

ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2010 MAY -5 AM 1:04

CLERK OF THE COURT

BY:

DEPUTY CLERK

1 REUBEN YEROUSHALMI (SBN 193981)

DANIEL D. CHO (SBN 105409)

2 BEN YEROUSHALMI (SBN 232540)

YEROUSHALMI & ASSOCIATES

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CASE MANAGEMENT CONFERENCE SET

OCT - 8 2010 - 9:00 AM

6 Attorneys for Plaintiffs,

7 Consumer Advocacy Group, Inc

DEPARTMENT 212

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

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

13 Plaintiff,

14 v.

15
16 BARJAN PRODUCTS LLC, a Delaware
Limited Liability Company,
17 TRAVELCENTERS OF AMERICA, a
Delaware Corporation, TA OPERATING
18 CORPORATION, a Delaware Corporation,
and DOES 1-50;

19 Defendants.

CASE NO. **CCC-10-499500**

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

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

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

BY FAX

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

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COMPLAINT FOR VIOLATION OF PROPOSITION 65, THE SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986 (HEALTH AND SAFETY CODE SECTIONS 25249.5, ET SEQ.)

THE PARTIES

1. Plaintiff Consumer Advocacy Group, Inc. (“Plaintiff” OR “CAG”) is a non-profit corporation qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant Barjan Products LLC is a Delaware limited liability company, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant TravelCenters of America is a Delaware corporation, qualified to do business and doing business in the State of California at all relevant times herein.
4. Defendant TA Operating Corporation is a Delaware corporation, qualified to do business and doing business in the State of California at all relevant times herein.
5. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-50, and therefore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
6. At all times mentioned herein, the term “Defendants” includes Barjan Products LLC, TravelCenters of America, TA Operating Corporation, and Does 1-50.
7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein has conducted business within the State of California.
8. At all times relevant to this action, each of the Defendants, including Does 1-50, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants

1 alleged in this Complaint were ratified and approved by every other Defendant or their
2 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
3 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

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

8 **JURISDICTION**

- 9 10. 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 11. 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 12. Venue is proper in the County of San Francisco because one or more of the instances of
23 wrongful conduct occurred, and continues to occur, in the County of San Francisco
24 and/or because Defendants conducted, and continue to conduct, business in the County of
25 San Francisco with respect to the consumer product that is the subject of this action.

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1 **BACKGROUND AND PRELIMINARY FACTS**

- 2 13. 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. 53. 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 protect California’s drinking water sources
8 from contamination, allow consumers to make informed choices about the products they
9 buy, and enable persons to protect themselves from toxic chemicals as they see fit.
- 10 14. Proposition 65 requires the Governor of California to publish a list of chemicals known to
11 the state to cause cancer, birth defects, or other reproductive harm. Health & Safety Code
12 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
13 chemicals and chemical families. Proposition 65 imposes warning requirements and
14 other controls that apply to Proposition 65-listed chemicals.
- 15 15. All businesses with ten (10) or more employees that operate or sell products in California
16 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
17 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
18 water (Health & Safety Code § 25249.5), and (2) required to provide “clear and
19 reasonable” warnings before exposing a person, knowingly and intentionally, to a
20 Proposition 65-listed chemical (Health & Safety Code § 25249.6).
- 21 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
22 may be enjoined in any court of competent jurisdiction. Health & Safety Code §
23 25249.7. "Threaten to violate" means "to create a condition in which there is a
24 substantial probability that a violation will occur." Health & Safety Code § 25249.11(e).
25 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
26 recoverable in a civil action. Health & Safety Code § 25249.7(b).
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1 17. 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 in 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 **SATISFACTION OF PRIOR NOTICE**

6 18. On or about July 1, 2009, Plaintiff gave notice of alleged violations of Health and Safety
7 Code section 25249.6, concerning consumer products exposure, subject to a private
8 action to Barjan Products LLC and to the California Attorney General, County District
9 Attorneys, and City Attorneys for each city containing a population of at least 750,000
10 people in whose jurisdictions the violations allegedly occurred, concerning the consumer
11 product Barjan Products Battery Terminal.

12 19. On or about August 13, 2009, Plaintiff gave notice of alleged violations of Health and
13 Safety Code section 25249.6, concerning consumer products exposure, subject to a
14 private action to Barjan Products LLC and to the California Attorney General, County
15 District Attorneys, and City Attorneys for each city containing a population of at least
16 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
17 consumer product Barjan Products Battery Terminal.

18 20. On or about October 22, 2009, Plaintiff gave notice of alleged violations of Health and
19 Safety Code section 25249.6, concerning consumer products exposure, subject to a
20 private action to Barjan Products LLC, TravelCenters of America, TA Operating
21 Corporation, and to the California Attorney General, County District Attorneys, and City
22 Attorneys for each city containing a population of at least 750,000 people in whose
23 jurisdictions the violations allegedly occurred, concerning the consumer product Barjan
24 Products Battery Terminal.

25 21. Before sending the notices of alleged violations, Plaintiff investigated the consumer
26 product involved, the likelihood that such product would cause users to suffer exposures
27 to Lead, and the corporate structure of each of the Defendants.

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1 22. Plaintiff's notices of alleged violations each included a Certificate of Merit executed by
2 the attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney
3 for Plaintiff who executed the certificates had consulted with at least one person with
4 relevant and appropriate expertise who reviewed data regarding the exposures to Lead,
5 which is the subject Proposition 65-listed chemical of this action. Based on that
6 information, the attorney for Plaintiff who executed the Certificate of Merit believed
7 there was a reasonable and meritorious case for this private action. The attorney for
8 Plaintiff attached to each Certificate of Merit served on the Attorney General the
9 confidential factual information sufficient to establish the bases of the Certificate of
10 Merit.

11 23. Plaintiff's notices of alleged violation also each included a Certificate of Service and a
12 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
13 (Proposition 65) A Summary." Health & Safety Code § 25249.7(d).

14 24. Plaintiff is commencing this action more than sixty (60) days from the date that Plaintiff
15 gave notice of the alleged violation to Barjan Products LLC, TravelCenters of America,
16 TA Operating Corporation, and to the public prosecutors referenced in Paragraphs 16-19.

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

20 CAUSE OF ACTION

21 **(By Consumer Advocacy Group, Inc. against Barjan Products LLC, TravelCenters of**
22 **America, and Does 1-50 for Violations Of Proposition 65, The Safe Drinking Water And**
23 **Toxic Enforcement Act Of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))**

24 **Barjan Products Battery Terminal Containing Lead**

25 26. Plaintiff, Consumer Advocacy Group, Inc. repeats and incorporates by reference
26 paragraphs 1 through 25 of this complaint as though fully set forth herein.

1 27. Each of the Defendants is, and at all times mentioned herein, was a manufacturer, or
2 distributor, or retailer of Barjan Products Battery Terminal ("Battery Terminal"), a
3 consumer product which is designed for use in connection with an automobile battery or
4 related automobile equipment.

5 28. Plaintiff is informed, believes, and thereon alleges that Battery Terminal contains Lead.

6 29. On October 1, 1992, the Governor of California added Lead and Lead compounds to the
7 list of chemicals known to the State to cause cancer (Cal. Code Regs. 27 § 27001(b)).
8 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
9 after addition of Lead to the list of chemicals known to the State to cause cancer, Lead
10 became fully subject to Proposition 65 warning requirements and discharge prohibitions.

11 30. On February 27, 1997, the Governor of California added Lead and Lead compounds to
12 the list of chemicals known to the State to cause reproductive toxicity (Cal. Code Regs.
13 27 § 27001(c)). Pursuant to Health and Safety Code sections 25249.9 and 25249.10,
14 twenty (20) months after addition of Lead to the list of chemicals known to the State to
15 reproductive toxicity, Lead became fully subject to Proposition 65 warning requirements
16 and discharge prohibitions.

17 31. Plaintiff is informed, believes, and thereon alleges that between July 1, 2006, and the
18 present, each of the Defendants knowingly and intentionally exposed California
19 consumers and users of Battery Terminal, which it manufactured or distributed as
20 mentioned above, to Lead without first giving clear and reasonable warning of such to the
21 exposed persons before the time of exposure. Defendants have distributed Battery
22 Terminal in California. Defendants thereby violated Proposition 65.

23 32. The principal, but not exclusive, routes of exposure were and are through dermal contact,
24 ingestion and inhalation caused when users of Battery Terminal are exposed to Lead by
25 handling Battery Terminal without wearing gloves or by touching bare skin or mucous
26 membranes with gloves after handling Battery Terminal, as well as hand to mouth contact, or
27 breathing in particulate matter emanating from Battery Terminal as part of the process of
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1 installing the product or removing it from an automobile battery or related automobile
2 equipment.

3 33. Plaintiff's allegations regarding Battery Terminal concern a "[c]onsumer products
4 exposure," which "is an exposure that results from a person's acquisition, purchase,
5 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
6 exposure that results from receiving a consumer service." Cal. Code Regs. 27 §
7 25602(b). Battery Terminal is a consumer product, and exposures to Lead took place as a
8 result of such consumption and foreseeable use as is described herein.

9 34. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
10 Proposition 65 as to Battery Terminal have been ongoing and continuous to the date of
11 the signing of this complaint, so that a separate and distinct violation of Proposition 65
12 occurred each and every time a consumer was exposed to Lead by using Battery Terminal
13 as mentioned herein.

14 35. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
15 mentioned herein is ever continuing.

16 **PRAYER FOR RELIEF**

17 Plaintiff demands against each of the Defendants as follows:

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

23 Dated: May 3, 2010

YEROUSHALMI & ASSOCIATES

24
25
26 BY: 

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