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FILED

OCT 24 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: S. Hernandez, Deputy

Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

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

Plaintiff,

v.

BENTEX GROUP, INC., a New York
Domestic Business Corporation;
NATIONAL STORES, INC. dba FALLAS
PAREDES, FACTORY 2-U, AND FALLAS
DISCOUNT STORES, a California
Corporation; FACTORY 2-U #0637, a
business entity form unknown; VIACOM
INTERNATIONAL, INC., a Delaware
Corporation; VIACOM, INC., a Delaware
Corporation; NICKELODEON, INC., a
business entity form unknown; NATIONAL
AMUSEMENTS, INC., a business entity
form unknown; and DOES 1-20;

Defendants.

CASE NO. CIV 1603877

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 BENTEX GROUP, INC.; NATIONAL STORES, INC. dba FALLAS PAREDES,
FACTORY 2-U, AND FALLAS DISCOUNT STORES; FACTORY 2-U #0637; VIACOM

COPY

1 INTERNATIONAL, INC.; VIACOM, INC.; NICKELODEON, INC.; NATIONAL
2 AMUSEMENTS, INC.; and 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 BENTEX GROUP, INC. ("BENTEX") is a New York Domestic Business
10 Corporation doing business in the State of California at all relevant times herein.
- 11 3. Defendant NATIONAL STORES, INC. dba FALLAS PAREDES, FACTORY 2-U,
12 AND FALLAS DISCOUNT STORES ("NATIONAL STORES"), is a California
13 Corporation doing business in the State of California at all relevant times herein.
- 14 4. Defendant FACTORY 2-U #0637 ("FACTORY 2-U"), is a business entity form
15 unknown doing business in the State of California at all relevant times herein.
- 16 5. Defendant VIACOM INTERNATIONAL, INC. ("VIACOM INTERNATIONAL"), is a
17 Delaware Corporation doing business in the State of California at all relevant times
18 herein.
- 19 6. Defendant VIACOM, INC. ("VIACOM"), is a Delaware Corporation doing business in
20 the State of California at all relevant times herein.
- 21 7. Defendant NICKELODEON, INC. ("NICKELODEON"), is a business entity form
22 unknown doing business in the State of California at all relevant times herein.
- 23 8. Defendant NATIONAL AMUSEMENTS, INC. ("NATIONAL AMUSEMENTS"), is a
24 business entity form unknown doing business in the State of California at all relevant
25 times herein.
- 26 9. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
27 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
28 complaint to allege their true names and capacities when ascertained. Plaintiff is

1 informed, believes, and thereon alleges that each fictitiously named defendant is
2 responsible in some manner for the occurrences herein alleged and the damages caused
3 thereby.

4 10. At all times mentioned herein, the term "Defendants" includes BENTEX; NATIONAL
5 STORES; FACTORY 2-U; VIACOM INTERNATIONAL; VIACOM;
6 NICKELODEON; NATIONAL AMUSEMENTS; and DOES 1-20.

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

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

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

22 **JURISDICTION**

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

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

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

13 BACKGROUND AND PRELIMINARY FACTS

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

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

- 1 19. All businesses with ten (10) or more employees that operate or sell products in California
2 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
3 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
4 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
5 reasonable" warnings before exposing a person, knowingly and intentionally, to a
6 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).
- 7 20. Proposition 65 provides that any person "violating or threatening to violate" the statute
8 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
9 "Threaten to violate" means "to create a condition in which there is a substantial
10 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
11 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
12 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).
- 13 21. Plaintiff identified certain practices of manufacturers and distributors of products bearing
14 Di (2-ethylhexyl) phthalate ("DEHP") exposing, knowingly and intentionally, persons in
15 California to the Proposition 65-listed chemicals of such products without first providing
16 clear and reasonable warnings of such to the exposed persons prior to the time of
17 exposure. Plaintiff later discerned that Defendants engaged in such practice.
- 18 22. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
19 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
20 to the list of chemicals known to the State to cause developmental male reproductive
21 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
22 months after addition of DEHP to the list of chemicals known to the State to cause
23 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
24 requirements and discharge prohibitions.

25 **SATISFACTION OF PRIOR NOTICE**

- 26 23. On or about April 12, 2016, Plaintiff gave notice of alleged violations of Health and
27 Safety Code section 25249.6, concerning consumer products exposures subject to a
28 private action to BENTEX; NATIONAL STORES; FACTORY 2-U; VIACOM

1 INTERNATIONAL; VIACOM; NICKELODEON; NATIONAL AMUSEMENTS; and
2 to the California Attorney General, County District Attorneys, and City Attorneys for
3 each city containing a population of at least 750,000 people in whose jurisdictions the
4 violations allegedly occurred, concerning the product CHILDREN'S POLYMER T-
5 SHIRTS, containing DEHP.

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

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

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

21 27. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
22 gave notices of the alleged violation BENTEX; NATIONAL STORES; FACTORY 2-U;
23 VIACOM INTERNATIONAL; VIACOM; NICKELODEON; NATIONAL
24 AMUSEMENTS; and the public prosecutors referenced in Paragraph 23.

25 28. 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 BENTEX; NATIONAL
3 STORES; FACTORY 2-U; VIACOM INTERNATIONAL; VIACOM; NICKELODEON;
4 NATIONAL AMUSEMENTS; and DOES 1-20 for Violations of Proposition 65, The Safe
5 Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et*
6 *seq.*))

7 **Children's Polymer T-Shirts**

8 29. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
9 reference paragraphs 1 through 28 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 Children's Polymer T-Shirts, which includes but is not limited to
12 "Teenage Mutant Ninja Turtles Shirt; 100% Polyester; RN 19109; Made in Egypt; Style
13 # 35T4995NT; Nickelodeon™; ©2015 Viacom International Inc.; Bentex Group, Inc.;
14 UPC: 024054383346; SKU: 60900812;" ("T-SHIRTS").

15 30. T-SHIRTS contain DEHP.

16 31. Defendants knew or should have known that DEHP has been identified by the State of
17 California as a chemical known to cause cancer and reproductive toxicity and therefore
18 was subject to Proposition 65 warning requirements. Defendants were also informed of
19 the presence of DEHP in T-SHIRTS within Plaintiff's notice of alleged violations further
20 discussed above at Paragraph 23.

21 32. Plaintiff's allegations regarding T-SHIRTS concern "[c]onsumer products exposure[s],"
22 which "is an exposure that results from a person's acquisition, purchase, storage,
23 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
24 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*. T-
25 SHIRTS are consumer products, and, as mentioned herein, exposures to lead took place
26 as a result of such normal and foreseeable consumption and use.

27 33. Plaintiff's allegations regarding T-SHIRTS also concern occupational exposure[s], which
28 "means an exposure to any employee in her or her employer's workplace." *Cal. Code*
Regs. tit. 27, § 25602(f). Exposures to DEHP to Defendants' employees occurred
through the course of their employment in their employer's workplaces.

1 34. Plaintiff is informed, believes, and thereon alleges that between April 12, 2013 and the
2 present, each of the Defendants knowingly and intentionally exposed their employees,
3 California consumers of T-SHIRTS, which Defendants manufactured, distributed, or sold
4 as mentioned above, to DEHP without first providing any type of clear and reasonable
5 warning of such to the exposed persons before the time of exposure. Defendants have
6 distributed and sold T-SHIRTS in California. Defendants know and intend that
7 California consumers will use and consume T-SHIRTS, thereby exposing them to DEHP.
8 Defendants thereby violated Proposition 65.

9 35. The principal routes of exposure are through dermal contact, ingestion and inhalation.
10 Persons sustain exposures by wearing T-SHIRTS, handling T-SHIRTS without wearing
11 gloves or any other personal protective equipment, or by touching bare skin or mucous
12 membranes with gloves after handling T-SHIRTS, as well as through direct and indirect
13 hand to mouth contact, hand to mucous membrane, or breathing in particulate matter
14 dispersed from T-SHIRTS.

15 36. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
16 Proposition 65 as to T-SHIRTS have been ongoing and continuous to the date of the
17 signing of this complaint, as Defendants engaged and continue to engage in conduct
18 which violates Health and Safety Code section 25249.6, including the manufacture,
19 distribution, promotion, and sale of T-SHIRTS, so that a separate and distinct violation of
20 Proposition 65 occurred each and every time a person was exposed to DEHP by T-
21 SHIRTS as mentioned herein.

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

25 38. Based on the allegations herein, Defendants are liable for civil penalties of up to
26 \$2,500.00 per day per individual exposure to DEHP from T-SHIRTS, pursuant to Health
27 and Safety Code section 25249.7(b).
28

1 39. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
2 filing this Complaint.

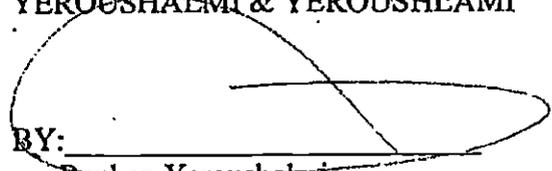
3 **PRAYER FOR RELIEF**

4 Plaintiff demands against each of the Defendants as follows:

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

10
11 Dated: October 18, 2016

YEROUSHALMI & YEROUSHLAMI

12
13 BY: 

14 Reuben Yeroushalmi
15 Attorneys for Plaintiff,
16 Consumer Advocacy Group, Inc.
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