

THE PARTIES

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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 BURLINGTON COAT FACTORY WAREHOUSE CORPORATION
8 ("BURLINGTON") is a New Jersey corporation, duly licensed under the laws of
9 California and doing business in the State of California at all relevant times herein.
- 10 3. Defendant MAXI GLOBAL INC. ("MAXI") is a California corporation duly licensed
11 under the law of California doing business in the State of California at all relevant times
12 herein.
- 13 4. Defendant BETTER WAY MANUFACTURING, INC. ("BETTER WAY") is a
14 California corporation, duly licensed under the laws of California and doing business in
15 the State of California at all relevant times herein.
- 16 5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
17 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
18 complaint to allege their true names and capacities when ascertained. Plaintiff is
19 informed, believes, and thereon alleges that each fictitiously named defendant is
20 responsible in some manner for the occurrences herein alleged and the damages caused
21 thereby.
- 22 6. At all times mentioned herein, the term "Defendants" includes BURLINGTON, MAXI,
23 BETTER WAY, and DOES 1-20.
- 24 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
25 times mentioned herein have conducted business within the State of California.
- 26 8. Upon information and belief, at all times relevant to this action, each of the Defendants,
27 including DOES 1-20, was an agent, servant, or employee of each of the other
28 Defendants. In conducting the activities alleged in this Complaint, each of the

1 Defendants was acting within the course and scope of this agency, service, or
2 employment, and was acting with the consent, permission, and authorization of each of
3 the other Defendants. All actions of each of the Defendants alleged in this Complaint
4 were ratified and approved by every other Defendant or their officers or managing agents.
5 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
6 wrongful conduct of each of the other Defendants.

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

11 JURISDICTION

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

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

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

BACKGROUND AND PRELIMINARY FACTS

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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 Di (2-ethylhexy)
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 18. 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
11 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
12 requirements and discharge prohibitions.

13 19. Plaintiff identified certain practices of manufacturers, distributors and retailers of
14 exposing, knowingly and intentionally, persons in California to Di-n-butyl Phthalate
15 ("DBP") in consumer products without first providing clear and reasonable warnings of
16 such to the exposed persons prior to the time of exposure. Plaintiff later discerned that
17 Defendants engaged in such practice.

18 20. On December 2, 2005, the Governor of California added DBP to the list of chemicals
19 known to the State to cause developmental, female, and male reproductive toxicity.
20 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
21 after addition of DBP to the list of chemicals known to the State to cause reproductive
22 toxicity, DBP became fully subject to Proposition 65 warning requirements and discharge
23 prohibitions.

24 **SATISFACTION OF PRIOR NOTICE**

25 21. On or about March 20, 2012, Plaintiff gave notice of alleged violations of Health and
26 Safety Code section 25249.6, concerning consumer products exposures, subject to a
27 private action to BURLINGTON and to the California Attorney General, County District
28 Attorneys, and City Attorneys for each city containing a population of at least 750,000

1 people in whose jurisdictions the violations allegedly occurred, concerning the product
2 CHILDREN'S SANDALS containing DEHP and DBP.

3 22. On or about September 27, 2013, Plaintiff gave notice of alleged violations of Health and
4 Safety Code section 25249.6, concerning consumer products exposures, subject to a
5 private action to BURLINGTON, MAXI, and BETTER WAY and to the California
6 Attorney General, County District Attorneys, and City Attorneys for each city containing
7 a population of at least 750,000 people in whose jurisdictions the violations allegedly
8 occurred, concerning the products SANDALS containing DBP.

9 23. Before sending the notices of alleged violation, Plaintiff investigated the consumer
10 products involved, the likelihood that such products would cause users to suffer
11 significant exposures to DEHP and DBP, and the corporate structure of each of the
12 Defendants.

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

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

25 26. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
26 gave notices of the alleged violations to BURLINGTON, MAXI, BETTER WAY, and
27 the public prosecutors referenced in Paragraph 21-22.
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1 27. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
2 any applicable district attorney or city attorney has commenced and is diligently
3 prosecuting an action against the Defendants.

4 **FIRST CAUSE OF ACTION**

5 (By CONSUMER ADVOCACY GROUP, INC. and against BURLINGTON, and DOES 1-
6 20 for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act
7 of 1986 (Health & Safety Code, §§ 25249.5, et seq.))

8 **Children's Sandals**

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

11 29. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
12 distributor, promoter, or retailer of SANDALS, which includes but is not limited to:
13 "Children Flip Flops S 10/11 (Yellow, Pink, White, Red Striped Pattern), YTH 17 022
14 00100007" ("CHILDREN'S SANDALS").

15 30. CHILDREN'S SANDALS contain DEHP and DBP.

16 31. Defendants knew or should have known that DEHP and DBP have been identified by the
17 State of California as chemicals known to cause cancer and reproductive toxicity and
18 therefore are subject to Proposition 65 warning requirements. Defendants were also
19 informed of the presence of DEHP and DBP in CHILDREN'S SANDALS within
20 Plaintiff's notice of alleged violations further discussed above at Paragraph 21-22.

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

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

6 34. Plaintiff is informed, believes, and thereon alleges that between September 27, 2010 and
7 the present, each of the Defendants knowingly and intentionally exposed their employees
8 and California consumers and users of CHILDREN'S SANDALS, which Defendants
9 manufactured, distributed, or sold as mentioned above, to DEHP and DBP, without first
10 providing any type of clear and reasonable warning of such to the exposed persons before
11 the time of exposure. Defendants have distributed and sold DEHP and DBP in
12 California. Defendants know and intend that California consumers will use and consume
13 CHILDREN'S SANDALS, thereby exposing them to DEHP and DBP. Defendants
14 thereby violated Proposition 65.

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

23 36. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
24 Proposition 65 as to CHILDREN'S SANDALS have been ongoing and continuous to the
25 date of the signing of this complaint, as Defendants engaged and continue to engage in
26 conduct which violates Health and Safety Code section 25249.6, including the
27 manufacture, distribution, promotion, and sale of CHILDREN'S SANDALS, so that a
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1 separate and distinct violation of Proposition 65 occurred each and every time a person
2 was exposed to DEHP and DBP by CHILDREN'S SANDALS as mentioned herein.

3 37. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
4 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
5 violations alleged herein will continue to occur into the future.

6 38. Based on the allegations herein, Defendants are liable for civil penalties of up to
7 \$2,500.00 per day per individual exposure to DEHP and DBP from CHILDREN'S
8 SANDALS, pursuant to Health and Safety Code section 25249.7(b).

9 39. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
10 filing this Complaint.

11 **SECOND CAUSE OF ACTION**

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

15 **Sandals**

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

18 41. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
19 distributor, promoter, or retailer of SANDALS, which includes but is not limited to:

20 "Children's Jump'n Splash Sandals "VEN 683834 DC-10 00408863320017829483 Style
21 SWFFGL131291 Color MULTI y GR7-16 SWIM Size 6-6X Compare \$16.99 Our Low
22 Price \$7.98 SEA 7 YTH 17 786 96755709 1 1/1" Item #SWFFGL131291 UPC
23 897889004270" ("SANDALS").

24 42. SANDALS contain DBP.

25 43. Defendants knew or should have known that DBP have been identified by the State of
26 California as chemicals known to cause cancer and reproductive toxicity and therefore
27 are subject to Proposition 65 warning requirements. Defendants were also informed of
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1 the presence of DBP in SANDALS within Plaintiff's notice of alleged violations further
2 discussed above at Paragraph 21-22.

3 44. Plaintiff's allegations regarding SANDALS 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 SANDALS are consumer products, and, as mentioned herein, exposures to DBP took
8 place as a result of such normal and foreseeable consumption and use.

9 45. Plaintiff's allegations regarding SANDALS 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 DBP to Defendants' employees occurred through
12 the course of their employment in their employers' workplaces.

13 46. Plaintiff is informed, believes, and thereon alleges that between September 27, 2010 and
14 the present, each of the Defendants knowingly and intentionally exposed their employees
15 and California consumers and users of SANDALS, which Defendants manufactured,
16 distributed, or sold as mentioned above, to DBP, without first providing any type of clear
17 and reasonable warning of such to the exposed persons before the time of exposure.
18 Defendants have distributed and sold DBP in California. Defendants know and intend
19 that California consumers will use and consume SANDALS, thereby exposing them to
20 DBP. Defendants thereby violated Proposition 65.

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

1 48. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
2 Proposition 65 as to SANDALS have been ongoing and continuous to the date of the
3 signing of this complaint, as Defendants engaged and continue to engage in conduct
4 which violates Health and Safety Code section 25249.6, including the manufacture,
5 distribution, promotion, and sale of SANDALS, so that a separate and distinct violation
6 of Proposition 65 occurred each and every time a person was exposed to DBP by
7 SANDALS as mentioned herein.

8 49. 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 50. Based on the allegations herein, Defendants are liable for civil penalties of up to
12 \$2,500.00 per day per individual exposure to DBP from SANDALS, pursuant to Health
13 and Safety Code section 25249.7(b).

14 51. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
15 filing this Complaint.

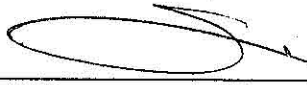
16 **PRAYER FOR RELIEF**

17 Plaintiff demands against each of the Defendants as follows:

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

23
24 Dated: MAY 30, 2014

YEROUSHALMI & ASSOCIATES

25 BY: 
26 Reuben Yeroushalmi
27 Attorneys for Plaintiff,
28 Consumer Advocacy Group, Inc.