

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.

ENDORSED  
FILED  
ALAMEDA COUNTY

OCT 24 2016

CLERK OF THE SUPERIOR COURT

By \_\_\_\_\_ Deputy

S. IYAMU

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 SOUTHERN EXCHANGE CO., INC. DBA  
19 TEXSPORT, a Texas Corporation; KMART  
20 CORPORATION, a Michigan Corporation;  
21 KMART HOLDING CORPORATION, a  
22 Delaware Corporation; SEARS HOLDINGS  
23 CORPORATION, a Delaware Corporation;  
24 SEIS BROTHER INDUSTRIAL CORP., a  
25 business entity form unknown; SEARS  
26 BRANDS, LLC, a business entity form  
27 unknown; and DOES 1-20;

28 Defendants.

CASE NO.

RG 16 836 273

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)

Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
Defendants SOUTHERN EXCHANGE CO., INC. DBA TEXSPORT; KMART  
CORPORATION; KMART HOLDING CORPORATION; SEARS HOLDINGS

1 CORPORATION; SEIS BROTHER INDUSTRIAL CORP.; SEARS BRANDS, LLC; and  
2 DOES 1-20 as follows:

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 SOUTHERN EXCHANGE CO., INC. DBA TEXSPORT ("SOUTHERN  
10 EXCHANGE") is a Texas Corporation doing business in the State of California at all  
11 relevant times herein.
- 12 3. Defendant KMART CORPORATION ("KMART") is a Michigan Corporation doing  
13 business in the State of California at all relevant times herein.
- 14 4. Defendant KMART HOLDING CORPORATION ("KMART HOLDING") is a  
15 Delaware Corporation doing business in the State of California at all relevant times  
16 herein.
- 17 5. Defendant SEARS HOLDINGS CORPORATION ("SEARS") is a Delaware  
18 Corporation doing business in the State of California at all relevant times herein.
- 19 6. Defendant SEIS BROTHER INDUSTRIAL CORP. ("SEIS BROTHER") is a business  
20 entity form unknown doing business in the State of California at all relevant times  
21 herein.
- 22 7. Defendant SEARS BRANDS, LLC ("SEARS BRANDS") is a business entity form  
23 unknown doing business in the State of California at all relevant times herein.
- 24 8. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-  
25 20, and therefore sues these defendants by such fictitious names. Plaintiff will amend  
26 this complaint to allege their true names and capacities when ascertained. Plaintiff is  
27 informed, believes, and thereon alleges that each fictitiously named defendant is  
28

1 responsible in some manner for the occurrences herein alleged and the damages caused  
2 thereby.

3 9. At all times mentioned herein, the term "Defendants" includes SOUTHERN  
4 EXCHANGE, KMART, KMART HOLDING, SEARS, SEARS BRANDS, and DOES  
5 1-20.

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

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

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

21 **JURISDICTION**

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

27 14. This Court has jurisdiction over Defendants named herein because Defendants either  
28 reside or are located in this State or are foreign corporations authorized to do business in

1 California, are registered with the California Secretary of State, or who do sufficient  
2 business in California, have sufficient minimum contacts with California, or otherwise  
3 intentionally avail themselves of the markets within California through their  
4 manufacture, distribution, promotion, marketing, or sale of their products within  
5 California to render the exercise of jurisdiction by the California courts permissible  
6 under traditional notions of fair play and substantial justice.

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

11 **BACKGROUND AND PRELIMINARY FACTS**

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

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

- 26 18. All businesses with ten (10) or more employees that operate or sell products in  
27 California must comply with Proposition 65. Under Proposition 65, businesses are: (1)  
28 prohibited from knowingly discharging Proposition 65-listed chemicals into sources of

1 drinking water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear and  
2 reasonable” warnings before exposing a person, knowingly and intentionally, to a  
3 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

4 19. Proposition 65 provides that any person "violating or threatening to violate" the statute  
5 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §  
6 25249.7. "Threaten to violate" means "to create a condition in which there is a  
7 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).  
8 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,  
9 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

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

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

22 **SATISFACTION OF PRIOR NOTICE**

23 22. On or about March 14, 2016, 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 SEIS BROTHER, KMART, KMART HOLDING, SEARS, and to the  
26 California Attorney General, County District Attorneys, and City Attorneys for each city  
27 containing a population of at least 750,000 people in whose jurisdictions the violations  
28 allegedly occurred, concerning the product Rain Ponchos containing DEHP.

1 23. On or about March 14, 2016, Plaintiff gave notice of alleged violations of Health and  
2 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
3 private action to SOUTHERN EXCHANGE, KMART, KMART HOLDING, SEARS,  
4 and to the California Attorney General, County District Attorneys, and City Attorneys  
5 for each city containing a population of at least 750,000 people in whose jurisdictions  
6 the violations allegedly occurred, concerning the product Rainsuits containing DEHP.

7 24. 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 25. 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 26. 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 27. Plaintiff is commencing this action more than sixty (60) days from the dates that  
23 Plaintiff gave notices of the alleged violation to SOUTHERN EXCHANGE, KMART,  
24 KMART HOLDING, SEARS, SEIS BROTHER, SEARS BRANDS, and the public  
25 prosecutors referenced in Paragraphs 22-23.

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

1 **FIRST CAUSE OF ACTION**

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

6 **Rain Ponchos**

7 29. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
8 reference paragraphs 1 through 28 of this complaint as though fully set forth herein.  
9 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
10 distributor, promoter, or retailer of Rain Ponchos, which includes but is not limited to, 1)  
11 Northwest Territory® Lightweight Rain Poncho; Orange; One Size Fits Most; Made in  
12 China for Kmart Corporation; DEPT: 89; CAT: 33; KSN:0-05770921-4; UPC #: 4  
13 713273 830118; 2) Northwest Territory® Lightweight Rain Poncho; Clear; One Size  
14 Fits Most; Made in China for Kmart Corporation; DEPT: 89; CAT: 33; KSN:0-  
15 05768909-3; UPC #: 4 713273 839111 (“PONCHOS”).

16 30. PONCHOS contain DEHP.

17 31. 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 PONCHOS within Plaintiff's notice of alleged violations  
21 further discussed above at Paragraph 22.

22 32. Plaintiff's allegations regarding PONCHOS 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)*. PONCHOS is a consumer product, and, as mentioned herein, exposures to  
27 DEHP took place as a result of such normal and foreseeable use.

28 33. Plaintiff is informed, believes, and thereon alleges that between March 14, 2013, and the  
present, each of the Defendants knowingly and intentionally exposed their California

1 consumers and users of PONCHOS, which Defendants manufactured, distributed, or sold  
2 as mentioned above, to DEHP without first providing any type of clear and reasonable  
3 warning of such to the exposed persons before the time of exposure. Defendants have  
4 distributed and sold PONCHOS in California. Defendants know and intend that  
5 California consumers will use PONCHOS, thereby exposing them to DEHP. Defendants  
6 thereby violated Proposition 65.

7 34. The principal routes of exposure are through dermal contact, ingestion, including direct  
8 and indirect hand to mouth exposure, and, possibly, inhalation. Persons sustained  
9 exposures by handling and wearing PONCHOS without wearing gloves or by touching  
10 bare skin or mucus membranes with or without gloves after handling PONCHOS, or  
11 through direct and indirect hand to mouth contact, hand to food to mouth, hand to  
12 mucous membrane, as well as through environmental mediums that carry the DEHP  
13 once contained within the PONCHOS.

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

21 36. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
22 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
23 violations alleged herein will continue to occur into the future.

24 37. Based on the allegations herein, Defendants are liable for civil penalties of up to  
25 \$2,500.00 per day per individual exposure to DEHP from PONCHOS, pursuant to  
26 Health and Safety Code section 25249.7(b).

27 38. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
28 filing this Complaint.



1 **SECOND CAUSE OF ACTION**

2 (By CONSUMER ADVOCACY GROUP, INC. and against SOUTHERN EXCHANGE,  
3 KMART, KMART HOLDING, SEARS, and DOES 1-20 for Violations of Proposition 65,  
4 The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§*  
5 *25249.5, et seq.*))

6 **Rainsuits**

7 39. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
8 reference paragraphs 1 through 38 of this complaint as though fully set forth herein.  
9 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
10 distributor, promoter, or retailer of Rainsuits, which includes but is not limited to,  
11 Northwest Territory® Deluxe 3 piece Rainsuit; Includes Jacket with Detachable Hood &  
12 Pants; Size L/ XL; Made in China for Kmart Corporation; DEPT: 89; CAT: 33; SKU 0-  
13 84015811-7; UPC #: 0 49794 33691 9 (“RAINSUITS”).

14 40. RAINSUITS contain DEHP.

15 41. 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 RAINSUITS within Plaintiff's notice of alleged violations  
19 further discussed above at Paragraph 23.

20 42. Plaintiff's allegations regarding RAINSUITS 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)*. RAINSUITS is a consumer product, and, as mentioned herein, exposures to  
25 DEHP took place as a result of such normal and foreseeable use.

26 43. Plaintiff is informed, believes, and thereon alleges that between March 14, 2013, and the  
27 present, each of the Defendants knowingly and intentionally exposed their California  
28 consumers and users of RAINSUITS, which Defendants manufactured, distributed, or  
sold as mentioned above, to DEHP without first providing any type of clear and

1 reasonable warning of such to the exposed persons before the time of exposure.

2 Defendants have distributed and sold RAINSUITS in California. Defendants know and  
3 intend that California consumers will use RAINSUITS, thereby exposing them to DEHP.  
4 Defendants thereby violated Proposition 65.

5 44. The principal routes of exposure are through dermal contact, ingestion, including direct  
6 and indirect hand to mouth exposure, and, possibly, inhalation. Persons sustained  
7 exposures by handling and wearing RAINSUITS without wearing gloves or by touching  
8 bare skin or mucus membranes with or without gloves after handling RAINSUITS, or  
9 through direct and indirect hand to mouth contact, hand to food to mouth, hand to  
10 mucous membrane, as well as through environmental mediums that carry the DEHP  
11 once contained within the RAINSUITS.

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

19 46. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
20 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
21 violations alleged herein will continue to occur into the future.

22 47. Based on the allegations herein, Defendants are liable for civil penalties of up to  
23 \$2,500.00 per day per individual exposure to DEHP from RAINSUITS, pursuant to  
24 Health and Safety Code section 25249.7(b).

25 48. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
26 filing this Complaint.

27 **PRAYER FOR RELIEF**

28 Plaintiff demands against each of the Defendants as follows:

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

6  
7  
8 Dated: October 21, 2016

YEROUSHALMI & YEROUSHALMI

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10  
11 BY: 

12 Reuben Yeroushalmi  
13 Attorneys for Plaintiff,  
14 Consumer Advocacy Group, Inc.  
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