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10 Attorneys for Plaintiff:
11 AS YOU SOW

12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF SAN FRANCISCO

14 AS YOU SOW)
15)
16 Plaintiff,)
17 vs.)
18 PETCO ANIMAL SUPPLIES, INC./PETCO)
19 ANIMAL SUPPLIES STORES, INC;)
20 PETSTAGES, INC.; COOPSPORT)
21 INTERNATIONAL LP; and DOES 1 through)
22 100, inclusive,)
23 Defendants.)

ENDORSED
FILED
Superior Court of California
County of San Francisco
MAR 9 2009
MAR 9 2009
GORDON KAPLAN, Clerk
BY: CRISTINA BOGOTISTA, Reference Set

AUG 7 2009 - 9:00 AM

DEPARTMENT 10

CSC-09-485923

Case No.

COMPLAINT FOR CIVIL
PENALTIES AND DECLARATORY
AND INJUNCTIVE RELIEF

1 Plaintiff, AS YOU SOW, alleges as follows:

2 **INTRODUCTION**

3 1. This complaint seeks civil penalties and declaratory and injunctive relief to remedy the
4 continuing failure of PETCO ANIMAL SUPPLIES, INC./PETCO ANIMAL SUPPLIES STORES,
5 INC.; PETSTAGES, INC.; COOPSPORT INTERNATIONAL LP; and DOES 1 through 100
6 (“Defendants”) to give clear and reasonable warnings to residents of California prior to exposing
7 those residents to products (pet toys for dogs and cats) which contain Di(2-ethylhexyl) phthalate
8 (“DEHP”) and/or lead.

9 2. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code
10 section 25249.5 et seq. (hereinafter, “Proposition 65”), businesses must provide persons with a “clear
11 and reasonable warning” before exposing them to chemicals known to the State to cause cancer or
12 reproductive harm. (Health & Saf. Code, § 25249.6.)

13 3. In this case, exposures to DEHP and/or lead occur when individuals handle or otherwise
14 come into contact with pet toys manufactured, marketed, sold, and/or distributed by Defendants.

15 4. Plaintiff brings this action in the public interest pursuant to section 25249.7, subdivision (d),
16 of the Health & Safety Code. Plaintiff seeks declaratory and injunctive relief (Health & Saf. Code,
17 § 25249.7, subd. (a)), in addition to statutory civil penalties (Health & Saf. Code, § 25249.7, subd.
18 (b)), to remedy these violations of Proposition 65.

19 **PARTIES**

20 5. Plaintiff AS YOU SOW (“AYS”) is a non-profit foundation organized under California’s
21 Non-Profit Public Benefit Corporation Law. (Cal. Corp. Code, § 5110 et seq.) AYS is dedicated to
22 ensuring that corporations and other institutions act responsibly and in the long-term best interests
23 of the environment and the human condition. To achieve these goals, AYS seeks to: (i) engage and
24 challenge corporations through direct dialogue and shareholder advocacy; (ii) refine economic
25 arguments to move corporations, other institutions, and financial markets toward environmentally and
26 socially responsible practices; (iii) enforce environmental, consumer protection, and right to know
27 laws; (iv) provide grants to non-profit organizations primarily focused on toxics reduction,
28 remediation, and prevention, and environmental education. AYS is a “person” pursuant to section

1 25249.11(a) of the Health & Safety Code, and is located at 311 California Street, Suite 510, San
2 Francisco, California 94104.

3 6. Defendant PETCO ANIMAL SUPPLIES, INC./PETCO ANIMAL SUPPLIES STORES,
4 INC. is a business entity with ten or more employees that has manufactured, marketed, sold, and/or
5 distributed pet toys containing DEHP and/or lead to individuals in California. PETCO ANIMAL
6 SUPPLIES, INC./PETCO ANIMAL SUPPLIES STORES, INC. is a “[p]erson in the course of doing
7 business” in California within the meaning of Health & Safety Code sections 25249.5 and 25249.11,
8 subdivision (b).

9 7. Defendant PETSTAGES, INC. is a business entity with ten or more employees that has
10 manufactured, marketed, sold, and/or distributed pet toys containing DEHP and/or lead to individuals
11 in California. PETSTAGES, INC. is a “person in the course of doing business” in California within
12 the meaning of Health & Safety Code sections 25249.5 and 25249.11, subdivision (b).

13 8. Defendant COOPSPORT INTERNATIONAL LP is a business entity with ten or more
14 employees that has manufactured, marketed, sold, and/or distributed pet toys containing DEHP and/or
15 lead to individuals in California. COOPSPORT INTERNATIONAL LP is a “person in the course
16 of doing business” in California within the meaning of Health & Safety Code sections 25249.5 and
17 25249.11, subdivision (b).

18 9. The true names and/or capacities of Defendants DOES 1 through 100 are unknown to Plaintiff
19 who therefore sues them by fictitious names pursuant to Code of Civil Procedure section 474.
20 Plaintiff will amend this complaint to allege the true names and capacities of these Defendants when
21 they have been determined. Each of the fictitiously named Defendant has manufactured, marketed,
22 sold, and/or distributed pet toys containing DEHP and/or lead to individuals in California.

23 JURISDICTION

24 10. This Court has subject matter jurisdiction over this action pursuant to subdivisions (a) and (b)
25 of Health & Safety Code section 25249.7, and article VI, section 10 of the California Constitution.
26 Health & Safety Code section 25249.7, subdivisions (a) and (b), allows enforcement of Proposition
27 65 by injunction and civil penalties “in any court of competent jurisdiction.” Article VI, section 10,
28 of the state Constitution grants the superior courts original jurisdiction over all causes other than those

1 expressly given by statute to other trial courts. This case is not given by statute to other trial courts.

2 11. The Court has personal jurisdiction over each of the Defendants named above, because each
3 is a business entity that has sufficient minimum contacts in California, or otherwise intentionally
4 avails itself of the California market, through the manufacture, marketing, sale, and/or distribution
5 of pet toys, to render the exercise of jurisdiction over it by the California courts consistent with
6 traditional notions of fair play and substantial justice.

7 12. On November 26, 2008, Plaintiff mailed a "Notice of Violation of California Health & Safety
8 Code, § 25249.5 et seq." to (i) the California Attorney General, (ii) the District Attorneys of each
9 county in California, and (iii) the City Attorneys of each California city with a population of over
10 750,000 persons, pursuant to Health & Safety Code section 25249.7, subdivision (d). On the same
11 day, Plaintiff mailed a "Notice of Violation of California Health & Safety Code, § 25249.5 et seq."
12 to each of the known Defendants. The notice included a statement that AYS has documented
13 violations by Defendants of Proposition 65 as well as information regarding (i) the identities of the
14 alleged violators, (ii) the chemicals alleged to be contained in their products, (iii) descriptions of the
15 consumer products alleged to violate Proposition 65, (iv) the route of exposure of the chemicals to
16 individuals in California, (v) the minimum duration of the violations, and (vi) summary information
17 regarding Proposition 65 in the form of a document entitled "The Safe Drinking Water and Toxic
18 Enforcement Act of 1986: a Summary." Each Defendant received the notice on either November 28,
19 2008, December 1, 2008, or December 2, 2008.

20 13. Each Notice of Violation also included a Certificate of Merit that Plaintiff's attorneys had
21 consulted with one or more persons with relevant and appropriate experience or expertise who has
22 reviewed facts, studies, or other data regarding exposure to DEHP and/or lead from the pet toys
23 manufactured, marketed, sold, and/or distributed by Defendants and that, based on these
24 consultations, Plaintiff's attorneys believe that there is a reasonable and meritorious case for this
25 private action.

26 14. Each Notice of Violation included a Certificate of Service.

27 15. In compliance with section 25249.7, subsection (d), and title 11, section 3102 of the California
28 Code of Regulations, Plaintiff served the Attorney General with a Notice of Violation and Certificate

1 of Merit that included confidential factual information sufficient to establish the basis of the
2 Certificate of Merit, including the identity of individual(s) with whom Plaintiff consulted and the
3 facts, studies, or other data that was reviewed by such person(s).

4 16. As of the date this Complaint is filed, more than 60 days have elapsed since November 26,
5 2008, as required by section 25249.7, subdivision (d)(1), of the Health & Safety Code. During the
6 60-day notice period, none of the public prosecutors who received the Notice of Violation have
7 commenced or begun diligently prosecuting an action against these named Defendants for the
8 violations alleged in this complaint.

9 VENUE

10 17. Venue is proper in this Court because this action seeks, inter alia, to recover a penalty imposed
11 by statute, and the cause or some part of the cause, arose in this County. (Code Civ. Proc., §§ 393,
12 subd. (a), 395.5.)

13 18. Defendants manufacture, market, sell, and/or distribute pet toys containing DEHP and/or lead
14 in this County, the County of San Francisco, causing individuals to be exposed to those chemicals
15 while they are physically present here without warning them, in violation of section 25249.6 of the
16 Health & Safety Code.

17 STATUTORY BACKGROUND

18 19. In November 1986, the voters of California passed The Safe Drinking Water and Toxic
19 Enforcement Act of 1986 as an initiative statute designated as "Proposition 65." Proposition 65 has
20 been codified in Health & Safety Code, sections 25249.2 - 25249.13.

21 20. Proposition 65 establishes a procedure by which the State of California is to develop a list of
22 chemicals "known to the state to cause cancer or reproductive toxicity." (Health & Saf. Code, §
23 25249.8.)

24 21. Section 25249.6 of the Health & Safety Code contains Proposition 65's warning requirement
25 which provides: "No person in the course of doing business shall knowingly and intentionally expose
26 any individual to a chemical known to the state to cause cancer or reproductive toxicity without first
27 giving clear and reasonable warning to such individual, except as provided in Section 25249.10."

28 22. An exposure to a chemical in a consumer product is one which "results from a person's

1 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good,
2 or any exposure that results from receiving a consumer service.” (Cal. Code Regs., tit. 27, § 12602,
3 subd. (b).)

4 23. Any person who “violates or threatens to violate” the warning requirement in section 25249.6
5 of the Health & Safety Code “may be enjoined in any court of competent jurisdiction.” (Health & Saf.
6 Code, § 25249.7, subd. (a).) The term “threaten to violate” means “to create a condition in which
7 there is a substantial probability that a violation will occur.” (Health & Saf. Code, § 25249.11, subd.
8 (e).)

9 24. Any person who violates the warning requirement in section 25249.6 of the Health & Safety
10 Code is liable for civil penalties of up to \$2,500 per day for each violation, which penalties are
11 recoverable in a civil action brought in any court of competent jurisdiction. (Health & Saf. Code, §
12 25249.7, subd. (b)(1).)

13 25. A private party may bring suit “in the public interest” to enforce Proposition 65, provided: (i)
14 that party first provides 60-day prior notice of the alleged violation to the Attorney General, every
15 district attorney (or city prosecutor consented to thereby) in whose jurisdiction the violation is alleged
16 to have occurred, and every city attorney of a city having a population in excess of 750,000 in whose
17 jurisdiction the violation is alleged to have occurred; and (ii) neither the Attorney General, nor any
18 district attorney, city attorney, or city prosecutor has commenced and begun diligently prosecuting
19 an action against the violation prior to notification by the private party. (Health & Saf. Code, §
20 25249.7, subd. (d).)

21 26. Proposition 65 provides exemptions from liability for exposures which (i) are subject to
22 federal warning requirements that preempts state authority, (ii) take place less than twelve months
23 after the listing of the chemical in question, or (iii) pose “no significant risk” as that term is defined
24 in the statute. (Health & Saf. Code, § 25249.10.) In addition, Proposition 65 does not apply to
25 persons employing fewer than 10 employees. (Health & Saf. Code, § 25249.11, subd. (b).)

26 FACTS

27 27. The State of California listed DEHP on its list of chemicals known by the State to cause
28 cancer on January 1, 1988. On October 24, 2003, the State also listed DEHP as a chemical known

1 to cause male reproductive toxicity. (Health & Saf. Code, § 25249.8; Cal. Code Regs., tit. 27, §
2 27001.)

3 28. The State of California listed lead on its list of chemicals known by the State to cause male
4 and female reproductive toxicity on February 27, 1987. On October 1, 1992, the State also listed lead
5 and lead compounds as chemicals known to cause cancer. (Health & Saf. Code, § 25249.8; Cal. Code
6 Regs., tit. 27, § 27001.)

7 29. Defendants PETCO ANIMAL SUPPLIES, INC./PETCO ANIMAL SUPPLIES STORES,
8 INC.; PETSTAGES, INC.; and COOPSPORT INTERNATIONAL LP manufacture, market, sell,
9 and/or distribute pet toys containing the chemical DEHP, listed under Proposition 65 as known by
10 the State to cause cancer and reproductive toxicity. (Cal. Code Regs., tit. 27, § 27001.) Specifically,
11 products containing DEHP include the following: (a) the "Twin Pull" dog toy, identified with UPC
12 No. 871864001638, manufactured by PETSTAGES, INC. and sold by PETCO ANIMAL SUPPLIES,
13 INC./PETCO ANIMAL SUPPLIES STORES, INC.; and (b) the "Fetcher football" dog toy, identified
14 with UPC No. 603152203147, manufactured by COOPSPORT INTERNATIONAL LP and sold by
15 PETCO ANIMAL SUPPLIES, INC./PETCO ANIMAL SUPPLIES STORES, INC.

16 30. Defendants PETCO ANIMAL SUPPLIES, INC./PETCO ANIMAL SUPPLIES STORES and
17 COOPSPORT INTERNATIONAL LP manufacture, market, sell, and/or distribute pet toys containing
18 the chemical lead, listed under Proposition 65 as known by the State to cause cancer and reproductive
19 toxicity. (Cal. Code Regs., tit. 27, § 27001.) Specifically, products containing lead include the
20 "Fetcher football" dog toy, identified with UPC No. 603152203147, manufactured by COOPSPORT
21 INTERNATIONAL LP and sold by PETCO ANIMAL SUPPLIES, INC./PETCO ANIMAL
22 SUPPLIES STORES, INC.

23 31. Defendants DOES 1 through 100 manufacture, market, sell, and/or distribute pet toys
24 containing the chemicals DEHP and/or lead, listed under Proposition 65 as known by the State to
25 cause cancer and/or reproductive toxicity. (Cal. Code Regs., tit. 27, § 27001.)

26 32. Use of the products identified in this notice results in human exposures to DEHP and/or lead.
27 The routes of exposure include, but are not limited to, (i) direct ingestion when consumers, including
28 children, put the product directly into their mouths; (ii) ingestion via hand-to-mouth contact when

1 consumers, including children, touch or handle the product; (iii) ingestion via hand-to-mouth contact
2 or pet saliva-to-mouth contact when consumers, including children, come into contact with a pet that
3 has played with the product or held the product in its mouth; and (iv) dermal absorption directly
4 through the skin and eyes when consumers, including children, touch or handle the product.

5 33. Each Defendant knew, or reasonably should have known, that the pet toys it manufactured,
6 marketed, sold, and/or distributed contained DEHP and/or lead.

7 34. Each Defendant has intended that individuals, including both children and adults, use and
8 handle the pet toys, containing DEHP and/or lead, that it manufactured, marketed, sold, and/or
9 distributed.

10 35. Each Defendant knew, or reasonably should have known, that individuals, including both
11 children and adults, use and handle the toys it manufactured, marketed, sold, and/or distributed
12 containing DEHP and/or lead.

13 36. Each Defendant has knowingly and intentionally exposed individuals to chemicals known by
14 the State of California to cause cancer and/or reproductive toxicity by its deliberate act(s) of
15 manufacturing, marketing, selling, and/or distributing its pet toy products containing DEHP and/or
16 lead.

17 37. Each Defendant has failed to provide a clear and reasonable warning to individual consumers
18 that handling and using the products in question results in exposure to chemical(s) known to the State
19 of California to cause cancer and/or reproductive toxicity.

20 38. No federal law governs warnings on pet toys such as those at issue in such a manner that
21 would preempt state authority.

22 39. Exposure of individual consumers to DEHP and/or lead through the handling and use of pet
23 toys manufactured, marketed, sold, and/or distributed by Defendants has occurred more than twelve
24 months after the listing of those chemicals as known by the State of California to cause cancer and/or
25 reproductive toxicity.

26 40. Individual consumers handling and using the pet toys manufactured, marketed, sold, and/or
27 distributed by Defendants have been exposed to significant amounts of DEHP and/or lead, posing a
28 significant risk to such consumers, assuming lifetime exposure to those chemicals at the levels present

1 in Defendants' products.

2 41. Each of the Defendants employed 10 or more employees during the time Defendants
3 knowingly and intentionally exposed individual consumers to DEHP and/or lead without first giving
4 clear and reasonable warning to such consumers of the risk that those chemicals cause cancer and/or
5 reproductive toxicity.

6 42. An actual and present controversy exists between Plaintiff and Defendants as to whether
7 Proposition 65 required, and continues to require, Defendants to give clear and reasonable warnings
8 to individual consumers, prior to their purchase of Defendants' pet toy products containing DEHP
9 and/or lead, alerting such consumers to the risk that those chemicals cause cancer and/or reproductive
10 toxicity.

11 43. Plaintiff has no adequate remedy in the ordinary course of law to obtain relief from the
12 consequences of said actions by Defendants for the harms alleged herein.

13 44. Defendants' manufacturing, marketing, selling, and/or distributing of pet toy products
14 containing DEHP and/or lead, without clear and reasonable warnings to individual consumers,
15 irreparably harms and will continue to irreparably harm the people of California in whose interest this
16 suit is filed

17 45. Unless restrained by this Court, Defendants will continue to violate Proposition 65.

18 **FIRST CAUSE OF ACTION**
19 **(Violation of Proposition 65 by Plaintiff Against All Defendants)**

20 46. Plaintiffs re-allege and re-plead the allegations of the preceding paragraphs of this Complaint
21 as though fully set forth herein.

22 47. By committing the acts alleged herein, each Defendant has, within the previous twelve
23 months, in the course of doing business, knowingly and intentionally exposed individuals to
24 chemicals known to the State of California to cause cancer and/or reproductive toxicity without first
25 giving clear and reasonable warning to such individuals, within the meaning of section 25249.6 of
26 the Health and Safety Code.

27 48. Said violations render each Defendant liable to Plaintiff for civil penalties of up to \$2,500 per
28 day for each violation in addition to any other remedy established by law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court provide for relief as follows:

49. Pursuant to Health and Safety Code section 25249.7, subdivision (b), assess civil penalties against each Defendant in the amount of \$2,500 per day for each violation of Proposition 65, according to proof;

50. Pursuant to Health and Safety Code section 25249.7, subdivision (a), enter such temporary restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting Defendants from exposing persons within the State of California to DEHP and/or lead caused by the handling and use by such persons of Defendants' pet toy products, without providing a clear and reasonable warning, as Plaintiff shall specify in a further application to the Court;

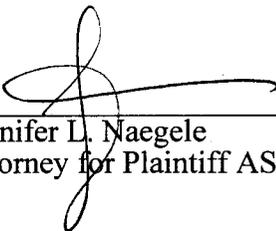
51. Pursuant to Code of Civil Procedure section 1060, judicially determine and declare that Defendants are required by Proposition 65 to give clear and reasonable warnings to individual consumers, prior to their purchase of Defendants' pet toy products containing DEHP and/or lead, alerting such consumers to the risk that those chemicals cause cancer and/or reproductive toxicity;

52. Pursuant to section 1021.5 of the Code of Civil Procedure, award attorney fees and costs incurred by Plaintiff in bringing this enforcement action, in an amount the Court determines to be reasonable; and

53. Grant such other relief that the Court deems just and proper.

Dated: March 5, 2009

LIPPE GAFFNEY WAGNER LLP



Jennifer L. Naegele
Attorney for Plaintiff AS YOU SOW

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