

ENDORSED
FILED
ALAMEDA COUNTY
Jan 25
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CLERK OF THE SUPERIOR COURT
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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 BURLINGTON COAT FACTORY
19 WAREHOUSE CORPORATION, a
20 Delaware Corporation; BURLINGTON
21 COAT FACTORY, a business entity form
22 unknown; and DOES 1-20;

23 Defendants.

CASE NO. **RG18891553**

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)

BY FAX

24 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
25 Defendants BURLINGTON COAT FACTORY WAREHOUSE CORPORATION,
26 BURLINGTON COAT FACTORY, and DOES 1-20 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

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

2. Defendant BURLINGTON COAT FACTORY WAREHOUSE CORPORATION (“BURLINGTON”), is a Delaware Corporation doing business in the State of California at all relevant times herein.
3. Defendant BURLINGTON COAT FACTORY (“BCF”) is a business entity form unknown doing business in the State of California at all relevant times herein.
4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
5. At all times mentioned herein, the term “Defendants” includes BURLINGTON, BCF and DOES 1-20.
6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
7. Upon information and belief, at all times relevant to this action, each of the Defendants, including DOES 1-20, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each of the other Defendants.
8. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the Defendants was a person doing business within the meaning of Health and Safety Code

1 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
2 employees at all relevant times.

3 **JURISDICTION**

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

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

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

21 **BACKGROUND AND PRELIMINARY FACTS**

22 12. In 1986, California voters approved an initiative to address growing concerns about
23 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
24 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
25 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
26 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
27 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
28 from contamination, to allow consumers to make informed choices about the products

1 they buy, and to enable persons to protect themselves from toxic chemicals as they see
2 fit.

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

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

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

20 16. On February 27, 1987, the Governor of California added lead to the list of chemicals
21 known to the State to cause reproductive toxicity (Cal. Code Regs. tit. 27, § 27001(c)).
22 lead is known to the State to cause developmental, female, and male reproductive
23 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
24 months after addition of lead to the list of chemicals known to the State to cause
25 reproductive toxicity, lead became fully subject to Proposition 65 warning requirements
26 and discharge prohibitions.

27 17. On October 1, 1992, the Governor of California added lead and lead compounds to the
28 list of chemicals known to the State to cause cancer (Cal. Code Regs. tit. 27, § 27001(b)).

Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months after addition of lead and lead compounds to the list of chemicals known to the State to cause cancer, lead and lead compounds became fully subject to Proposition 65 warning requirements and discharge prohibitions.

18. On December 2, 2005, the Governor of California added Di-n-Butyl Phthalate, also known as Dibutyl Phthalate (“DBP”) to the list of chemicals known to the State to cause developmental, female, and male reproductive toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months after addition of DBP to the list of chemicals known to the State to cause reproductive toxicity, DBP became fully subject to Proposition 65 warning requirements and discharge prohibitions.

19. Plaintiff identified certain practices of manufacturers and distributors of products bearing lead and lead compounds (“LEAD”) and DBP of exposing, knowingly and intentionally, persons in California to the Proposition 65-listed chemicals of such products without first providing clear and reasonable warnings of such to the exposed persons prior to the time of exposure. Plaintiff later discerned that Defendants engaged in such practice.

SATISFACTION OF PRIOR NOTICE

20. On or about May 19, 2017 Plaintiff gave notice of alleged violations of Health and Safety Code section 25249.6, concerning consumer products exposures subject to a private action to BCF and to the California Attorney General, County District Attorneys, and City Attorneys for each city containing a population of at least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the product Footwear, containing DBP.

21. On or about October 18, 2017, Plaintiff gave notice of alleged violations of Health and Safety Code section 25249.6, concerning consumer products exposures subject to a private action to BURLINGTON and to the California Attorney General, County District Attorneys, and City Attorneys for each city containing a population of at least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the product Ground Spices, containing LEAD.

1 22. Before sending the notice of alleged violations, Plaintiff investigated the consumer
2 products involved, the likelihood that such products would cause users to suffer
3 significant exposures to LEAD and DBP and the corporate structure of each of the
4 Defendants.

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

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

18 25. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
19 gave notices of the alleged violation to BURLINGTON, and the public prosecutors
20 referenced in Paragraph 19 to 20.

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

24 **FIRST CAUSE OF ACTION**

25 **(By CONSUMER ADVOCACY GROUP, INC. and against BCF and DOES 1-10 for**
26 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
(*Health & Safety Code*, §§ 25249.5, *et seq.*))

27 **Footwear**

1 27. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
2 reference paragraphs 1 through 26 of this complaint as though fully set forth herein. Each
3 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
4 promoter, or retailer of Sandals with Polymer Straps, which includes but is not limited to
5 “U.S. Polo Assn.”; “Premium Sandals”; “Authentic”; “www.uspoloassn.com”; “Not
6 affiliated with Polo Ralph Lauren Corp.”; “Authentic Since 1890”; “Y1043B”;
7 “USL524154655”; 662239006729 (“SANDALS”).

8 28. SANDALS contains DBP.

9 29. Defendants knew or should have known that DBP has been identified by the State of
10 California as a chemical known to cause cancer and reproductive toxicity and therefore
11 was subject to Proposition 65 warning requirements. Defendants were also informed of
12 the presence of DBP in SANDALS within Plaintiff's notice of alleged violations further
13 discussed above at Paragraph 19.

14 30. Plaintiff's allegations regarding SANDALS concern “[c]onsumer products exposure[s],”
15 which “is an exposure that results from a person's acquisition, purchase, storage,
16 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
17 that results from receiving a consumer service.” *Cal. Code Regs.* tit. 27, § 25602(b).
18 SANDALS is a consumer product, and, as mentioned herein, exposures to DBP took
19 place as a result of such normal and foreseeable consumption and use.

20 31. Plaintiff is informed, believes, and thereon alleges that between May 19, 2014, and the
21 present, each of the Defendants knowingly and intentionally exposed their employees,
22 California consumers of SANDALS, which Defendants manufactured, distributed, or
23 sold as mentioned above, to DBP without first providing any type of clear and reasonable
24 warning of such to the exposed persons before the time of exposure. Defendants have
25 distributed and sold SANDALS in California. Defendants know and intend that
26 California consumers will use and consume SANDALS, thereby exposing them to DBP.
27 Defendants thereby violated Proposition 65.
28

1 32. The principal routes of exposure are through dermal contact and ingestion, including
2 hand to mouth pathways. Persons sustain exposures by handling the SANDALS without
3 wearing gloves or by touching bare skin or mucous membranes with or without gloves
4 after handling SANDALS, as well as direct and indirect hand to mouth contact, hand to
5 mucous membrane, trans-dermal absorption, or even breathing in particulate matter
6 emanating from the SANDALS during wear and general use, as well as through
7 environmental mediums that carry the DBP once contained within the SANDALS.

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

15 34. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
16 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
17 violations alleged herein will continue to occur into the future.

18 35. Based on the allegations herein, Defendants are liable for civil penalties of up to
19 \$2,500.00 per day per individual exposure to DBP from SANDALS, pursuant to Health
20 and Safety Code section 25249.7(b).

21 36. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
22 filing this Complaint.

23 **SECOND CAUSE OF ACTION**

24 **(By CONSUMER ADVOCACY GROUP, INC. and against BURLINGTON, BCF and**
25 **DOES 11-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic**
26 **Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

27 **Ground Spices**

37. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by reference paragraphs 1 through 36 of this complaint as though fully set forth herein. Each of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor, promoter, or retailer of Ground Cinnamon, which includes but is not limited to “Pepper Creek Farms” “Vietnamese Cinnamon” “Net Wt. 4.5 Oz (127g)” “Our Vietnamese Cinnamon is sweet, spicy and strong. It is excellent used with cinnamon rolls, apple pie, cookies and French toast. Mix 2-3 tsp. into ½ cup of sugar to make your own cinnamon sugar for the table.” “Nutrition facts; Serving Size ¼ tsp. (0.7g)” “www.peppercreekfarms.com” “1002 S. W. Ard St. Lawton, OK 73505” “Best By 10/2018” “Style Bur 19” “V685778” “FLTUSA 6419537” “H HouseW Groumet” “Sea 2 LIN 16 110 16455898 9 1/1” UPC # 087822191635 (“GROUND CINNAMON”).
38. GROUND CINNAMON contains LEAD.
39. Defendants knew or should have known that LEAD has been identified by the State of California as a chemical known to cause cancer and reproductive toxicity and therefore was subject to Proposition 65 warning requirements. Defendants were also informed of the presence of LEAD in GROUND CINNAMON within Plaintiff’s notice of alleged violations further discussed above at Paragraph 20.
40. Plaintiff’s allegations regarding GROUND CINNAMON concern “[c]onsumer products 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 exposure that results from receiving a consumer service.” *Cal. Code Regs.* tit. 27, § 25602(b). GROUND CINNAMON is a consumer product, and, as mentioned herein, exposures to lead took place as a result of such normal and foreseeable consumption and use.
41. Plaintiff is informed, believes, and thereon alleges that between October 18, 2014, and the present, each of the Defendants knowingly and intentionally exposed their employees, California consumers of GROUND CINNAMON, which Defendants manufactured, distributed, or sold as mentioned above, to LEAD without first providing any type of

1 clear and reasonable warning of such to the exposed persons before the time of exposure.
2 Defendants have distributed and sold GROUND CINNAMON in California. Defendants
3 know and intend that California consumers will use and consume GROUND
4 CINNAMON, thereby exposing them to LEAD. Defendants thereby violated Proposition
5 65.

6 42. The principal routes of exposure are through ingestion, especially direct (oral) ingestion,
7 hand to mouth pathways, inhalation and trans-dermal absorption. Persons sustain
8 exposures by eating and consuming GROUND CINNAMON, handling GROUND
9 CINNAMON without wearing gloves or any other personal protective equipment, or by
10 touching bare skin or mucous membranes with gloves after handling GROUND
11 CINNAMON, as well as through direct and indirect hand to mouth contact, hand to
12 mucous membrane, or breathing in particulate matter dispersed from GROUND
13 CINNAMON.

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

21 44. 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 45. Based on the allegations herein, Defendants are liable for civil penalties of up to
25 \$2,500.00 per day per individual exposure to lead from GROUND CINNAMON,
26 pursuant to Health and Safety Code section 25249.7(b).

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

1 **PRAYER FOR RELIEF**

2 Plaintiff demands against each of the Defendants as follows:

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

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9 Dated: January 25, 2018

YEROUSHALMI & YEROUSHLAMI

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11 BY: 

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

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