

1 Reuben Yeroushalmi (SBN 193981)  
2 Ben Yeroushalmi (SBN 232540)  
3 Peter T. Sato (SBN 238486)  
4 **YEROUSHALMI & YEROUSHALMI**  
5 An Association of Independent Law Corporations  
6 9100 Wilshire Boulevard, Suite 240W  
7 Beverly Hills, California 90212  
8 Telephone: 310.623.1926  
9 Facsimile: 310.623.1930

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

ENFORCED  
FILED  
ALAMEDA COUNTY

JUN 23 2016

CLERK OF THE SUPERIOR COURT

Anita Dhir

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF ALAMEDA**

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

16 Plaintiff,

17 v.

18 KMART CORPORATION, a Michigan  
19 Corporation; and DOES 1-20;

20 Defendants.

CASE NO. R16820735

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)

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

23 **THE PARTIES**

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

BY FAX

- 1 2. Defendant KMART CORPORATION (“KMART”) is a Michigan Corporation, doing  
2 business in the State of California at all relevant times herein.
- 3 3. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-  
4 20, and therefore sues these defendants by such fictitious names. Plaintiff will amend  
5 this 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 “Defendant” includes KMART  
10 CORPORATION, and DOES 1-20.
- 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  
20 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated  
21 the alleged 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.

26 **JURISDICTION**

- 27 8. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article  
28 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except

1 those given by statute to other trial courts. This Court has jurisdiction over this action  
2 pursuant to Health and Safety Code section 25249.7, which allows enforcement of  
3 violations of Proposition 65 in any Court of competent jurisdiction.

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

12 10. Venue is proper in the County of Alameda because one or more of the instances of  
13 wrongful conduct occurred, and continues to occur, in the County of Alameda and/or  
14 because Defendants conducted, and continue to conduct, business in the County of  
15 Alameda with respect to the consumer product that is the subject of this action.

#### 16 **BACKGROUND AND PRELIMINARY FACTS**

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

26 12. Proposition 65 requires the Governor of California to publish a list of chemicals known  
27 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*  
28 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains

1 over 700 chemicals and chemical families. Proposition 65 imposes warning  
2 requirements and other controls that apply to Proposition 65-listed chemicals.

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

9 14. Proposition 65 provides that any person "violating or threatening to violate" the statute  
10 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §  
11 25249.7. "Threaten to violate" means "to create a condition in which there is a  
12 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).  
13 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,  
14 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

15 15. Plaintiff identified certain practices of manufacturers and distributors of products  
16 bearing Di (2-ethylhexyl) phthalate (“DEHP”), exposing, knowingly and intentionally,  
17 persons in California to said Proposition 65-listed chemical without first providing clear  
18 and reasonable warnings to the exposed persons prior to the time of exposure. Plaintiff  
19 later discerned that Defendants engaged in such practice.

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

27 **SATISFACTION OF PRIOR NOTICE**

1 17. On or about July 2, 2015, Plaintiff gave notice of alleged violations of Health and Safety  
2 Code section 25249.6, concerning consumer products exposures, subject to a private  
3 action to KMART CORPORATION, and to the California Attorney General, County  
4 District Attorneys, and City Attorneys for each city containing a population of at least  
5 750,000 people in whose jurisdictions the violations allegedly occurred, concerning  
6 Wrenches with Vinyl Grip containing DEHP.

7 18. Before sending the notice of alleged violations, Plaintiff investigated the consumer  
8 products involved, the likelihood that such products would cause users to suffer  
9 significant exposures to DEHP, and the corporate structure of each of the Defendants.

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

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

22 21. Plaintiff is commencing this action more than sixty (60) days from the dates that  
23 Plaintiff gave notices of the alleged violation to KMART CORPORATION, and the  
24 public prosecutors referenced in Paragraph 17.

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

1 **FIRST CAUSE OF ACTION**

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

5 **Wrenches with Vinyl Grip**

- 6 23. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
7 reference paragraphs 1 through 22 of this complaint as though fully set forth herein.  
8 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
9 distributor, promoter, or retailer of Wrenches with Vinyl Grip, which includes but is not  
10 limited to, CALA 2PC Adjustable Wrench Set; Set Includes: 6" Adjustable Wrench Set,  
11 8" Adjustable Wrench; KDE2AWS; Made in China; Imported BY; CALA Industries;  
12 UPC #: 0 810005 020015 ("WRENCHES").
- 13 24. WRENCHES contain DEHP.
- 14 25. Defendants knew or should have known that DEHP has been identified by the State of  
15 California as a chemical known to cause cancer and reproductive toxicity and therefore  
16 was subject to Proposition 65 warning requirements. Defendants were also informed of  
17 the presence of DEHP in WRENCHES within Plaintiff's notice of alleged violations  
18 further discussed above at Paragraph 17.
- 19 26. Plaintiff's allegations regarding WRENCHES concerns "[c]onsumer products  
20 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,  
21 storage, consumption, or other reasonably foreseeable use of a consumer good, or any  
22 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*  
23 *25602(b)*. WRENCHES is a consumer product, and, as mentioned herein, exposures to  
24 DEHP took place as a result of such normal and foreseeable use.
- 25 27. The principal routes of exposure are through dermal contact, direct and indirect hand to  
26 mouth exposure, and, possibly, inhalation. Persons sustained exposures by handling  
27 WRENCHES without wearing gloves or by touching bare skin or mucus membranes  
28 with or without gloves after handling WRENCHES, or through direct and indirect hand

1 to mouth contact, hand to food to mouth, hand to mucous membrane. as well as through  
2 environmental mediums that carry the DEHP once contained within the WRENCHES.

3 28. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
4 Proposition 65 as to WRENCHES 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 WRENCHES, so that a separate and distinct  
8 violation of Proposition 65 occurred each and every time a person was exposed to DEHP  
9 by WRENCHES as mentioned herein.

10 29. 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 30. 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 WRENCHES, pursuant to  
15 Health and Safety Code section 25249.7(b).

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

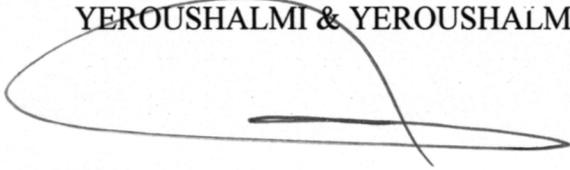
18 **PRAYER FOR RELIEF**

19 Plaintiff demands against each of the Defendants as follows:

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

1 Dated: June 22, 2016

YEROUSHALMI & YEROUSHALMI



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4 BY: \_\_\_\_\_  
5 Reuben Yeroushalmi  
6 Attorneys for Plaintiff,  
7 Consumer Advocacy Group, Inc.  
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