

ENDORSED
FILED
ALAMEDA COUNTY

JUL 01 2009

CLERK OF THE SUPERIOR COURT

Michelle Cohen

1 REUBEN YEROUSHALMI (SBN 193981)
2 DANIEL D. CHO (SBN 105409)
3 BEN YEROUSHALMI (SBN 232540)
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9 Attorneys for Plaintiffs,
10 Consumer Advocacy Group, Inc

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA - UNLIMITED

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

15 Plaintiff,

16 v.

17 RED DEVIL, INC., a New Jersey
18 Corporation, and DOES 1-50;

19 Defendants.

20 CASE NO. ~~RG09460598~~
21 RG09460583

22 COMPLAINT FOR PENALTY,
23 INJUNCTION, AND RESTITUTION

24 Violation of Proposition 65, the Safe
25 Drinking Water and Toxic Enforcement
26 Act of 1986 (Health & Safety Code., §§
27 25249.5, et seq.)

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

29 Plaintiff Consumer Advocacy Group, Inc. alleges, based on information and belief, a
30 cause of action against defendants as follows:

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1 Enforcement Act of 1986, codified at Health and Safety Code sections 25249.5, *et seq.*
2 (“Proposition 65”), helps to protect California’s drinking water sources from
3 contamination, to allow consumers to make informed choices about the products they
4 buy, and to enable persons to protect themselves from toxic chemicals as they see fit.

5 9. Proposition 65 requires the Governor of California to publish a list of chemicals known to
6 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
7 *Code*, § 25249.8. The list, which the Governor updates at least once a year, contains over
8 800 chemicals and chemical families. Proposition 65 imposes warning requirements and
9 other controls that apply to Proposition 65-listed chemicals.

10 10. 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 & Safety 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 & Safety Code*, § 25249.6).

16 11. Plaintiff conducted research, from which it identified a widespread practice of
17 manufacturers and distributors of adhesives and sealants exposing, knowingly and
18 intentionally, persons in California to the Proposition 65-listed chemicals of such
19 products without providing clear and reasonable warnings of such to the exposed persons
20 prior to exposure. Plaintiff later discerned that Defendants engaged in such practice.

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22 **FIRST CAUSE OF ACTION**

23 **(By Consumer Advocacy Group, Inc. and against Red Devil, Inc. and Does 1-50 For**
24 **Violation Of Proposition 65, The Safe Drinking Water And Toxic Enforcement Act Of 1986**
25 **(*Health & Safety Code*, §§ 25249.5, *et seq.*))**

26 **Red Devil Speed Demon® Acrylic Caulk**
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1 12. Plaintiff, Consumer Advocacy Group, Inc. repeats and incorporates by reference
2 paragraphs 1 through 11 of this complaint as though fully set forth herein.

3 13. Each of the Defendants is, and at all times mentioned herein, was a manufacturer or
4 distributor of Red Devil Speed Demon® Acrylic Caulk (“Speed Demon”), a consumer
5 product designed as a protective sealant in window, door frames, and other home
6 applications.

7 14. Plaintiff is informed, believes, and thereon alleges that Speed Demon contains Butyl
8 benzyl phthalate (BBP) (hereinafter “BBP”).

9 15. On December 2, 2005, the Governor of California added BBP to the list of chemicals
10 known to the State to cause reproductive toxicity, developmental (*Cal. Code Regs. 27 §*
11 *25001(c)*). Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty
12 (20) months after addition of BBP to the list of chemicals known to the State to cause
13 reproductive toxicity, BBP became fully subject to Proposition 65 warning requirements
14 and discharge prohibitions.

15 16. Plaintiff is informed, believes, and thereon alleges that between May 26, 2006, and the
16 present, each of the Defendants knowingly and intentionally exposed California
17 consumers and users of Speed Demon, which it manufactured or distributed as mentioned
18 above, to BBP without first giving clear and reasonable warning of such to the exposed
19 persons before the time of exposure. Defendants have distributed Speed Demon in
20 California. Defendants thereby violated Proposition 65.

21 17. The principal route of exposure is through dermal contact and inhalation when users of
22 Speed Demon apply the product as a sealant around window and door frames, and other
23 applications in and around the home environment, with or without the use of personal
24 protective equipment, and the users purposely or inadvertently come into dermal contact
25 with Speed Demon, or others in temporal and physical proximity, inadvertently or
26 intentionally touched the product, thereby allowing bare skin to become exposed to the
27 chemical relevant to this complaint. Users and others in temporal and physical proximity
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1 to Speed Demon and who come into dermal contact and Speed Demon are further
2 exposed through hand to mouth or hand to mucous membranes mechanisms, and other
3 absorption mechanisms. Users and others in temporal and physical proximity of
4 applications of the product also suffered a principal route of exposure through inhalation
5 by breathing in fumes or other airborne matter from the product. Lastly, users and others
6 in temporal and physical proximity to applications of Speed Demon are further exposed
7 by inadvertent oral ingestion of Speed Demon. Such exposure assumes use of Speed
8 Demon in accordance with its instructions.

9 18. Plaintiff's allegations regarding Speed Demon concern a "[c]onsumer products
10 exposure," 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. 27 §*
13 *25602(b)*. Speed Demon is a consumer product, and exposures to BBP took place as a
14 result of such consumption and foreseeable use as is described herein.

15 19. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
16 Proposition 65 as to Speed Demon have been ongoing and continuous to the date of the
17 signing of this complaint, so that a separate and distinct violation of Proposition 65
18 occurred each and every time a consumer was exposed to BBP by using Speed Demon as
19 mentioned herein.

20 20. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
21 mentioned herein is ever continuing.

22 SATISFACTION OF PRIOR NOTICE

23 21. On or about April 13, 2009, Plaintiff gave notice of alleged violations of Health and
24 Safety Code section 25249.6 subject to a private action to Red Devil, Inc., identified in
25 the notice as "Red Devil, Incorporated," and to the California Attorney General, County
26 District Attorneys, and City Attorneys for each city containing a population of at least
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1 750,000 people in whose jurisdictions the violations allegedly occurred, concerning
2 consumer products Red Devil Speed Demon® Acrylic Caulk.

3 22. Before sending the notice of alleged violation, Plaintiff investigated the consumer
4 product involved, the likelihood that such product would cause users to suffer exposures
5 to BBP, the corporate structure of each of the Defendants, and other relevant matters.

6 23. Plaintiff's notice of alleged violation included a certificate of merit executed by the
7 attorney for the noticing party, Plaintiff. The certificates of merit stated that the attorney
8 for Plaintiff who executed the certificate had consulted with at least one person with
9 relevant and appropriate expertise who had reviewed data regarding the exposure to BBP,
10 respectively, which are the subject Proposition 65-listed chemicals of this action. Based
11 on that information, the attorney for Plaintiff who executed the certificates believed there
12 was a reasonable and meritorious case for this private action. The attorney for Plaintiff
13 attached to the certificates of merit served on the Attorney General information sufficient
14 to establish the basis of the certificates of merit.

15 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
16 gave notice of the alleged violations to Red Devil, Inc. and to the public prosecutors
17 referenced in Paragraph 21.

18 25. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
19 any applicable district attorney or city attorney has commenced and is diligently
20 prosecuting an action against the Defendants.

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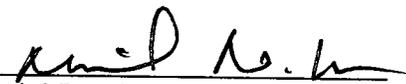
PRAYER FOR RELIEF

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: June 24, 2009

YEROUSHALMI & ASSOCIATES

BY: 
Daniel D. Cho
Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.