

1 Reuben Yeroushalmi (SBN 193981)
Daniel D. Cho (SBN 105409)
2 Ben Yeroushalmi (SBN 232540)
YEROUSHALMI & YEROUSHALMI
3 An Association of Independent Law Corporations
9100 Wilshire Boulevard, Suite 240W
4 Beverly Hills, California 90212
5 Telephone: 310.623.1926
Facsimile: 310.623.1930

6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.

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

10 **COUNTY OF LOS ANGELES**

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

13 Plaintiff,

14 v.

15 **ASHLEY FOX, INC.,** a California
16 Corporation; and **DOES 1-20;**

17 Defendants.

CASE NO.

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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20 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
21 Defendants ASHLEY FOX, INC., and DOES 1-20 as follows:

22 **THE PARTIES**

- 23 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
24 organization qualified to do business in the State of California. CAG is a person within
25 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
26 as a private attorney general, brings this action in the public interest as defined under
27 Health and Safety Code section 25249.7, subdivision (d).
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- 1 2. Defendant ASHLEY FOX, INC. ("ASHLEY") does business in the State of California at
2 all relevant times herein.
- 3 3. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
4 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
5 complaint to allege their true names and capacities when ascertained. Plaintiff is
6 informed, believes, and thereon alleges that each fictitiously named defendant is
7 responsible in some manner for the occurrences herein alleged and the damages caused
8 thereby.
- 9 4. At all times mentioned herein, the term "Defendants" includes ASHLEY and DOES 1-
10 20.
- 11 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
12 times mentioned herein have conducted business within the State of California.
- 13 6. Upon information and belief, at all times relevant to this action, each of the Defendants,
14 including DOES 1-20, was an agent, servant, or employee of each of the other
15 Defendants. In conducting the activities alleged in this Complaint, each of the
16 Defendants was acting within the course and scope of this agency, service, or
17 employment, and was acting with the consent, permission, and authorization of each of
18 the other Defendants. All actions of each of the Defendants alleged in this Complaint
19 were ratified and approved by every other Defendant or their officers or managing agents.
20 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
21 wrongful conduct of each of the other Defendants.
- 22 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
23 Defendants was a person doing business within the meaning of Health and Safety Code
24 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
25 employees at all relevant times.

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JURISDICTION

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

BACKGROUND AND PRELIMINARY FACTS

11. 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.

- 1 12. 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 13. 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 14. 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 15. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
19 Phthalate, also known as Bis (2-ethylhexyl) phthalate (“DEHP”)-bearing products of
20 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
21 chemicals of such products without first providing clear and reasonable warnings of such
22 to the exposed persons prior to the time of exposure. Plaintiff later discerned that
23 Defendants engaged in such practice.
- 24 16. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
25 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
26 to the list of chemicals known to the State to cause developmental male reproductive
27 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
28 months after addition of DEHP to the list of chemicals known to the State to cause

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

3 **SATISFACTION OF PRIOR NOTICE**

- 4 17. On or about May 8, 2014, Plaintiff gave notice of alleged violations of Health and Safety
5 Code section 25249.6, concerning consumer products exposures and occupational
6 exposures, subject to a private action to ASHLEY and to the California Attorney General,
7 County District Attorneys, and City Attorneys for each city containing a population of at
8 least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning
9 the product Sunglasses containing DEHP.
- 10 18. Before sending the notice of alleged violations, Plaintiff investigated the consumer
11 products involved, the likelihood that such products would cause users to suffer
12 significant exposures to DEHP and the corporate structure of each of the Defendants.
- 13 19. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
14 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
15 Plaintiff who executed the certificate had consulted with at least one person with relevant
16 and appropriate expertise who reviewed data regarding the exposures to DEHP the
17 subject Proposition 65-listed chemicals of this action. Based on that information, the
18 attorney for Plaintiff who executed the Certificate of Merit believed there was a
19 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
20 to the Certificate of Merit served on the Attorney General the confidential factual
21 information sufficient to establish the basis of the Certificate of Merit.
- 22 20. Plaintiff's notices of alleged violations also included a Certificate of Service and a
23 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
24 (Proposition 65) A Summary." *Health & Safety Code § 25249.7(d)*.
- 25 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
26 gave notices of the alleged violation to ASHLEY and the public prosecutors referenced in
27 Paragraph 17.
- 28

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

4 **FIRST CAUSE OF ACTION**

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

8 **Sunglasses**

9 23. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
10 reference paragraphs 1 through 22 of this complaint as though fully set forth herein. Each
11 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
12 promoter, or retailer of SUNGLASSES, which includes but is not limited to, “Aviator
13 EYEWEAR, “3773 Italy Design”, “AVIATOR SUNGLASS”, “UV400”, “27526”,
14 “IMPACT RESISTANT POLYCARBONATE”, Barcode:2 010020 037731”
15 (“SUNGLASSES”).

16 24. SUNGLASSES contain DEHP.

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

22 26. Plaintiff's allegations regarding SUNGLASSES concerns “[c]onsumer products
23 exposure[s],” which “is an exposure that results from a person's acquisition, purchase,
24 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
25 exposure that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, §*
26 *25602(b)*. SUNGLASSES are consumer products, and, as mentioned herein, exposures
27 to DEHP took place as a result of such normal and foreseeable use.

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

5 28. Plaintiff is informed, believes, and thereon alleges that between May 8, 2011 and the
6 present, each of the Defendants knowingly and intentionally exposed their employees and
7 California consumers and users of SUNGLASSES, which Defendants manufactured,
8 distributed, or sold as mentioned above, to DEHP, without first providing any type of
9 clear and reasonable warning of such to the exposed persons before the time of exposure.
10 Defendants have distributed and sold SUNGLASSES in California. Defendants know
11 and intend that California consumers will use and consume SUNGLASSES, thereby
12 exposing them to DEHP. Defendants thereby violated Proposition 65.

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

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

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1 31. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
3 violations alleged herein will continue to occur into the future.

4 32. Based on the allegations herein, Defendants are liable for civil penalties of up to
5 \$2,500.00 per day per individual exposure to DEHP from SUNGLASSES, pursuant to
6 Health and Safety Code section 25249.7(b).

7 33. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
8 filing this Complaint.

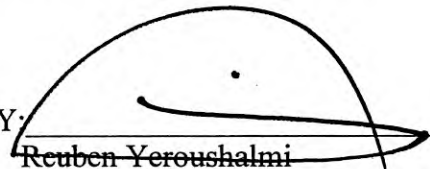
9 **PRAYER FOR RELIEF**

10 Plaintiff demands against each of the Defendants as follows:

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

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18 Dated: February 20, 2015

YEROUSHALMI & YEROUSHLAMI

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21 BY: 
22 Reuben Yeroushalmi
23 Attorneys for Plaintiff,
24 Consumer Advocacy Group, Inc.
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