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Consumer Advocacy Group, Inc.

**FILED**

**JUN - 4 2014**

KIM TURNER, CLERK EMERITUS OFFICER  
MARIN COUNTY SUPERIOR COURT  
By: R. Smith, Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF MARIN

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

13 Plaintiff,

14 v.

15 BILLABONG RETAIL, INC., a California  
16 Corporation; KUSTOM FOOTWEAR USA,  
17 business entity form unknown;  
18 BILLABONG USA, business entity form  
unknown; and DOES 1-20;

19 Defendants.

CASE NO. CIV-1402013

FIRST AMENDED 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)

**BY FAX**

21  
22 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
23 defendants BILLABONG RETAIL, INC., KUSTOM FOOTWEAR USA, BILLABONG USA,  
24 and DOES 1-20 as follows:

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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 BILLABONG RETAIL INC. ("BILLABONG RETAIL") is a California corporation, doing business in the State of California at all relevant times herein.
3. Defendant KUSTOM FOOTWEAR USA ("KUSTOM") does business in the State of California at all relevant times herein.
4. Defendant BILLABONG USA ("BILLABONG USA") does business in the State of California at all relevant times herein.
5. 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.
6. At all times mentioned herein, the term "Defendants" includes BILLABONG RETAIL, KUSTOM, BILLABONG USA and DOES 1-20.
7. 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.
8. 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

1 the other Defendants. All actions of each of the Defendants alleged in this Complaint  
2 were ratified and approved by every other Defendant or their officers or managing agents.  
3 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged  
4 wrongful conduct of each of the other Defendants.

- 5 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the  
6 Defendants 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 10. 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 11. 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 12. Venue is proper in the County of Marin because one or more of the instances of wrongful  
24 conduct occurred, and continues to occur, in County of Marin and/or because Defendants  
25 conducted, and continue to conduct, business in County of Marin with respect to the  
26 consumer product that is the subject of this action.

27 **BACKGROUND AND PRELIMINARY FACTS**

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

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

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

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

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

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

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

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

8 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
9 gave notices of the alleged violations to KUSTOM, BILLABONG USA, BILLABONG  
10 RETAIL, and the public prosecutors referenced in Paragraphs 19.

11 24. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
12 any applicable district attorney or city attorney has commenced and is diligently  
13 prosecuting an action against the Defendants.

14 **FIRST CAUSE OF ACTION**

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

19 **FOOTWEAR**

20 25. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
21 reference paragraphs 1 through 24 of this complaint as though fully set forth herein.

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

25 27. FOOTWEAR contains DEHP.

26 28. Defendants knew or should have known that DEHP has been identified by the State of  
27 California as a chemical known to cause reproductive toxicity and therefore was subject  
28

1 to Proposition 65 warning requirements. Defendants were also informed of the presence  
2 of DEHP in FOOTWEAR within Plaintiff's notice of alleged violations further discussed  
3 above at Paragraph 19.

4 29. Plaintiff's allegations regarding FOOTWEAR concerns "[c]onsumer products  
5 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,  
6 storage, consumption, or other reasonably foreseeable use of a consumer good, or any  
7 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*  
8 *25602(b)*. FOOTWEAR is a consumer product, and, as mentioned herein, exposures to  
9 DEHP took place as a result of such normal and foreseeable consumption and use.

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

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

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

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

10 34. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
11 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
12 violations alleged herein will continue to occur into the future.

13 35. Based on the allegations herein, Defendants are liable for civil penalties of up to  
14 \$2,500.00 per day per individual exposure to DEHP from FOOTWEAR, pursuant to  
15 Health and Safety Code section 25249.7(b).

16 36. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
17 filing this Complaint.

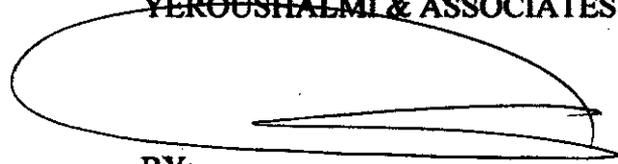
18  
19 **PRAYER FOR RELIEF**

20 Plaintiff demands against each of the Defendants as follows:

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

1 Dated: June 3, 2014

YEROUSHALMI & ASSOCIATES

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4 BY: \_\_\_\_\_

5 Reuben Yeroushalmi  
6 Attorneys for Plaintiff,  
7 Consumer Advocacy Group, Inc.

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