

**FILED**

**AUG 19 2014**

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

By: R. Smith, Deputy

1 Reuben Yeroushalmi (SBN 193981)  
Daniel D. Cho (SBN 105409)  
2 Ben Yeroushalmi (SBN 232540)  
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6 Attorneys for Plaintiff,  
7 Consumer Advocacy Group, Inc.

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

9 **COUNTY OF MARIN**

**BY FAX**

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

13 Plaintiff,

14 v.

15 BILLABONG RETAIL INC., now known as  
16 GSM RETAIL, INC., a California  
Corporation; BURLEIGH POINT LTD., a  
17 California Corporation; and DOES 1-20;

18 Defendants.

CASE NO. CIV-1402013

SECOND 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)

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21 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
22 Defendants BILLABONG RETAIL, INC., now known as GSM RETAIL, INC., BURLEIGH  
23 POINT, LTD., and DOES 1-20 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 BILLABONG RETAIL INC., now known as GSM RETAIL, INC.  
10 ("BILLABONG") is a California Corporation, doing business in the State of California at  
11 all relevant times herein.
- 12 3. Defendant BURLEIGH POINT, LTD. ("BURLEIGH") is a California Corporation, doing  
13 business in the State of California at all relevant times herein.
- 14 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,  
15 and therefore sues these defendants by such fictitious names. Plaintiff will amend this  
16 complaint to allege their true names and capacities when ascertained. Plaintiff is  
17 informed, believes, and thereon alleges that each fictitiously named defendant is  
18 responsible in some manner for the occurrences herein alleged and the damages caused  
19 thereby.
- 20 5. At all times mentioned herein, the term "Defendants" includes BILLABONG and  
21 BURLEIGH, and DOES 1-20.
- 22 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
23 times mentioned herein have conducted business within the State of California.
- 24 7. Upon information and belief, at all times relevant to this action, each of the Defendants,  
25 including DOES 1-20, was an agent, servant, or employee of each of the other  
26 Defendants. In conducting the activities alleged in this Complaint, each of the  
27 Defendants was acting within the course and scope of this agency, service, or  
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1 employment, and was acting with the consent, permission, and authorization of each of  
2 the other Defendants. All actions of each of the Defendants alleged in this Complaint  
3 were ratified and approved by every other Defendant or their officers or managing agents.  
4 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged  
5 wrongful conduct of each of the other Defendants.

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

### 10 JURISDICTION

- 11 9. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article  
12 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except  
13 those given by statute to other trial courts. This Court has jurisdiction over this action  
14 pursuant to Health and Safety Code section 25249.7, which allows enforcement of  
15 violations of Proposition 65 in any Court of competent jurisdiction.
- 16 10. This Court has jurisdiction over Defendants named herein because Defendants either  
17 reside or are located in this State or are foreign corporations authorized to do business in  
18 California, are registered with the California Secretary of State, or who do sufficient  
19 business in California, have sufficient minimum contacts with California, or otherwise  
20 intentionally avail themselves of the markets within California through their manufacture,  
21 distribution, promotion, marketing, or sale of their products within California to render  
22 the exercise of jurisdiction by the California courts permissible under traditional notions  
23 of fair play and substantial justice.
- 24 11. Venue is proper in the County of Marin because one or more of the instances of wrongful  
25 conduct occurred, and continues to occur, in the County of Marin and/or because  
26 Defendants conducted, and continue to conduct, business in the County of Marin with  
27 respect to the consumer product that is the subject of this action.

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**BACKGROUND AND PRELIMINARY FACTS**

12. In 1986, California voters approved an initiative to address growing concerns about exposure to toxic chemicals and declared their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp., Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking 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.

13. 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.

14. 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).

15. 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

1 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

2 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,  
3 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

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

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

16 **SATISFACTION OF PRIOR NOTICE**

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

23 19. On or about May 28, 2014, Plaintiff gave notice of alleged violations of Health and  
24 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
25 private action to BILLABONG, BURLEIGH, and to the California Attorney General,  
26 County District Attorneys, and City Attorneys for each city containing a population of at  
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1 least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning  
2 the product Footwear containing DEHP.

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

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

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

18 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
19 gave notices of the alleged violation to BILLABONG, BURLEIGH and the public  
20 prosecutors referenced in Paragraph 18-19.

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

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3 **FIRST CAUSE OF ACTION**

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

7 **FOOTWEAR**

8 25. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
9 reference paragraphs 1 through 24 of this complaint as though fully set forth herein. Each  
10 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,  
11 promoter, or retailer of FOOTWEAR, which includes but is not limited to, "KUSTOM,  
12 "STYLE NAME: KAD TIDE", Men's US Size 10, Men's UK Size 9 "D1013 C707",  
13 Ross Tag Code: 400084108406" ("FOOTWEAR").

14 26. FOOTWEAR contain DEHP.

15 27. Defendants knew or should have known that DEHP has been identified by the State of  
16 California as a chemical known to cause cancer and reproductive toxicity and therefore  
17 was subject to Proposition 65 warning requirements. Defendants were also informed of  
18 the presence of DEHP in FOOTWEAR within Plaintiff's notice of alleged violations  
19 further discussed above at Paragraphs 18-19.

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

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

3           30. Plaintiff is informed, believes, and thereon alleges that between November 20, 2010 and  
4 the present, each of the Defendants knowingly and intentionally exposed their California  
5 consumers and users of FOOTWEAR, which Defendants manufactured, distributed, or  
6 sold as mentioned above, to DEHP, without first providing any type of clear and  
7 reasonable warning of such to the exposed persons before the time of exposure.

8           Defendants have distributed and sold FOOTWEAR in California. Defendants know and  
9 intend that California consumers will use and consume FOOTWEAR, thereby exposing  
10 them to DEHP. Defendants thereby violated Proposition 65.

11           31. The principal routes of exposure are through dermal contact, ingestion and inhalation.

12           Persons sustain exposures by handling FOOTWEAR without wearing gloves or any other  
13 personal protective equipment, or by touching bare skin or mucous membranes with  
14 gloves after handling FOOTWEAR, as well as through direct and indirect hand to mouth  
15 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
16 FOOTWEAR.

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

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

1 34. 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 from FOOTWEAR, pursuant to  
3 Health and Safety Code section 25249.7(b).

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

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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.

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16 Dated: August 19, 2014

YEROUSHALMI & ASSOCIATES

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19 BY: \_\_\_\_\_

20 Reuben Yeroushalmi  
21 Attorneys for Plaintiff,  
22 Consumer Advocacy Group, Inc.  
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