

FILED
San Francisco County Superior Court

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Deputy Clerk

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DEPARTMENT 212

NO SUMMONS ISSUED

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

11 CONSUMER ADVOCACY GROUP, INC.,)
12 in the interest of the Public,)
13 Plaintiff,)
14 v.)
15)
16 PRO GENERAL ROOFING, INC.,)
ASSOCIATED BUILDING)
17 ENTERPRISES, INC., LOS GATOS OLD)
TOWN ROOFING, INC., EASTMAN)
18 ROOFING & WATERPROOFING, INC.,)
DINYARI INCORPORATED, IMR)
19 CONTRACTOR CORPORATION, and)
DOES 1-500,)
20)
21 Defendants.)

CASE NO. CGC07 - 460126

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

1. Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (Health and Safety Code
sections 25249.5 et seq.)

ORIGINAL

Action is an Unlimited Civil Case
(Amount demand exceeds \$25,000)

23 BACKGROUND AND PRELIMINARY FACTS

24 1. In 1986, California voters approved an initiative to address growing concerns about
25 exposure to toxic chemicals. The initiative, The Safe Drinking Water and Toxic
26 Enforcement Act of 1986, codified at Health and Safety Code sections 25249.5 et seq.
27 ("Proposition 65"), helps to protect California's drinking water sources from
28

1 contamination, to allow consumers to make informed choices about the products they
2 buy, and to enable persons to protect themselves from toxic chemicals as they see fit.

- 3
4 2. Proposition 65 requires the Governor of California to publish a list of chemicals known to
5 the state to cause cancer, birth defects, or other reproductive harm (“Proposition 65-
6 Listed Chemicals”). (Health & Saf. Code, § 25249.8.) The list, which the Governor
7 updates at least once a year, contains over 550 chemicals. Proposition 65 imposes
8 warning requirements and other controls that apply to Proposition 65-Listed Chemicals.
9
10 3. All businesses with ten or more employees that operate or sell products in California
11 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
12 from knowingly discharging Proposition 65-Listed Chemicals into sources of drinking
13 water (Health & Saf. 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 & Saf. Code, § 25249.6). A business can satisfy
16 its obligations under Health and Safety Code section 25249.6 by the tendering the
17 requisite warnings through various means, e.g. labeling a consumer product, posting
18 signs, or publishing notices in a newspaper.
19
20 4. Plaintiff, Consumer Advocacy Group, Inc. (“Plaintiff”) is a non-profit corporation
21 qualified to do business in the State of California. It brings this action in the public
22 interest as defined under Health and Safety Code section 25249.7, subdivision (d).
23
24 5. In 2000 and 2001, Plaintiff conducted research, from which it identified an industry-wide
25 practice among California companies, which install, repair, or replace roofs, of exposing,
26 knowingly and intentionally, persons to asphalt without first providing clear and
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1 reasonable warnings of such to the exposed persons prior to exposure. Asphalt is
2 extremely toxic material, containing numerous Proposition 65-Listed Chemicals.

3
4 6. Defendants Pro General Roofing, Inc., Associated Building Enterprises, Inc., Los Gatos
5 Old Town Roofing, Inc., Eastman Roofing & Waterproofing, Inc., Dinyari Incorporated,
6 IMR Contractor Corporation, and Does 1-500, are and at all times mentioned herein have
7 been qualified to do and did conduct business in the State of California.

8
9 7. Plaintiff is ignorant of the true names and capacities of defendants sued as Does 1-500.
10 Therefore, Plaintiff 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 and damages alleged herein.

14
15 8. At all times mentioned herein, "Defendants" include Pro General Roofing, Inc.,
16 Associated Building Enterprises, Inc., Los Gatos Old Town Roofing, Inc., Eastman
17 Roofing & Waterproofing, Inc., Dinyari Incorporated, IMR Contractor Corporation, and
18 Does 1-500.

19
20 9. At all times mentioned each defendant was a person within the meaning of Health and
21 Safety Code section 25249.11, subdivision (a). Plaintiff is informed, believes, and
22 thereon alleges that at all times relevant to the complaint; each Defendant had ten or more
23 employees.

24
25 10. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
26 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
27 those given by statute to other trial courts. The statutes under which Plaintiff brings this
28 lawsuit do not specify any other basis of jurisdiction.

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3 **FIRST CAUSE OF ACTION**

4 By Plaintiff, CONSUMER ADVOCACY GROUP, INC., and against Defendants, PRO
5 GENERAL ROOFING, INC., ASSOCIATED BUILDING ENTERPRISES, INC., LOS
6 GATOS OLD TOWN ROOFING, INC., EASTMAN ROOFING & WATERPROOFING,
7 INC., DINYARI INCORPORATED, IMR CONTRACTOR CORPORATION, and DOES
8 1-500, for violation of Proposition 65, The Safe Drinking Water and Toxic Enforcement
9 Act of 1986 (Health and Safety Code sections 25249.5, et seq.)
10

11 11. Plaintiff repeats and incorporates by reference the preceding paragraphs of this complaint
12 as though fully set forth herein.

13 12. Defendants are and at all times mentioned herein have been engaged in the business of
14 installing, repairing, and or replacing the roofs on residential and commercial structures.

15 13. Defendants have been exposing persons, knowingly and intentionally, by deliberately
16 using asphalt, to the constituent Proposition 65-Listed Chemicals of asphalt, without first
17 giving clear and reasonable warning of such to the exposed persons before the time of
18 exposure. (Health & Saf. Code, § 25249.6.)
19

20 14. Plaintiff mailed a separate Proposition 65 60-day Notice of intent to sue to Pro General
21 Roofing, Inc., Associated Building Enterprises, Inc., Los Gatos Old Town Roofing, Inc.,
22 Eastman Roofing & Waterproofing, Inc., Dinyari Incorporated, and IMR Contractor
23 Corporation, respectively. Such Notices stated that each respective defendant, by failing
24 to warn persons of exposures to Proposition 65-Listed Chemicals before exposing them
25 to Proposition 65-Listed Chemicals, had violated Proposition 65. Plaintiff mailed copies
26 of each respective notice to the Office of the Attorney General, State of California,
27
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1 Department of Justice ("Attorney General"), and the County District Attorneys for each
2 county and City Attorneys for each city containing a population of at least 750,000
3 people, within which each respective named defendant violated Proposition 65.
4

5 15. On or about April 14, 2006, Plaintiff sent a Proposition 65 60-Day Notice of intent to sue
6 to Pro General Roofing, Inc. alleging the facts found in Paragraph 13 of this pleading.

7 16. On or about June 27, 2006, Plaintiff sent a Proposition 65 60-Day Notice of intent to sue
8 to Associated Building Enterprises, Inc. alleging the facts in Paragraph 13 of this
9 pleading.
10

11 17. On or about June 27, 2006, Plaintiff sent a Proposition 65 60-Day Notice of intent to sue
12 to Los Gatos Old Town Roofing, Inc. alleging the facts found in Paragraph 13 of this
13 pleading.
14

15 18. On or about April 14, 2006, Plaintiff sent a Proposition 65 60-Day Notice of intent to sue
16 to Eastman Roofing & Waterproofing, Inc. alleging the facts found in Paragraph 13 of
17 this pleading.

18 19. On or about April 14, 2006, Plaintiff sent a Proposition 65 60-Day Notice of intent to sue
19 to Dinyari Incorporated alleging the facts found in Paragraph 13 of this pleading.
20

21 20. On or about June 27, 2006, Plaintiff sent a Proposition 65 60-Day Notice of intent to sue
22 to IMR Contractor Corporation alleging the facts found in Paragraph 13 of this pleading.

23 21. Each Proposition 65 60-Day Notice of intent to sue listed above included a certificate of
24 merit executed by the attorney for the noticing party, Plaintiff. The certificate of merit
25 stated that the attorney for Plaintiff who executed the certificate had consulted with at
26 least one person with relevant and appropriate expertise who had reviewed data regarding
27 the exposure to Proposition 65-Listed Chemicals that are the subjects of the action.
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1 Based on that information, the attorney for Plaintiff who executed the certificate believed
2 there was a reasonable and meritorious case for this private action. The attorney for
3 Plaintiff attached to the certificate of merit served on the Attorney General information
4 sufficient to establish the basis of the certificate of merit.
5

6 22. Plaintiff is commencing this action more than sixty days (plus five calendar days because
7 Plaintiff mailed the notices and the place of mailing and the place of address were within
8 California) from the date that Plaintiff gave notice of the alleged violations of Proposition
9 65 to each respective named defendant, the Attorney General, and applicable district
10 attorneys and city attorneys in whose jurisdictions the violations allegedly occurred.
11

12 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
13 any applicable district attorney or city attorney has commenced and is diligently
14 prosecuting an action against the violation.
15

16 24. Between three years before the sending of each respective Proposition 65 60-Day Notice
17 of intent to sue and the present, in the normal course of business, Defendants installed,
18 repaired, and or replaced roofs. Defendants have been exposing, knowingly and
19 intentionally, reasonably foreseeable members of the public, including occupants of the
20 structures serviced, neighbors of the same, passersby, motorists, and inspectors not
21 employed by Defendants, to Proposition 65-Listed Chemicals by using asphalt, including
22 hot asphalt, "cold" asphalt emulsions and adhesives, asphalt shingles, and inter-ply layers
23 of asphalt or coal tar. Defendants exposed such persons without providing "clear and
24 reasonable" warnings to affected persons before exposing such persons, knowingly and
25 intentionally, to Proposition 65-Listed Chemicals. In doing so, Defendants violated
26 Proposition 65.
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1 25. As to environmental exposures, Defendants failed to provide a warning either that (A)
2 appears on a sign in the affected area, (B) constitutes a posting of signs in the manner
3 described in Cal. Code Regs., tit. 3, § 6776(d), (C) is in a notice mailed or otherwise
4 delivered to each occupant in the affected area at least once in any three-month period, or
5 (D) provided by public media announcements that targets the affected area at least once
6 in any three-month period.
7

8 26. As to Occupational Exposures, Defendants failed to provide a Proposition 65-complaint
9 warning.
10

11 27. Between three years before the sending of each respective Proposition 65 60-Day Notice
12 of intent to sue and the present, in the normal course of business, Defendants installed,
13 repaired, and or replaced roofs. Defendants have also been exposing, knowingly and
14 intentionally, their employees, including roofing contractors, drivers, roofing installers,
15 and workers otherwise involved in the installation, repair, and or replacement of roofs, to
16 Proposition 65-Listed Chemicals by using asphalt, including hot asphalt, "cold" asphalt
17 emulsions and adhesives, asphalt shingles, and inter-ply layers of asphalt or coal tar.
18 Defendants exposed such employees without providing "clear and reasonable" warnings
19 to affected employees before exposing such persons, knowingly and intentionally, to
20 Proposition 65-Listed Chemicals. In doing so, Defendants violated Proposition 65.
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23 28. The sources of exposures are the constituent chemicals of asphalt, as listed in this
24 complaint. The locations of the exposures include:

- 25 a. Violators' principal places of business and areas within 50 feet of the same;
26 b. Areas along and within 50 feet of the routes traveled between said principal
27 places of business and where Defendants stored roofing materials, such as storage
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1 facilities and garage areas, wherein Defendants also prepared and heated the
2 asphalt;

3 c. Areas along and within 50 feet of the routes traveled between said principal
4 places of business and where Defendants performed roofing work, including
5 roofing installations, removals, and replacements; and

6 d. Areas within 50 feet of where Defendants performed roofing work or established
7 staging grounds for the performance of such work.
8

9
10 31. These Environmental and Occupational Exposures occurred in the California counties
11 whose district attorneys received copies of the operative 60-Day Notices relevant to each
12 respective named defendant.

13 32. The route of exposure for Environmental Exposures is inhalation contact whereby
14 affected persons breathed in the ambient air, which contained asphalt, asphalt smoke, or
15 associated fumes, causing contact with their mouths, throats, esophagi, and lungs.
16 Defendants possessed sufficient control over the relevant areas to control the quality of
17 the ambient air.
18

19 33. The route of exposure for Occupational Exposures is inhalation contact whereby affected
20 employees breathed in the ambient air, which contained asphalt, asphalt smoke, or
21 associated fumes, causing contact with their mouths, throats, esophagi, and lungs.
22 Defendants possessed sufficient control over the relevant areas to control the quality of
23 the ambient air. Employees also sustained inhalation contact by inhaling particulate
24 matter and other airborne constituents, including gaseous emissions released from "cold"
25 asphalt emulsions and adhesives, asphalt shingles, and inter-ply layers of asphalt or coal
26 tar, when they removed various roofing products from packaging and or tore out
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1 previously installed roofing products in preparation of re-roofing. The route of exposure
 2 for Occupational Exposures is also Dermal Contact, whereby employees allowed their
 3 bare skin to touch, intentionally or inadvertently, asphalt products, while mixing, heating,
 4 transporting, or applying the same. Dermal Contact also occurred when Employees, after
 5 allowing work gloves to touch asphalt, then touched their bare skin with the asphalt-
 6 impregnated work gloves. Said exposures occurred in the California counties whose
 7 district attorneys received copies of the operative notices.
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 10 34. For each type and means of exposure, Defendants have exposed and are exposing the
 11 above referenced persons to the Proposition 65-Listed Chemicals listed below.

12 **CARCINOGENS**

13 Benz[a]anthracene	Chrysene	Toluene diisocyanate	Formaldehyde (gas)
14 5-Methylchrysene	Nickel and Nickel Compounds	Dichloromethane (Methylene Chloride)	Benzene
15 Lead and Lead Compounds	Benzo[b]flouranthene	Benzo[k]flouranthene	Benzo[a]pyrene
16 Indeno[1,2,3-cd]pyrene	Acetaldehyde	Beryllium and Beryllium compounds	Arsenic (inorganic arsenic compounds)
17 Cadmium and Cadmium compounds	Chromium (hexavalent compounds)	Tetrachloroethylene (Perchloroethylene)	Trichloroethylene
18 Formaldehyde (gas)	Chrysene	Dibenz[a,h]anthracene	Carbazole
19 Dibenzo[a,i]pyrene	Dibenzo[a,e]pyrene	Dibenz[a,j]acridine	Dibenzo[a,h]p
20 Dibenzo[a,l]pyrene			

21
 22
 23 **REPRODUCTIVE TOXINS**

24 Toluene	Carbon Disulfide	Benzene	Lead
25 Mercury and Mercury compounds	Arsenic (inorganic oxides)	Cadmium	

26
 27
 28 35. Each Proposition 65-Listed Chemical listed above first appeared on the Governor's
 Proposition 65 list more than twenty months before Plaintiff sent a Proposition 65 60-

1 Day Notice of intent to sue to each respective named defendant. Therefore, each
2 Proposition 65-Listed Chemical was subject to Proposition 65 warning requirements at
3 the times of the exposures alleged herein.
4

5 36. For the past several years, both the Attorney General as well as Plaintiff have
6 investigated and prosecuted Asphalt Roofing entities as an industry for alleged violations
7 of Proposition 65. Plaintiff and its counsel poured and continue to pour significant
8 resources, including time, money, and energy, in trying to bring all members of the
9 Asphalt Roofing Industry in compliance with Proposition 65. In fact, the Attorney
10 General and Plaintiff co-litigated a previous action that resulted in a universal settlement
11 reached with over 100 Asphalt Roofing entities. That settlement had an extensive opt-in
12 period that allowed all roofing entities, including these defendants, to join the settlement
13 and end not only their continual violations of Proposition 65, but also their potential
14 liabilities for alleged violations of the statute. Accordingly, these defendants have had
15 plenty of time and opportunities to end their violations of Proposition 65 and come into
16 compliance with the law.
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19

20 37. Instead, these defendants flouted the various opportunities they had to comply with
21 Proposition 65, and chose instead not to participate in a win-win settlement agreement
22 offered by both the Attorney General and CAG. The settlement these defendants chose
23 not to participate in would have benefited all parties involved, in that it would have
24 required defendants to significantly reduce both their employees' as well as the public's
25 exposures to deadly chemicals, and would have obligated these defendants to post the
26 required warnings. By choosing to continue their violations, these defendants have
27 significantly enlarged their potential liabilities for violating Proposition 65.
28


PRAVER FOR RELIEF

WHEREFORE, Plaintiff in the FIRST CAUSE OF ACTION demands against each defendant as follows:

1. A permanent injunction pursuant to Health and Safety Code section 25249.7, subdivision (a), and the equitable powers of the court;
2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b) in the amount of \$2,500 per day per violation;
3. Order to disgorge or pay restitution in an amount sufficient to restore to any person in interest any money or property that Defendants may have acquired by means of violations set forth herein and to prevent defendants' future use of such violations, pursuant to the equitable powers of the court;
4. Costs of suit;
5. Reasonable attorney's fees and costs; and
6. Any further relief that the court may deem just and equitable.

Dated: January 29, 2007

YEROUSHALMI & ASSOCIATES



Reuben Yeroushalmi
Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.