

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & YEROUSHALMI***
5 9100 Wilshire Boulevard, Suite 240W
6 Beverly Hills, California 90212
7 Telephone: 310.623.1926
8 Facsimile: 310.623.1930

9 Attorneys for Plaintiff,
10 Consumer Advocacy Group, Inc.

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

SEP 09 2014

Sherri R. Carter, Executive Officer/Clerk
By: Moses Soto, Deputy

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF LOS ANGELES**

13 CONSUMER ADVOCACY GROUP, INC.,
14 in the public interest,

15 Plaintiff,

16 v.

17 J.C. PENNEY CORPORATION, INC., a
18 Delaware Corporation; J.C. PENNEY
19 COMPANY, INC., a Delaware Corporation;
20 and DOES 1-20;

21 Defendants.

CASE NO. **BC 557184**

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)

22 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
23 Defendants J.C. PENNEY CORPORATION, INC., J.C. PENNEY COMPANY, INC. and DOES
24 1-20 as follows:

THE PARTIES

- 25 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
26 organization qualified to do business in the State of California. CAG is a person within
27 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
28 as a private attorney general, brings this action in the public interest as defined under
Health and Safety Code section 25249.7, subdivision (d).

COPY

1 2. Defendant J.C. PENNEY CORPRATION, INC. (JCP CORP), is a Delaware corporation
2 doing business in the State of California at all relative times herein.

3 3. Defendant J.C. PENNEY COMPANY, INC. (JCP), is a Delaware corporation doing
4 business in the State of California at all relative times herein.

5 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
6 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
7 complaint to allege their true names and capacities when ascertained. Plaintiff is
8 informed, believes, and thereon alleges that each fictitiously named defendant is
9 responsible in some manner for the occurrences herein alleged and the damages caused
10 thereby.

11 5. At all times mentioned herein, the term "Defendants" includes JCP CORP, JCP and
12 DOES 1-20.

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

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

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

1 JURISDICTION

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

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

15 11. Venue is proper in the County of Los Angeles because one or more of the instances of
16 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
17 because Defendants conducted, and continue to conduct, business in the County of Los
18 Angeles with respect to the consumer product that is the subject of this action.

19 BACKGROUND AND PRELIMINARY FACTS

20 12. In 1986, California voters approved an initiative to address growing concerns about
21 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
22 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
23 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
24 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
25 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
26 from contamination, to allow consumers to make informed choices about the products
27 they buy, and to enable persons to protect themselves from toxic chemicals as they see
28 fit.

1 13. Proposition 65 requires the Governor of California to publish a list of chemicals known to
2 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
3 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
4 chemicals and chemical families. Proposition 65 imposes warning requirements and
5 other controls that apply to Proposition 65-listed chemicals.

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

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

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

23 17. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
24 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
25 to the list of chemicals known to the State to cause developmental male reproductive
26 toxicity. Pursuant to *Health and Safety Code* sections 25249.9 and 25249.10, twenty (20)
27 months after addition of DEHP to the list of chemicals known to the State to cause
28

1 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
2 requirements and discharge prohibitions.

3
4 **SATISFACTION OF PRIOR NOTICE**

5 18. On or about April 28, 2014, Plaintiff gave notice of alleged violations of Health and
6 Safety Code section 25249.6, concerning consumer products exposures, and occupational
7 exposures subject to a private action to J.C. PENNEY CORPORATION, INC., J.C.
8 PENNEY COMPANY, INC. and to the California Attorney General, County District
9 Attorneys, and City Attorneys for each city containing a population of at least 750,000
10 people in whose jurisdictions the violations allegedly occurred, concerning the product
11 Sunglasses, containing DEHP.

12 19. Before sending the notice of alleged violations, Plaintiff investigated the consumer
13 products involved, the likelihood that such products would cause users to suffer
14 significant exposures to DEHP and the corporate structure of each of the Defendants.

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

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

1 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
2 gave notices of the alleged violation to JCP CORP, JCP and the public prosecutors
3 referenced in Paragraph 18.

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

7
8
9 **FIRST CAUSE OF ACTION**

10 **(By CONSUMER ADVOCACY GROUP, INC. and against J.C. PENNEY**
11 **CORPORATION, INC., J.C. PENNEY COMPANY, INC. and DOES 1-20 for Violations**
12 **of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health &***
13 ***Safety Code, §§ 25249.5, et seq.))***

14 **Sunglasses**

15 24. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
16 reference paragraphs 1 through 23 of this complaint as though fully set forth herein. Each
17 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
18 promoter, or retailer of Sunglasses, which includes but is not limited to, "Aviator Style
19 Sunglasses, "ONE SIZE" Bar Code "7 04895 00254 4" "537-2287-0406" "JCP.COM"
20 "\$12" "ANTIQUE" "0988-A" "04808-2" ("Sunglasses").

21 25. Sunglasses contain DEHP.

22 26. Defendants knew or should have known that DEHP has been identified by the State of
23 California as a chemical known to cause cancer and reproductive toxicity and therefore
24 was subject to Proposition 65 warning requirements. Defendants were also informed of
25 the presence of DEHP in SUNGLASSES within Plaintiff's notice of alleged violations
26 further discussed above at Paragraph 18.

27 27. Plaintiff's allegations regarding SUNGLASSES concerns "[c]onsumer products
28 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,

1 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
2 exposure that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, §*
3 *25602(b)*. SUNGLASSES are consumer products, and, as mentioned herein, exposures
4 to DEHP took place as a result of such normal and foreseeable consumption and use.

5 28. Plaintiff’s allegations regarding SUNGLASSES also concern “[o]ccupational
6 exposure[s],” which are exposures “to any employees in his or her employer’s
7 workplace.” *Cal. Code Reg. tit. 27, § 25602(f)*. As mentioned herein, employees were
8 exposed to DEHP in their employer’s workplace as a result of handling SUNGLASSES,
9 in conjunction with packaging, shipping, distributing and/or selling SUNGLASSES,
10 among other activities, without having first been given clear and reasonable warnings that
11 such handling would cause exposures to DEHP.

12 29. Plaintiff is informed, believes, and thereon alleges that between April 28, 2011 and the
13 present, each of the Defendants knowingly and intentionally exposed their employees,
14 California consumers and users of SUNGLASSES, which Defendants manufactured,
15 distributed, or sold as mentioned above, to DEHP, without first providing any type of
16 clear and reasonable warning of such to the exposed persons before the time of exposure.
17 Defendants have distributed and sold SUNGLASSES in California. Defendants know
18 and intend that California consumers will use and consume SUNGLASSES, thereby
19 exposing them to DEHP. Defendants thereby violated Proposition 65.

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

1 31. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
2 Proposition 65 as to SUNGLASSES 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 SUNGLASSES, so that a separate and distinct
6 violation of Proposition 65 occurred each and every time a person was exposed to DEHP
7 by SUNGLASSES as mentioned herein.

8 32. 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 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
12 \$2,500.00 per day per individual exposure to DEHP from SUNGLASSES, pursuant to
13 Health and Safety Code section 25249.7(b).

14 34. 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: September 9, 2014

YEROUSHALMI & YEROUSHLAMI

25
26 BY: 

27 Reuben Yeroushalmi
28 Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.