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ORIGINAL FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

FEB 01 2017

Sherri R. Carter, Executive Officer/Clerk
By: Shaunya Bolden, Deputy

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

13 **COUNTY OF LOS ANGELES**

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

16 Plaintiff,

17 v.

18 PINKY FOOTWEAR, INC., a California
19 Corporation; ONLY 123 FASHION, a
20 business entity form unknown; 123
21 FASHION, a business entity form unknown;
22 and DOES 1-20;
23 Defendants.

CASE NO. **BC 649033**

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)

24 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
25 Defendants ONLY 123 FASHION, 123 FASHION, PINKY FOOTWEAR, INC., and DOES 1-
26 20 as follows:

27 **THE PARTIES**

- 28 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
organization qualified to do business in the State of California. CAG is a person within
the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting

1 as a private attorney general, brings this action in the public interest as defined under
2 Health and Safety Code section 25249.7, subdivision (d).

3 2. Defendant PINKY FOOTWEAR, INC. ("PINKY INC") is a California Corporation,
4 doing business in the State of California at all relevant times herein.

5 3. Defendant ONLY 123 FASHION ("ONLY 123") is a business entity form unknown,
6 doing business in the State of California at all relevant times herein.

7 4. Defendant 123 FASHION ("123 FASHION") is a business entity form unknown, doing
8 business in the State of California at all relevant times herein.

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

15 6. At all times mentioned herein, the term "Defendants" includes PINKY INC, ONLY 123,
16 123 FASHION, and DOES 1-20.

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

19 8. Upon information and belief, at all times relevant to this action, each of the Defendants,
20 including DOES 1-20, was an agent, servant, or employee of each of the other
21 Defendants. In conducting the activities alleged in this Complaint, each of the
22 Defendants was acting within the course and scope of this agency, service, or
23 employment, and was acting with the consent, permission, and authorization of each of
24 the other Defendants. All actions of each of the Defendants alleged in this Complaint
25 were ratified and approved by every other Defendant or their officers or managing
26 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated
27 the alleged wrongful conduct of each of the other Defendants.
28

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

5 **JURISDICTION**

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

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

19 12. Venue is proper in the County of Los Angeles because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
21 because Defendants conducted, and continue to conduct, business in the County of Los
22 Angeles with respect to the consumer product that is the subject of this action.

23 **BACKGROUND AND PRELIMINARY FACTS**

24 13. In 1986, California voters approved an initiative to address growing concerns about
25 exposure to toxic chemicals and declared their right "[t]o be informed about exposures
26 to chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
27 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
28 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections

1 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
2 from contamination, to allow consumers to make informed choices about the products
3 they buy, and to enable persons to protect themselves from toxic chemicals as they see
4 fit.

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

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

16 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
17 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
18 25249.7. "Threaten to violate" means "to create a condition in which there is a
19 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
20 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
21 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

22 17. Plaintiff identified certain practices of manufacturers and distributors of products
23 bearing Di Isononyl Phthalate ("DINP"), also known as diisononyl phthalate, Di (2-
24 ethylhexyl) phthalate ("DEHP"), also known as Bis (2-ethylhexyl) phthalate, and Di-n-
25 Butyl Phthalate ("DBP") of exposing, knowingly and intentionally, persons in California
26 to the Proposition 65-listed chemicals of such products without first providing clear and
27 reasonable warnings of such to the exposed persons prior to the time of exposure.
28 Plaintiff later discerned that Defendants engaged in such practice.

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

8 19. On December 2, 2005, the Governor of California added DBP to the list of chemicals
9 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).
10 DBP is known to the State to cause developmental, female, and male reproductive
11 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty
12 (20) months after addition DBP to the list of chemicals known to the State to cause
13 reproductive toxicity, DBP became fully subject to Proposition 65 warning requirements
14 and discharge prohibitions.

15 20. On December 20, 2013, the Governor of California added DINP to the list of chemicals
16 known to the State to cause cancer. Pursuant to Health and Safety Code sections
17 25249.9 and 25249.10, twenty (20) months after addition of DINP to the list of
18 chemicals known to the State to cause cancer, DINP became fully subject to Proposition
19 65 warning requirements and discharge prohibitions.

20 **SATISFACTION OF PRIOR NOTICE**

21 21. On or about April 20, 2016, Plaintiff served notice of alleged violations of Health and
22 Safety Code section 25249.6, concerning consumer products exposures, subject to a
23 private action to ONLY 123, 123 FASHION, PINKY INC, and to the California
24 Attorney General, County District Attorneys, and City Attorneys for each city
25 containing a population of at least 750,000 people in whose jurisdictions the violations
26 allegedly occurred, concerning the product Vinyl Women's Flats containing DINP and
27 DEHP.
28

- 1 22. On or about June 16, 2016, Plaintiff served notice of alleged violations of Health and
2 Safety Code section 25249.6, concerning consumer products exposures, subject to a
3 private action to ONLY 123, 123 FASHION, PINKY INC, and to the California
4 Attorney General, County District Attorneys, and City Attorneys for each city
5 containing a population of at least 750,000 people in whose jurisdictions the violations
6 allegedly occurred, concerning the product Vinyl/Synthetic Women's Flip Flops
7 containing DEHP and DBP.
- 8 23. Before sending the notice of alleged violations, Plaintiff investigated the consumer
9 products involved, the likelihood that such products would cause users to suffer
10 significant exposures to DINP, DEHP, and DBP, and the corporate structure of each of
11 the Defendants.
- 12 24. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
13 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney
14 for Plaintiff who executed the certificate had consulted with at least one person with
15 relevant and appropriate expertise who reviewed data regarding the exposures to DINP,
16 DEHP, and DBP, the subject Proposition 65-listed chemicals of this action. Based on
17 that information, the attorney for Plaintiff who executed the Certificate of Merit believed
18 there was a reasonable and meritorious case for this private action. The attorney for
19 Plaintiff attached to the Certificate of Merit served on the Attorney General the
20 confidential factual information sufficient to establish the basis of the Certificate of
21 Merit.
- 22 25. 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 26. Plaintiff is commencing this action more than sixty (60) days from the dates that
26 Plaintiff gave notices of the alleged violation to PINKY INC, ONLY 123, 123
27 FASHION, and the public prosecutors referenced in Paragraphs 21 and 22.
- 28

1 27. 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 ONLY 123, 123 FASHION,**
6 **PINKY INC, and DOES 1-10 for Violations of Proposition 65, The Safe Drinking Water**
7 **and Toxic Enforcement Act of 1986 (Health & Safety Code, §§ 25249.5, et seq.))**

8 **Vinyl Women's Flats**

9 28. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
10 reference paragraphs 1 through 27 of this complaint as though fully set forth herein.
11 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
12 distributor, promoter, or retailer of Vinyl Women's Flats, which includes but is not
13 limited to, ""Via Pinky Collection® Women's Flats, Color: Black with Floral
14 Decoration, Diamond Sequences Around Petal Edges, Size 8.5, "RENOY-02 8.5",
15 "ALL MAN MADE MATERIALS", Only \$1\$2\$3 Fashion, \$FLATS TRENDY-KUMI
16 STY 47651-C100\$123; UPC: 10897940 "" ("BLACK FLATS").

17 29. BLACK FLATS contain DINP and DEHP.

18 30. Defendants knew or should have known that DINP and DEHP have been identified by
19 the State of California as chemicals known to cause cancer, developmental, and
20 reproductive toxicity and therefore was subject to Proposition 65 warning requirements.
21 Defendants were also informed of the presence of DINP and DEHP in BLACK FLATS
22 within Plaintiff's notice of alleged violations further discussed above at Paragraph 21.

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

1 32. Plaintiff is informed, believes, and thereon ~~alleges that~~ between April 20, 2013 and the
2 present, each of the Defendants knowingly and intentionally exposed California
3 consumers and users of BLACK FLATS, which Defendants manufactured, distributed,
4 or sold as mentioned above, to DINP and DEHP, without first providing any type of
5 clear and reasonable warning of such to the exposed persons before the time of
6 exposure. Defendants have distributed and sold BLACK FLATS in California.
7 Defendants know and intend that California consumers will use BLACK FLATS,
8 thereby exposing them to DINP and DEHP. Defendants thereby violated Proposition
9 65.

10 33. The principal routes of exposure were through dermal contact, trans-dermal absorption,
11 ingestion, including hand to mouth pathways, and inhalation. Persons sustained
12 exposures by wearing and handling BLACK FLATS or by touching bare skin or mucus
13 membranes after handling BLACK FLATS, or through direct and indirect hand to
14 mouth contact, hand to food to mouth, direct contact to food then to mouth, hand to
15 mucous membrane, or breathing in particulate matter emanating from BLACK FLATS,
16 as well as through environmental mediums that carry the DINP and DEHP once
17 contained within the BLACK FLATS.

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

25 35. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
26 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
27 violations alleged herein will continue to occur into the future.
28

1 36. Based on the allegations herein, Defendants are liable for civil penalties of up to
2 \$2,500.00 per day per individual exposure to DINP and DEHP from BLACK FLATS,
3 pursuant to Health and Safety Code section 25249.7(b).

4 37. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
5 filing this Complaint.

6
7 **SECOND CAUSE OF ACTION**

8 **(By CONSUMER ADVOCACY GROUP, INC. and against ONLY 123, 123 FASHION,
9 PINKY INC, and DOES 11-20 for Violations of Proposition 65, The Safe Drinking Water
10 and Toxic Enforcement Act of 1986 (Health & Safety Code, §§ 25249.5, et seq.))**

11 **Vinyl/Synthetic Women's Flip Flops**

12 38. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
13 reference paragraphs 1 through 37 of this complaint as though fully set forth herein.
14 Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
15 distributor, promoter, or retailer of Vinyl/Synthetic Women's Flip Flops, which includes
16 but is not limited to, ""Annie Pinky®" Women's Flip Flops, Yellow; 37, 1203; 6;
17 "Upper: Synthetic, Lining&Sock: Synthetic, Sole: Synthetic, Made in China"; "ONLY
18 \$1 \$2 \$3 FASHION JELLY SANDALS VIA JR STY:ALDORAJR\$123";
19 "*10940104*" Dp:10" ("PINKY FLIP FLOPS").

20 39. PINKY FLIP FLOPS contain DEHP and DBP.

21 40. Defendants knew or should have known that DEHP and DBP have been identified by
22 the State of California as chemicals known to cause cancer, developmental, and
23 reproductive toxicity and therefore was subject to Proposition 65 warning requirements.
24 Defendants were also informed of the presence of DEHP and DBP in PINKY FLIP
25 FLOPS within Plaintiff's notice of alleged violations further discussed above at
26 Paragraph 22.

27 41. Plaintiff's allegations regarding PINKY FLIP FLOPS concerns "[c]onsumer products
28 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
storage, consumption, or other reasonably foreseeable use of a consumer good, or any

1 exposure that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, §*
2 25602(b). PINKY FLIP FLOPS are consumer products, and, as mentioned herein,
3 exposures to DEHP and DBP took place as a result of such normal and foreseeable use.

4 42. Plaintiff is informed, believes, and thereon alleges that between June 16, 2013 and the
5 present, each of the Defendants knowingly and intentionally exposed California
6 consumers and users of PINKY FLIP FLOPS, which Defendants manufactured,
7 distributed, or sold as mentioned above, to DEHP and DBP, without first providing any
8 type of clear and reasonable warning of such to the exposed persons before the time of
9 exposure. Defendants have distributed and sold PINKY FLIP FLOPS in California.
10 Defendants know and intend that California consumers will use PINKY FLIP FLOPS,
11 thereby exposing them to DEHP and DBP. Defendants thereby violated Proposition 65.

12 43. The principal routes of exposure were through dermal contact, trans-dermal absorption,
13 ingestion, including hand to mouth pathways, and inhalation. Persons sustained
14 exposures by wearing and handling PINKY FLIP FLOPS or by touching bare skin or
15 mucus membranes after handling PINKY FLIP FLOPS, or through direct and indirect
16 hand to mouth contact, hand to food to mouth, direct contact to food then to mouth, hand
17 to mucous membrane, or breathing in particulate matter emanating from PINKY FLIP
18 FLOPS, as well as through environmental mediums that carry the DEHP and DBP once
19 contained within the PINKY FLIP FLOPS.

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

1 45. 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 46. 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 and DBP from PINKY FLIP
6 FLOPS, pursuant to Health and Safety Code section 25249.7(b).

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

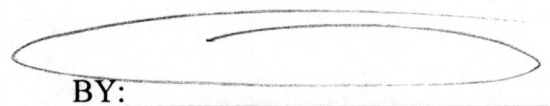
9 **PRAYER FOR RELIEF**

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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17
18 Dated: February 1, 2017

YEROUSHALMI & YEROUSHALMI

19
20 

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