (I), pursuant to
22 Health and Safety Code section 25249.7(b).

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

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

39. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by reference paragraphs 1 through 38 of this complaint as though fully set forth herein.

40. Each of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor, promoter, or retailer of Flip Flop Sandals, which includes but is not limited to “Kmart, Island Club, Boys, Navy, 10492, RILEY 2, 7/8, EV/5281, Dept: 35, Cat: 08, Subcat: 01, Seas: 3011, KSN: 0-02960127-5, UPC # 6 939894 055251, 021929NOV10, MADE IN CHINA” (“SANDALS (II)”).

41. SANDALS (II) contain DEHP and DBP.

42. Defendants knew or should have known that DEHP and DBP have been identified by the State of California as a chemical known to cause reproductive toxicity and therefore was subject to Proposition 65 warning requirements. Defendants were also informed of the presence of DEHP and DBP in SANDALS (II) within Plaintiff's notice of alleged violations further discussed above at Paragraph 21.

43. Plaintiff's allegations regarding SANDALS (II) concern "[c]onsumer products exposure[s]," which "is an exposure that results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, § 25602(b). SANDALS (II) are consumer products, and, as mentioned herein, exposures to DBP took place as a result of such normal and foreseeable consumption and use.

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

1 45. Plaintiff is informed, believes, and thereon alleges that between March 25, 2010 and the
2 present, each of the Defendants knowingly and intentionally exposed their employees and
3 California consumers and users of SANDALS (II), which Defendants manufactured,
4 distributed, or sold as mentioned above, to DEHP and DBP, without first providing any
5 type of clear and reasonable warning of such to the exposed persons before the time of
6 exposure. Defendants have distributed and sold SANDALS (II) in California.
7 Defendants know and intend that California consumers will use and consume SANDALS
8 (II), thereby exposing them to DEHP and DBP. Defendants thereby violated Proposition
9 65.

10 46. The principal routes of exposure are through dermal contact, ingestion and inhalation.
11 Persons sustain exposures by handling SANDALS (II) without wearing gloves or any
12 other personal protective equipment, or by touching bare skin or mucous membranes with
13 gloves after handling SANDALS (II), as well as through direct and indirect hand to
14 mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed
15 from SANDALS (II). And as to Defendants' employees, employees may be exposed to
16 DEHP and DBP in the course of their employment by handling, distributing, and selling
17 SANDALS (II).

18 47. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
19 Proposition 65 as to SANDALS (II) have been ongoing and continuous to the date of the
20 signing of this complaint, as Defendants engaged and continue to engage in conduct
21 which violates Health and Safety Code section 25249.6, including the manufacture,
22 distribution, promotion, and sale of SANDALS (II), so that a separate and distinct
23 violation of Proposition 65 occurred each and every time a person was exposed to DBP
24 by SANDALS (II) as mentioned herein.

25 48. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
26 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
27 violations alleged herein will continue to occur into the future.
28

1 49. Based on the allegations herein, Defendants are liable for civil penalties of up to
2 \$2,500.00 per day per individual exposure to DEHP and DBP from SANDALS (II),
3 pursuant to Health and Safety Code section 25249.7(b).

4 50. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
5 filing this Complaint.
6

7 **PRAYER FOR RELIEF**

8 Plaintiff demands against each of the Defendants as follows:

- 9 1. A permanent injunction mandating Proposition 65-compliant warnings;
10 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
11 3. Costs of suit;
12 4. Reasonable attorney fees and costs; and
13 5. Any further relief that the court may deem just and equitable.
14
15

16
17 Dated: SEPT 12, 2014

YEROUSHALMI & YEROUSHALMI

18
19 BY: 

20 Reuben Yeroushalmi
21 Attorneys for Plaintiff,
22 Consumer Advocacy Group, Inc.
23
24
25
26
27
28