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FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

14 APR 25 AM 1:11

ELIAS BUTI

8 Attorneys for Plaintiff,

9 Consumer Advocacy Group, Inc.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12
13 **COUNTY OF SAN FRANCISCO**

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

17 Plaintiff,

18 v.

19 NATIONAL STORES, INC. DBA FALLAS
20 DISCOUNT STORES, a California
21 Corporation; and DOES 1-20;

22 Defendants.

CASE NO. GC - 14 - 538924

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

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)

BY FAX

25 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
26 defendant NATIONAL STORES, INC. DBA FALLAS DISCOUNT STORES, and DOES 1-20
27 as follows:
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3 **THE PARTIES**

- 4 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
5 organization qualified to do business in the State of California. CAG is a person within
6 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
7 as a private attorney general, brings this action in the public interest as defined under
8 Health and Safety Code section 25249.7, subdivision (d).
- 9 2. Defendant NATIONAL STORES, INC. DBA FALLAS DISCOUNT STORES
10 ("NATIONAL STORES"), is a California corporation, qualified to do business and doing
11 business in the State of California at all relevant times herein.
- 12 3. 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 factiously named defendant is
16 responsible in some manner for the occurrences herein alleged and the damages caused
17 thereby.
- 18 4. At all times mentioned herein, the term "Defendant" is NATIONAL STORES, and
19 DOES 1-20.
- 20 5. Plaintiff is informed and believes, and thereon alleges that the Defendant at all times
21 mentioned herein has conducted business within the State of California.
- 22 6. At all times relevant to this action, the Defendant, including DOES 1-20 was an agent,
23 servant, or employee of each of the other Defendants. In conducting the activities alleged
24 in this Complaint, each of the Defendants was acting within the course and scope of this
25 agency, service, or employment, and was acting with the consent, permission, and
26 authorization of each of the other Defendants. All actions of each of the Defendants
27 alleged in this Complaint were ratified and approved by every other Defendant or their
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2 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
3 and/or facilitated the alleged wrongful conduct of each of the other Defendants.
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- 5 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, the
6 Defendant 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 8. 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 9. 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 10. Venue is proper in the County of San Francisco because one or more of the instances of
24 wrongful conduct occurred, and continues to occur, in the County of San Francisco
25 and/or because Defendants conducted, and continue to conduct, business in the County of
26 San Francisco with respect to the consumer product that is the subject of this action.

27 **BACKGROUND AND PRELIMINARY FACTS**

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

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

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

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

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3 15. Plaintiff identified certain practices of manufacturers and distributors of Di (2-ethylhexyl)
4 phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons
5 in California to the Proposition 65-listed chemicals of such products without first
6 providing clear and reasonable warnings of such to the exposed persons prior to the time
7 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

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

15 **SATISFACTION OF PRIOR NOTICE**

16 17. On or about October 15, 2013, Plaintiff gave notice of alleged violations of Health and
17 Safety Code section 25249.6, concerning consumer products exposures and occupational
18 exposures, subject to a private action to NATIONAL STORES, and to the California
19 Attorney General, County District Attorneys, and City Attorneys for each city containing
20 a population of at least 750,000 people in whose jurisdictions the violations allegedly
21 occurred, concerning the product Eyewear containing DEHP.

22 18. Before sending the notices of alleged violation, Plaintiff investigated the consumer
23 products involved, the likelihood that such products would cause users to suffer
24 significant exposures to DEHP, and the corporate structure of each of the Defendants.

25 19. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
26 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
27 Plaintiff who executed the certificate had consulted with at least one person with relevant
28 and appropriate expertise who reviewed data regarding the exposures to DEHP, the

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3 subject Proposition 65-listed chemical of this action. Based on that information, the
4 attorney for Plaintiff who executed the Certificate of Merit believed there was a
5 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
6 to the Certificate of Merit served on the Attorney General the confidential factual
7 information sufficient to establish the basis of the Certificate of Merit.

8 20. Plaintiff's notices of alleged violations also included a Certificate of Service and a
9 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
10 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

11 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
12 gave notices of the alleged violations to NATIONAL STORES and the public
13 prosecutors referenced in Paragraph 17.

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

17 **FIRST CAUSE OF ACTION**

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

21 **EYEWEAR**

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

24 24. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
25 distributor, promoter, or retailer of Eyewear, including but not limited to "Celebrity
26 Eyewear," Aviator Style Sunglasses with Multi-Color Frame and Black Lens, "AV-
27 1286," "100% UV PROTECTION," "14/3 U13 G," Product ID: 1262633"
28 ("EYEWEAR").

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3 25. Plaintiff is informed, believes, and thereon alleges that EYEWEAR contains DEHP.

4 26. Defendants knew or should have known that DEHP have been identified by the State of
5 California as chemicals known to cause cancer and reproductive toxicity and therefore
6 was subject to Proposition 65 warning requirements. Defendants were also informed of
7 the presence of DEHP in EYEWEAR within Plaintiff's notice of alleged violations
8 further discussed above at Paragraph 17.

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

15 28. Plaintiff's allegations regarding EYEWEAR also concern occupational exposures, which
16 "means an exposure to any employee in his or her employer's workplace." *Cal. Code*
17 *Regs. tit. 27, § 25602(f)*. Exposures of DEHP to Defendants' employees occurred
18 through the course of their employment in their employers' workplaces.

19 29. Plaintiff is informed, believes, and thereon alleges that between October 15, 2010 and the
20 present, each of the Defendants knowingly and intentionally exposed their employees and
21 California consumers and users of EYEWEAR, which Defendants manufactured,
22 distributed, or sold as mentioned above, to DEHP, without first providing any type of
23 clear and reasonable warning of such to the exposed persons before the time of exposure.
24 Defendants have distributed and sold EYEWEAR in California. Defendants know and
25 intend that California consumers will use and consume EYEWEAR, thereby exposing
26 them to DEHP. Defendants thereby violated Proposition 65.

27 30. The principal routes of exposure are through dermal contact, ingestion and inhalation.
28 Persons sustain exposures by handling EYEWEAR without wearing gloves or any other

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3 personal protective equipment, or by touching bare skin or mucous membranes with
4 gloves after handling EYEWEAR, as well as through direct and indirect hand to mouth
5 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
6 EYEWEAR. And as to Defendants' employees, employees may be exposed to DEHP in
7 the course of their employment by handling, distributing, and selling EYEWEAR.

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

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

18 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
19 \$2,500.00 per day per individual exposure to DEHP from EYEWEAR, pursuant to
20 Health and Safety Code section 25249.7(b).

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

23 **PRAYER FOR RELIEF**

24 Plaintiff demands against each of the Defendants as follows:

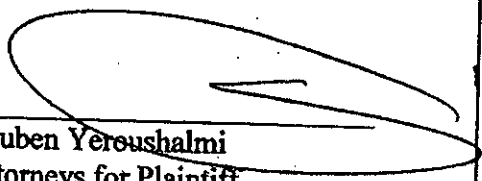
- 25 1. A permanent injunction mandating Proposition 65-compliant warnings;
26 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
27 3. Costs of suit;
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- 4. Reasonable attorney fees and costs; and
- 5. Any further relief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

Dated: April 25, 2014

YEROUSHALMI & ASSOCIATES

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