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Superior Court of California
County of Los Angeles

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11 Consumer Advocacy Group, Inc.

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 UPPER CANADA SOAP & CANDLE
19 MAKERS CORPORATION, a business
20 entity form unknown; THE TJX
21 COMPANIES, INC., a Delaware
22 Corporation; T.J. MAXX OF CA, LLC, a
23 Delaware Limited Liability Company; NBC
24 FOURTH REALTY CORP., a Nevada
25 Corporation; MARMAXX OPERATING
26 CORP., a New York Domestic Business
27 Corporation; T.J. MAXX, a business entity
28 form unknown and DOES 1-20;

Defendants.

CASE NO.

BC 6 4 0 3 2 5

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 UPPER CANADA SOAP & CANDLE MAKERS CORPORATION; THE TJX

1 COMPANIES, INC.; T.J. MAXX OF CA, LLC; NBC FOURTH REALTY CORP.;
2 MARMAXX OPERATING CORP.; T.J. MAXX; 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 UPPER CANADA SOAP & CANDLE MAKERS CORPORATION
10 ("UPPER CANADA") is a business entity form unknown doing business in the State of
11 California at all relevant times herein.
- 12 3. Defendant THE TJX COMPANIES, INC. ("TJX") is a Delaware Corporation doing
13 business in the State of California at all relevant times herein.
- 14 4. Defendant T.J. MAXX OF CA, LLC ("T.J. MAXX") is a Delaware Limited Liability
15 Company doing business in the State of California at all relevant times herein.
- 16 5. Defendant NBC FOURTH REALTY CORP. ("NBC") is a Nevada Corporation doing
17 business in the State of California at all relevant times herein.
- 18 6. Defendant MARMAXX OPERATING CORP. ("MARMAXX") is a New York
19 Domestic Business Corporation doing business in the State of California at all relevant
20 times herein.
- 21 7. Defendant T.J. MAXX ("TJ") is a business entity form unknown doing business in the
22 State of California at all relevant times herein.
- 23 8. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
24 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
25 complaint to allege their true names and capacities when ascertained. Plaintiff is
26 informed, believes, and thereon alleges that each fictitiously named defendant is
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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, UPPER CANADA, TJX,
4 T.J. MAXX, NBC, MARMAXX, TJ, and DOES 1-20.

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

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

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

20 JURISDICTION

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

26 14. This Court has jurisdiction over Defendants named herein because Defendants either
27 reside or are located in this State or are foreign corporations authorized to do business in
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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 manufacture,
4 distribution, promotion, marketing, or sale of their products within California to render
5 the exercise of jurisdiction by the California courts permissible under traditional notions
6 of fair play and substantial justice.

7 15. Venue is proper in the County of Los Angeles because one or more of the instances of
8 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
9 because Defendants conducted, and continue to conduct, business in the County of Los
10 Angeles 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 to
14 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 to
22 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
23 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
24 chemicals and chemical families. Proposition 65 imposes warning requirements and
25 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 California
27 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
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1 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
2 water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear and
3 reasonable” warnings before exposing a person, knowingly and intentionally, to a
4 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

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

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

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

24 **SATISFACTION OF PRIOR NOTICE**

25 22. On or about August 19, 2016, Plaintiff gave notice of alleged violations of Health and
26 Safety Code section 25249.6, concerning consumer products, subject to a private action
27 to UPPER CANADA, TJX, T.J. MAXX, NBC, MARMAXX, TJ, and to the California
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1 Attorney General, County District Attorneys, and City Attorneys for each city containing
2 a population of at least 750,000 people in whose jurisdictions the violations allegedly
3 occurred, concerning the product body massagers containing DEHP.

4 23. Before sending the notices of alleged violation, Plaintiff investigated the consumer
5 products involved, the likelihood that such products would cause users to suffer
6 significant exposures to DEHP, and the corporate structure of each of the Defendants.

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

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

19 26. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
20 gave notices of the alleged violations to UPPER CANADA, TJX, T.J. MAXX, NBC,
21 MARMAXX, TJ, and the public prosecutors referenced in Paragraph 22.

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

25 **FIRST CAUSE OF ACTION**

26 **(By CONSUMER ADVOCACY GROUP, INC. and against UPPER CANADA, TJX, T.J.**
27 **MAXX, NBC, MARMAXX, TJ, and DOES 1-20 for Violations of Proposition 65, The Safe**

1 **Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et***
2 ***seq.*)**

3 **Body Massagers with Polymer Cords**

4 28. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
5 reference paragraphs 1 through 27 of this complaint as though fully set forth herein.

6 29. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
7 distributor, promoter, or retailer of Body Massagers with Polymer Cords, which includes
8 but is not limited to ““theraWell”; Body Massager; “Do-it-Yourself Massage Therapy”;
9 “DIRECTIONS: Place the Body Massager behind your back or over your shoulder
10 whole holding the rope at each end. Move the rope to the desired area while applying
11 pressure. Apply more pressure for a deeper, more invigorating massage. This massager
12 can also be used on arms and legs.”; theraWell AN UPPER CANADA COMPANY
13 Mississauga, Canada”; “Made in China”; “www.uppercanadasoap.com”; W768107TL;
14 “TJ Maxx 73-9105-384003-000799-03-2; “W768107TL”; UPC:064323161619”
15 (“BODY MASSAGER”).

16 30. BODY MASSAGER contains 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 BODY MASSAGER within Plaintiff's notice of alleged
21 violations further discussed above at Paragraph 22.

22 32. Plaintiff's allegations regarding BODY MASSAGER concern “[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)*. BODY MASSAGER are consumer products, and, as mentioned herein,
27 exposures to DEHP took place as a result of such normal and foreseeable consumption
28 and use.

1 33. Plaintiff is informed, believes, and thereon alleges that between August 19, 2013 and the
2 present, each of the Defendants knowingly and intentionally exposed California
3 consumers and users of BODY MASSAGER, which Defendants manufactured,
4 distributed, or sold as mentioned above, to DEHP, without first providing any type of
5 clear and reasonable warning of such to the exposed persons before the time of exposure.
6 Defendants have distributed and sold BODY MASSAGER in California. Defendants
7 know and intend that California consumers will use and consume BODY MASSAGER,
8 thereby exposing them to DEHP. Defendants thereby violated Proposition 65.

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

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

22 36. 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 37. 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 BODY MASSAGER, pursuant
27 to Health and Safety Code section 25249.7(b).

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

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4 **PRAYER FOR RELIEF**

5 Plaintiff demands against each of the Defendants as follows:

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

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12 Dated: November 14, 2016

YEROUSHALMI & YEROUSHAMLI

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15 BY: _____

16 Reuben Yeroushalmi
17 Attorneys for Plaintiff,
18 Consumer Advocacy Group, Inc.
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