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**FILED**

**MAY 28 2014**

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT  
By: E. Chais, Deputy

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF MARIN**

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

13 Plaintiff,

14 v.

15  
16 **BILLABONG RETAIL, INC.,** a California  
Corporation; **GMS RETAIL, INC.** fka  
17 **Billabong Retail, Inc.,** a California  
Corporation; **BILLABONG**  
18 **INTERNATIONAL LIMITED,** an Australia  
Corporation; **BURLEIGH POINT LIMITED,**  
19 **a California Limited Liability Company;**  
20 **KUSTOM FOOTWEAR USA,** business  
entity form unknown; **BILLABONG USA,**  
21 **business entity form unknown; and DOES 1-**  
22 **20;**

23 Defendants.

CASE NO.

CIV 14 0 2 0 1 3

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  
25 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
26 defendants BILLABONG RETAIL, INC., GMS RETAIL, INC. fka Billabong Retail, Inc.,  
27  
28

1 BILLABONG INTERNATIONAL LIMITED, BURLEIGH POINT LIMITED, KUSTOM  
2 FOOTWEAR USA, BILLABONG USA, and DOES 1-20 as follows:

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 BILLABONG RETAIL INC. ("BILLABONG RETAIL") is a California  
10 corporation, doing business in the State of California at all relevant times herein.
- 11 3. Defendant GMS RETAIL, INC. fka Billabong Retail, Inc. ("GMS") is a California  
12 Corporation, doing business in the State of California at all relevant times herein.
- 13 4. Defendant BILLABONG INTERNATIONAL LIMITED ("BILLABONG INT'L") is an  
14 Australia Corporation, doing business in the State of California at all relevant times  
15 herein.
- 16 5. Defendant BURLEIGH POINT LIMITED ("BURLEIGH") is a California Limited  
17 Liability Company, doing business in the State of California at all relevant times herein.
- 18 6. Defendant KUSTOM FOOTWEAR USA ("KUSTOM") does business in the State of  
19 California at all relevant times herein.
- 20 7. Defendant BILLABONG USA ("BILLABONG USA") does business in the State of  
21 California at all relevant times herein.
- 22 8. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,  
23 and therefore sues these defendants by such fictitious names. Plaintiff will amend this  
24 complaint to allege their true names and capacities when ascertained. Plaintiff is  
25 informed, believes, and thereon alleges that each fictitiously named defendant is  
26 responsible in some manner for the occurrences herein alleged and the damages caused  
27 thereby.

1 9. At all times mentioned herein, the term "Defendants" includes KUSTOM, BILLABONG  
2 USA, BILLABONG RETAIL, GMS, BILLABONG INT'L, BURLEIGH and DOES 1-  
3 20.

4 10. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
5 times mentioned herein have conducted business within the State of California.

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

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

### 19 JURISDICTION

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

25 14. This Court has jurisdiction over Defendants named herein because Defendants either  
26 reside or are located in this State or are foreign corporations authorized to do business in  
27 California, are registered with the California Secretary of State, or who do sufficient  
28

1 business in California, have sufficient minimum contacts with California, or otherwise  
2 intentionally avail themselves of the markets within California through their manufacture,  
3 distribution, promotion, marketing, or sale of their products within California to render  
4 the exercise of jurisdiction by the California courts permissible under traditional notions  
5 of fair play and substantial justice.

6 15. Venue is proper in the County of Marin because one or more of the instances of wrongful  
7 conduct occurred, and continues to occur, in County of Marin and/or because Defendants  
8 conducted, and continue to conduct, business in County of Marin with respect to the  
9 consumer product that is the subject of this action.

10  
11 **BACKGROUND AND PRELIMINARY FACTS**

12 16. In 1986, California voters approved an initiative to address growing concerns about  
13 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to  
14 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,  
15 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking  
16 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections  
17 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources  
18 from contamination, to allow consumers to make informed choices about the products  
19 they buy, and to enable persons to protect themselves from toxic chemicals as they see  
20 fit.

21 17. Proposition 65 requires the Governor of California to publish a list of chemicals known to  
22 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*  
23 § 25249.8. The list, which the Governor updates at least once a year, contains over 700  
24 chemicals and chemical families. Proposition 65 imposes warning requirements and  
25 other controls that apply to Proposition 65-listed chemicals.

26 18. All businesses with ten (10) or more employees that operate or sell products in California  
27 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited  
28

1 from knowingly discharging Proposition 65-listed chemicals into sources of drinking  
2 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and  
3 reasonable" warnings before exposing a person, knowingly and intentionally, to a  
4 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

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

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

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

#### 23 SATISFACTION OF PRIOR NOTICE

24 22. On or about November 20, 2013, Plaintiff gave notice of alleged violations of Health and  
25 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
26 private action to KUSTOM, BILLABONG USA, BILLABONG RETAIL, and to the  
27

1 California Attorney General, County District Attorneys, and City Attorneys for each city  
2 containing a population of at least 750,000 people in whose jurisdictions the violations  
3 allegedly occurred, concerning the products FOOTWEAR, containing DEHP.

4 23. On or about May 22, 2014, Plaintiff gave notice of alleged violations of Health and  
5 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
6 private action to KUSTOM, BILLABONG USA, BILLABONG RETAIL, GMS,  
7 BILLABONG INT'L, BURLEIGH, and to the California Attorney General, County  
8 District Attorneys, and City Attorneys for each city containing a population of at least  
9 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the  
10 products FOOTWEAR, containing DEHP.

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

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

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

26 27. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
27 gave notices of the alleged violations to KUSTOM, BILLABONG USA, BILLABONG  
28

1 RETAIL, GMS, BILLABONG INT'L, BURLEIGH and the public prosecutors  
2 referenced in Paragraphs 22 and 23.

3 28. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
4 any applicable district attorney or city attorney has commenced and is diligently  
5 prosecuting an action against the Defendants.

6  
7 **FIRST CAUSE OF ACTION**

8 (By CONSUMER ADVOCACY GROUP, INC. and against BILLABONG RETAIL, GSM,  
9 BILLABONG INT'L, BURLEIGH, KUSTOM, BILLABONG USA, and DOES 1-20 for  
10 Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986  
11 (*Health & Safety Code, §§ 25249.5, et seq.*))

12 **FOOTWEAR**

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

15 30. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
16 distributor, promoter, or retailer of FOOTWEAR, which includes but is not limited to  
17 "KUSTOM, "STYLE NAME: KAD TIDE", Men's US Size 10, Men's UK Size 9  
18 "D1013 C707", Ross Tag Code: 400084108406" ("FOOTWEAR").

19 31. FOOTWEAR contains DEHP.

20 32. Defendants knew or should have known that DEHP has been identified by the State of  
21 California as a chemical known to cause reproductive toxicity and therefore was subject  
22 to Proposition 65 warning requirements. Defendants were also informed of the presence  
23 of DEHP in FOOTWEAR within Plaintiff's notice of alleged violations further discussed  
24 above at Paragraph 22-23.

25 33. Plaintiff's allegations regarding FOOTWEAR concerns "[c]onsumer products  
26 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,  
27 storage, consumption, or other reasonably foreseeable use of a consumer good, or any  
28 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*

1 25602(b). FOOTWEAR is a consumer product, and, as mentioned herein, exposures to  
2 DEHP took place as a result of such normal and foreseeable consumption and use.

3 34. Plaintiff's allegations regarding FOOTWEAR concern occupational exposures, which  
4 "means an exposure to any employee in his or her employer's workplace." *Cal. Code*  
5 *Regs. Tit. 27, § 25602(f)*. Exposures of DEHP to Defendants' employees occurred  
6 through the course of their employment in their employers' workplaces.

7 35. Plaintiff is informed, believes, and thereon alleges that between November 20, 2010 and  
8 the present, each of the Defendants knowingly and intentionally exposed their employees  
9 and California consumers and users of FOOTWEAR, which Defendants manufactured,  
10 distributed, or sold as mentioned above, to DEHP, without first providing any type of  
11 clear and reasonable warning of such to the exposed persons before the time of exposure.  
12 Defendants have distributed and sold FOOTWEAR in California. Defendants know and  
13 intend that California consumers will use and consume FOOTWEAR, thereby exposing  
14 them to DEHP. Defendants thereby violated Proposition 65.

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

22 37. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
23 Proposition 65 as to FOOTWEAR have been ongoing and continuous to the date of the  
24 signing of this complaint, as Defendants engaged and continue to engage in conduct  
25 which violates Health and Safety Code section 25249.6, including the manufacture,  
26 distribution, promotion, and sale of FOOTWEAR, so that a separate and distinct violation



1 of Proposition 65 occurred each and every time a person was exposed to DEHP by  
2 FOOTWEAR as mentioned herein.

3 38. 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 39. 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 from FOOTWEAR, pursuant to  
8 Health and Safety Code section 25249.7(b).

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

11  
12 **PRAAYER FOR RELIEF**

13 Plaintiff demands against each of the Defendants as follows:

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

19  
20 Dated: May 28, 2014

YEROUSHALMI & ASSOCIATES

21  
22 BY: 

23 Reuben Yeroushalmi  
24 Attorneys for Plaintiff,  
25 Consumer Advocacy Group, Inc.