

12007

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6 Attorneys for Plaintiffs,
7 Consumer Advocacy Group, Inc.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF ALAMEDA

10 CONSUMER ADVOCACY GROUP, INC.,
11 in the public interest,

12 Plaintiff,

13 v.

14
15 EJK CORP., a Washington Corporation; DE
16 ANZA TRUE VALUE HARDWARE &
17 BUILDING SUPPLY, a business entity, form
unknown; and DOES 1-20;

18 Defendants.

CASE NO. *fy* 094 877 00

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Cal. Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

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20 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendants as
21 follows:

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**ENDORSED
FILED
ALAMEDA COUNTY**
DEC 04 2009
CLERK OF THE SUPERIOR COURT
M. Hayes
By _____ Deputy

THE PARTIES

- 1
2 1. Plaintiff Consumer Advocacy Group, Inc. (“Plaintiff” OR “CAG”) is a non-profit
3 corporation qualified to do business in the State of California. CAG is a person within
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
5 as a private attorney general, brings this action in the public interest as defined under
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant EJK Corp is a Washington Corporation qualified to do business and doing
8 business in the State of California at all relevant times herein.
- 9 3. Defendant De Anza True Value Hardware & Building Supply (“De Anza”) is a business
10 entity, form unknown, qualified to do business and doing business in the State of
11 California at all relevant times herein.
- 12 4. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,
13 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
14 Complaint to allege their true names and capacities when ascertained. Plaintiff is
15 informed, believes, and thereon alleges that each fictitiously named defendant is
16 responsible in some manner for the occurrences herein alleged and the damages caused
17 thereby.
- 18 5. At all times mentioned herein, the term “Defendants” includes EJK Corp., De Anza True
19 Value Hardware & Building Supply, and Does 1-20.
- 20 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
21 times mentioned herein has conducted business within the State of California.
- 22 7. At all times relevant to this action, each of the Defendants, including Does 1-20, was an
23 agent, servant, or employee of each of the other Defendants. In conducting the activities
24 alleged in this Complaint, each of the Defendants was acting within the course and scope
25 of this agency, service, or employment, and was acting with the consent, permission, and
26 authorization of each of the other Defendants. All actions of each of the Defendants
27 alleged in this Complaint were ratified and approved by every other Defendant or their
28

1 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
2 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

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8 **JURISDICTION**

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

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

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

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1 **BACKGROUND AND PRELIMINARY FACTS**

2 12. In 1986, California voters approved an initiative to address growing concerns about
3 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
4 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
5 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
6 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
7 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
8 from contamination, to allow consumers to make informed choices about the products
9 they buy, and to enable persons to protect themselves from toxic chemicals as they see
10 fit.

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

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

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

1 16. Through research and investigation, Plaintiff identified certain practices of Defendants of
2 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
3 chemicals of the consumer products discussed below without first providing clear and
4 reasonable warnings of such to the exposed persons prior to the time of exposure.
5

6 **SATISFACTION OF PRIOR NOTICE**

7 17. On or about December 7, 2008, Plaintiff gave notice of alleged violations of Health and
8 Safety Code section 25249.6, concerning consumer products and environmental
9 exposures, subject to a private action to De Anza, identified in the notice by its trade
10 name "De Anza True Value Hardware & Building Supply", EJK Corp. identified in the
11 notice by its trade name "EJK Corp" and to the California Attorney General, County
12 District Attorneys, and City Attorneys for each city containing a population of at least
13 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
14 consumer product Tat® Ant Bait.

15 18. Plaintiff's notice of alleged violations included a Certificate of Merit executed by the
16 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
17 Plaintiff who executed the certificate had consulted with at least one person with relevant
18 and appropriate expertise who reviewed data regarding the exposures to propoxur, which
19 is the subject Proposition 65-listed chemical of this action. Based on that information,
20 the attorney for Plaintiff who executed the Certificate of Merit believed there was a
21 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
22 to the Certificate of Merit served on the Attorney General the confidential factual
23 information sufficient to establish the bases of the Certificate of Merit.

24 19. Plaintiff's notice of alleged violation also included a Certificate of Service and a
25 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
26 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
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1 20. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
2 gave notice of the alleged violations to De Anza, EJK Corp. and the public prosecutors
3 referenced in Paragraph 17.

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

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8 **FIRST CAUSE OF ACTION**

9 **(By Consumer Advocacy Group, Inc. and against EJK Corp., De Anza True Value**
10 **Hardware & Building Supply, and Does 1-20 for Violations of Proposition 65, The Safe**
11 **Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et***
12 ***seq.*))**

13 **Tat® Ant Bait**

14 22. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
15 paragraphs 1 through 21 of this Complaint as though fully set forth herein.

16 23. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
17 distributor, promoter, or retailer of Tat® Ant Bait (hereinafter “Ant Bait”), a consumer
18 product designed for use in killing ants.

19 24. Plaintiff is informed, believes, and thereon alleges that Ant Bait contains propoxur.

20 25. On August 11, 2006, the Governor of California added propoxur to the list of chemicals
21 known to the State to cause cancer (*Cal. Code Regs. tit. 27, § 27001(b)*). Pursuant to
22 Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months after
23 addition of Propoxur to the list of chemicals known to the State to cause cancer, Propoxur
24 became fully subject to Proposition 65 warning requirements and discharge prohibitions.

25 26. Defendants knew or should have known that Propoxur has been identified by the State of
26 California as a chemical known to cause cancer and reproductive toxicity and therefore
27 were subject to Proposition 65 warning requirements. Defendants were also informed of
28 the presence of Propoxur in the Ant Bait within Plaintiff's notice of alleged violation
further discussed above at Paragraph 17.

1 27. Plaintiff's allegations regarding Ant Bait concern "[c]onsumer products exposure[s],"
2 which "is an exposure that results from a person's acquisition, purchase, storage,
3 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
4 that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, § 25602(b). Ant
5 Bait is a consumer product, and, as mentioned in herein, exposures to Propoxur took
6 place as a result of such normal and foreseeable consumption and use.

7 28. Plaintiff's allegations regarding Ant Bait as to De Anza concern "occupational
8 exposure[s]," which "means an exposure to any employee in his or her employer's
9 workplace" of a Listed Chemical. *Cal. Code Regs.* tit. 27, § 25602(f). As mentioned in
10 herein, exposures to Propoxur to De Anza's employees by way of Ant Bait took place as
11 a result of such contact through their handling Ant Bait in the course of their sale,
12 distribution, and promotion of Ant Bait.

13 29. Plaintiff is informed, believes, and thereon alleges that between December 7, 2005 and
14 the present, each of the Defendants knowingly and intentionally exposed California
15 consumers and users of Ant Bait, which Defendants manufactured, distributed, or sold as
16 mentioned above, to Propoxur, without first providing any type of clear and reasonable
17 warning of such to the exposed persons before the time of exposure. Defendants have
18 distributed and sold Ant Bait in California. Defendants know and intend that California
19 consumers will use and consume Ant Bait thereby exposing them to Propoxur.
20 Defendants thereby violated Proposition 65.

21 30. The principal routes of exposure were and are through dermal contact, ingestion, and
22 inhalation. Persons sustain exposures by Handling Ant Bait without wearing gloves or by
23 touching bare skin with gloves handling Ant Bait, hand-to-mouth contact, or breathing in
24 particulate matter from Ant Bait as part of the process of using Ant Bait in killing ants.
25 The foregoing routes of exposure assume use of the product in accordance with its
26 instructions.

27 31. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
28 Proposition 65 as to Ant Bait have been ongoing and continuous to the date of the signing

1 of this Complaint, as Defendants engaged and continue to engage in conduct which
2 violates Health and Safety Code section 25249.6, including the manufacture, distribution,
3 promotion, and sale of Ant Bait, so that a separate and distinct violation of Proposition 65
4 occurred each and every time a person was exposed to Propoxur by Ant Bait as
5 mentioned herein.

6 32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
7 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
8 violations alleged herein will continue to occur into the future.

9 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
10 \$2,500.00 per day per individual exposure to Propoxur from Ant Bait, pursuant to Health
11 and Safety Code section 25249.7(b).

12 34. In the absence of equitable relief, California consumers, the general public, and others
13 will continue to be involuntarily exposed to Propoxur that is contained in Ant Bait,
14 creating a substantial risk of irreparable harm. Thus, by committing the acts alleged
15 herein, Defendants have caused irreparable harm for which there is no plain, speedy, or
16 adequate remedy at law.

17 35. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
18 filing this Complaint.

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PRAYER FOR RELIEF

Plaintiff demands against each of the Defendants as follows:

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

Dated: December 4, 2009

YEROUSHALMI & ASSOCIATES

BY: _____
 Reuben Yeroushalmi
 Attorneys for Plaintiff,
 Consumer Advocacy Group, Inc.