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Los Angeles Superior Court

MAR 05 2010

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By SHAUNYA WESLEY, Deputy

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9 Attorneys for Plaintiffs,  
10 Consumer Advocacy Group, Inc.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF LOS ANGELES - UNLIMITED

13 CONSUMER ADVOCACY GROUP, INC.,  
14 in the public interest,

15 Plaintiff,

16 v.

17 GREEN LIGHT COMPANY, an Unknown  
18 Business Entity; RAINBOW  
19 TECHNOLOGY CORPORATION, an  
20 Alabama Corporation, and DOES 1-50;

21 Defendants.

CASE NO.

**BC433193**

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)

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

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**COPY**

**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 Green Light Company is a business form unknown, qualified to do business  
8 and doing business in the State of California at all relevant times herein.
- 9 3. Defendant Rainbow Technology Corporation is an Alabama Corporation, qualified to do  
10 business and doing business in the State of California at all relevant times herein.
- 11 4. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-50,  
12 and therefore sues these defendants by such fictitious names. Plaintiff will amend this  
13 Complaint to allege their true names and capacities when ascertained. Plaintiff is  
14 informed, believes, and thereon alleges that each fictitiously named defendant is  
15 responsible in some manner for the occurrences herein alleged and the damages caused  
16 thereby.
- 17 5. At all times mentioned herein, the term “Defendants” includes Green Light Company,  
18 Rainbow Technology Corporation, and Does 1-50.
- 19 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
20 times mentioned herein has conducted business within the State of California.
- 21 7. At all times relevant to this action, each of the Defendants, including Does 1-50, was an  
22 agent, servant, or employee of each of the other Defendants. In conducting the activities  
23 alleged in this Complaint, each of the Defendants was acting within the course and scope  
24 of this agency, service, or employment, and was acting with the consent, permission, and  
25 authorization of each of the other Defendants. All actions of each of the Defendants  
26 alleged in this Complaint were ratified and approved by every other Defendant or their  
27 officers or managing agents. Alternatively, each of the Defendants aided, conspired with  
28 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

5  
6 **JURISDICTION**

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

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

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

24  
25 **BACKGROUND AND PRELIMINARY FACTS**

26 12. In 1986, California voters approved an initiative to address growing concerns about  
27 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to  
28 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,

1 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 53. The initiative, The Safe Drinking  
2 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections  
3 25249.5, *et seq.* ("Proposition 65"), helps protect California's drinking water sources  
4 from contamination, allow consumers to make informed choices about the products they  
5 buy, and enable persons to protect themselves from toxic chemicals as they see fit.

6 13. Proposition 65 requires the Governor of California to publish a list of chemicals known to  
7 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*  
8 § 25249.8. The list, which the Governor updates at least once a year, contains over 700  
9 chemicals and chemical families. Proposition 65 imposes warning requirements and  
10 other controls that apply to Proposition 65-listed chemicals.

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

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

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

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SATISFACTION OF PRIOR NOTICE

- 1
- 2 17. On or about December 7, 2008, Plaintiff gave notice of alleged violations of Health and
- 3 Safety Code section 25249.6, concerning consumer products exposures, subject to a
- 4 private action to Green Light Company and to the California Attorney General, County
- 5 District Attorneys, and City Attorneys for each city containing a population of at least
- 6 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
- 7 consumer product Green Light® Fung Away® Systematic Lawn Fungicide (granules).
- 8 18. On or about July 8, 2008, Plaintiff gave notice of alleged violations of Health and Safety
- 9 Code section 25249.6, concerning consumer products exposures, subject to a private
- 10 action, to Rainbow Technology Corporation and to the California Attorney General,
- 11 County District Attorneys, and City Attorneys for each city containing a population of at
- 12 least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning
- 13 Rainbow® Jungle Formula Insect Repellent (Product No. 4501).
- 14 19. Before sending the notices of alleged violations, Plaintiff investigated the consumer
- 15 products involved, and the likelihood that such product would cause users to suffer
- 16 significant exposures to the relevant Proposition 65-listed chemicals at issue.
- 17 20. Plaintiff's notices of alleged violations each included a Certificate of Merit executed by
- 18 the attorney for the noticing party, CAG. The Certificates of Merit stated that the
- 19 attorney for Plaintiff who executed each certificate had consulted with at least one person
- 20 with relevant and appropriate expertise who reviewed data regarding the exposures to Di-
- 21 *n*-propyl isocinchomeronate (MGK Repellent 326) and Myclobutanil, respectively, which
- 22 are the subject Proposition 65-listed chemicals of this action. Based on that information,
- 23 the attorney for Plaintiff who executed each Certificate of Merit believed there was a
- 24 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
- 25 to each Certificate of Merit served on the Attorney General the confidential factual
- 26 information sufficient to establish the bases of the Certificate of Merit.
- 27
- 28

1 21. Plaintiff's notices of alleged violation also included a Certificate of Service and a  
2 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
3 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

4 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
5 gave notice of the alleged violations to Green Light Company and Rainbow Technology  
6 Corporation, and to the public prosecutors referenced in Paragraphs 17, 18.

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

10  
11 **FIRST CAUSE OF ACTION**

12 **(By Consumer Advocacy Group, Inc. against Green Light Company, and Does 1-25 for**  
13 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**  
14 **(*Health & Safety Code*, §§ 25249.5, *et seq.*))**

15 **Green Light® Fung Away® Systemic Lawn Fungicide (granules)**

16 24. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference  
17 paragraphs 1 through 23 of this Complaint as though fully set forth herein.

18 25. Defendant Green Light Company and Does 1-25 (hereinafter "Green Light Defendants")  
19 is, and at all times mentioned herein was, a manufacturer, distributor, promoter, or  
20 retailer of Green Light Fung Away Systemic Lawn Fungicide, (hereinafter "Fung-  
21 Away®"), a consumer product which is designed for use as a preventative and curative  
22 systemic lawn fungicide.

23 26. Plaintiff is informed, believes, and thereon alleges that Fung-Away® contains  
24 Myclobutanil.

25 27. On April 16, 1999, the Governor of California added Myclobutanil to the list of  
26 chemicals known to the State to cause reproductive toxicity (developmental, male) (*Cal.*  
27 *Code Regs.* tit. 27, § 27001(c)). Pursuant to Health and Safety Code sections 25249.9  
28

1 and 25249.10, twenty (20) months after addition of Myclobutanil to the list of chemicals  
2 known to the State to cause reproductive toxicity, Myclobutanil became fully subject to  
3 Proposition 65 warning requirements and discharge prohibitions.

4 28. Green Light Defendants knew or should have known that Myclobutanil has been  
5 identified by the State of California as a chemical known to cause reproductive toxicity  
6 and therefore were subject to Proposition 65 warning requirements. Green Light  
7 Defendants were also informed of the presence of Myclobutanil in the Fung-Away®  
8 within Plaintiff's notice of alleged violation further discussed above at Paragraph 17.

9 29. Plaintiff's allegations regarding Fung-Away® concern "[c]onsumer products  
10 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,  
11 storage, consumption, or other reasonably foreseeable use of a consumer good, or any  
12 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*  
13 *25602(b)*. Fung-Away® is a consumer product, and, as mentioned in herein, exposures  
14 to Myclobutanil took place as a result of such normal and foreseeable consumption and  
15 use.

16 30. Plaintiff's allegations also concern "[e]nvironmental exposure[s]," which are exposures  
17 "that may foreseeably occur as a result of contact with an environmental medium,  
18 including, but not limited to, ambient air, indoor air, drinking water, standing water,  
19 running water, soil, vegetation, or manmade or natural substances, either through  
20 inhalation, ingestion, skin contact, or otherwise. Environmental exposures include all  
21 exposures that are not consumer products exposures, or occupational exposures." *Cal.*  
22 *Code Reg. tit. 27, § 25602(c)*. As mentioned in herein, exposures to Lead by way of  
23 Battery Terminals took place as a result of contact with an environmental medium.

24 31. Plaintiff is informed, believes, and thereon alleges that between December 20, 2007 and  
25 the present, Green Light Defendants knowingly and intentionally exposed California  
26 consumers and users of Fung-Away®, which Green Light Defendants manufactured,  
27 distributed, or sold as mentioned above, to Myclobutanil, without first providing any type  
28 of clear and reasonable warning of such to the exposed persons before the time of

1 exposure. Green Light Defendants have distributed and sold Fung-Away® in California.  
2 Green Light Defendants know and intend that California consumers will use and  
3 consume Fung-Away® thereby exposing them to Myclobutanil. Green Light Defendants  
4 thereby violated Proposition 65.

5 32. The principal routes of exposure are through inhalation and dermal contact caused when  
6 users of Fung-Away® apply Fung-Away granules and the users and others in proximity  
7 to the application inadvertently inhale fumes, mist, or granules of Fung-Away®, or allow  
8 bare skin to come into contact with Fung-Away® for example by touching the product  
9 directly or touching application surfaces immediately after application and thereby  
10 coming into contact with Myclobutanil.

11 33. Plaintiff is informed, believes, and thereon alleges that each of Green Light Defendants' <sup>7</sup>  
12 violations of Proposition 65 as to Fung-Away® have been ongoing and continuous to the  
13 date of the signing of this Complaint, as Green Light Defendants engaged and continue to  
14 engage in conduct which violates Health and Safety Code section 25249.6, including the  
15 manufacture, distribution, promotion, and sale of Fung-Away®, so that a separate and  
16 distinct violation of Proposition 65 occurred each and every time a person was exposed to  
17 Myclobutanil by Fung-Away® as mentioned herein.

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

21 35. Based on the allegations herein, Green Light Defendants are liable for civil penalties of  
22 up to \$2,500.00 per day per individual exposure to Myclobutanil from Fung-Away®,  
23 pursuant to Health and Safety Code section 25249.7(b).

24 36. In the absence of equitable relief, California consumers, the general public, and others  
25 will continue to be involuntarily exposed to Myclobutanil that is contained in Fung-  
26 Away®, creating a substantial risk of irreparable harm. Thus, by committing the acts  
27 alleged herein, Green Light Defendants have caused irreparable harm for which there is  
28 no plain, speedy, or adequate remedy at law.

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

3 **SECOND CAUSE OF ACTION**

4 **(By Consumer Advocacy Group, Inc. against Rainbow Technology Corporation, and Does**  
5 **26-50 for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement**  
6 **Act of 1986 (Health & Safety Code, §§ 25249.5, et seq.))**

7 **Rainbow® Jungle Formula Insect Repellent (Product No. 4501)**

8 38. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference  
9 paragraphs 1 through 23 of this Complaint as though fully set forth herein.

10 39. Defendant Rainbow Technology Corporation and Does 26-50 (hereinafter "Rainbow  
11 Defendants") is, and at all times mentioned herein was, a manufacturer, distributor,  
12 promoter, or retailer of Rainbow® Jungle Formula Insect Repellent (Product No. 4501)  
13 (hereinafter "Rainbow® Repellent"), a consumer product designed for use to repel  
14 various insects on exposed skin surfaces on humans.

15 40. Plaintiff is informed, believes, and thereon alleges that Rainbow® Repellent contains Di-  
16 *n*-propyl isocinchomeronate (MGK Repellent 326).

17 41. On May 1, 1996, the Governor of California added Di-*n*-propyl isocinchomeronate  
18 (MGK Repellent 326) to the list of chemicals known to the State to cause cancer (*Cal.*  
19 *Code Regs.* tit. 27, § 27001(b)). Pursuant to Health and Safety Code sections 25249.9  
20 and 25249.10, twenty (20) months after addition of Di-*n*-propyl isocinchomeronate  
21 (MGK Repellent 326) to the list of chemicals known to the State to cause cancer, Di-*n*-  
22 propyl isocinchomeronate (MGK Repellent 326) became fully subject to Proposition 65  
23 warning requirements and discharge prohibitions.

24 42. Rainbow Defendants knew or should have known that Di-*n*-propyl isocinchomeronate  
25 (MGK Repellent 326) has been identified by the State of California as a chemical known  
26 to cause cancer and therefore were subject to Proposition 65 warning requirements.  
27 Defendants were also informed of the presence of Di-*n*-propyl isocinchomeronate (MGK  
28

1 Repellent 326) in the Rainbow® Repellent within Plaintiff's notice of alleged violation  
2 further discussed above at Paragraph 18.

3 43. Plaintiff's allegations regarding Rainbow® Repellent "[c]onsumer products exposure[s],"  
4 which "is an exposure that results from a person's acquisition, purchase, storage,  
5 consumption, or other reasonably foreseeable use of a consumer good, or any exposure  
6 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.  
7 Rainbow® Repellent is a consumer product, and, as mentioned in herein, exposures to  
8 Di-*n*-propyl isocinchomeronate (MGK Repellent 326) took place as a result of such  
9 normal and foreseeable consumption and use.

10 44. Plaintiff is informed, believes, and thereon alleges that between January 2, 2007 and the  
11 present, Rainbow Defendants knowingly and intentionally exposed California consumers  
12 and users of Rainbow® Repellent, which Defendants manufactured, distributed, or sold  
13 as mentioned above, to Di-*n*-propyl isocinchomeronate (MGK Repellent 326), without  
14 first providing any type of clear and reasonable warning of such to the exposed persons  
15 before the time of exposure. Defendants have distributed and sold Rainbow® Repellent  
16 in California. Rainbow Defendants know and intend that California consumers will use  
17 and consume Rainbow® Repellent thereby exposing them to Di-*n*-propyl  
18 isocinchomeronate (MGK Repellent 326). Rainbow Defendants thereby violated  
19 Proposition 65.

20 45. The principal routes of exposure are through inhalation and dermal contact caused when  
21 the bare skin of users of Rainbow® Repellent and those in spatial and temporal proximity  
22 comes into contact with the Rainbow® Repellent solution containing Di-*n*-propyl  
23 isocinchomeronate (MGK Repellent 326), and when users of Rainbow® Repellent and  
24 others in spatial and temporal proximity inhale spray, fumes, or mist of the Rainbow®  
25 Repellent solution containing Di-*n*-propyl isocinchomeronate (MGK Repellent 326).

26 46. Plaintiff is informed, believes, and thereon alleges that each of Rainbow Defendants'  
27 violations of Proposition 65 as to Rainbow® Repellent have been ongoing and  
28 continuous to the date of the signing of this Complaint, as Rainbow Defendants engaged

1 and continue to engage in conduct which violates Health and Safety Code section  
2 25249.6, including the manufacture, distribution, promotion, and sale of Rainbow®  
3 Repellent, so that a separate and distinct violation of Proposition 65 occurred each and  
4 every time a person was exposed to Di-*n*-propyl isocinchomeronate (MGK Repellent  
5 326) by Rainbow® Repellent as mentioned herein.

6 47. 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 48. Based on the allegations herein, Rainbow Defendants are liable for civil penalties of up to  
10 \$2,500.00 per day per individual exposure to Di-*n*-propyl isocinchomeronate (MGK  
11 Repellent 326) from Rainbow® Repellent, pursuant to Health and Safety Code section  
12 25249.7(b).

13 49. In the absence of equitable relief, California consumers, the general public, and others  
14 will continue to be involuntarily exposed to Di-*n*-propyl isocinchomeronate (MGK  
15 Repellent 326) that is contained in Rainbow® Repellent, creating a substantial risk of  
16 irreparable harm. Thus, by committing the acts alleged herein, Rainbow Defendants have  
17 caused irreparable harm for which there is no plain, speedy, or adequate remedy at law.

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

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1 **PRAYER FOR RELIEF**

2 Plaintiff demands for each cause of action and 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.

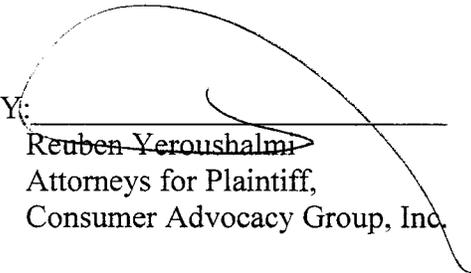
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9 Dated: March 4, 2010

YEROUSHALMI & ASSOCIATES

10

11

12 BY:  \_\_\_\_\_

13 ~~Reuben Yeroushalmi~~

14 Attorneys for Plaintiff,

15 Consumer Advocacy Group, Inc.

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