

DEC 30 2010

John A. Clarke, Executive Officer/Clerk
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 – CENTRAL DISTRICT

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

15 Plaintiff,

16 v.

17 BAYER CORPORATION, a Pennsylvania
18 Corporation, and DOES 1-50

19 Defendants.

CASE NO.

BC452177

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)

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

23 **THE PARTIES**

- 24 1. Plaintiff, Consumer Advocacy Group, Inc. ("Plaintiff"), is a non-profit corporation
25 qualified to do business in the State of California. It brings this action in the public
26 interest as defined under Health and Safety Code section 25249.7, subdivision (d).
27 2. Defendant Bayer Corp. is a corporation incorporated in the state Pennsylvania.
28

1 3. Plaintiff is ignorant of the true names and capacities of defendants Does 1-50, and
2 therefore sues these defendants by such fictitious names. Plaintiff will amend this
3 complaint to allege their true names and capacities when ascertained. Plaintiff is
4 informed, believes, and thereon alleges that each fictitiously named defendant is
5 responsible in some manner for the occurrences herein alleged and the damages caused
6 thereby.
7

8 4. At all times mentioned herein, "Defendants" include Bayer Corporation, as well as Does
9 1-50.
10

11 5. At all times mentioned each defendant was a "[p]erson in the course of doing business"
12 within the meaning of Health and Safety Code section 25249.11, subdivision (b).

13 Plaintiff is informed, believes, and thereon alleges that at all times mentioned herein each
14 defendant had ten or more employees.
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17 **JURISDICTION AND VENUE**

18 **JURISDICTION**

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

24 7. This Court has jurisdiction over Defendants named herein because Defendants either
25 reside or are located in this State or are foreign corporations authorized to do business in
26 California, are registered with the California Secretary of State, or who do sufficient
27 business in California, have sufficient minimum contacts with California, or otherwise
28 intentionally avail themselves of the markets within California through their manufacture,

1 distribution, promotion, marketing, or sale of their products within California to render
2 the exercise of jurisdiction by the California courts permissible under traditional notions
3 of fair play and substantial justice. Furthermore, Defendants have purposefully availed
4 themselves of California by deliberately placing products within the stream of commerce
5 and thereby directed their activities towards, and had a substantial connection with, the
6 State of California.

- 7 8. Venue is proper in the County of Los Angeles because one or more of the instances of
8 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
9 because Defendants conducted, and continue to conduct, business in the County of Los
10 Angeles with respect to the consumer product that is the subject of this action.

11 **BACKGROUND AND PRELIMINARY FACTS**

- 12 9. In 1986, California voters approved an initiative to address growing concerns about
13 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
14 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
15 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
16 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
17 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
18 from contamination, to allow consumers to make informed choices about the products
19 they buy, and to enable persons to protect themselves from toxic chemicals as they see
20 fit.
- 21 10. Proposition 65 requires the Governor of California to publish a list of chemicals known to
22 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
23 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
24 chemicals and chemical families. Proposition 65 imposes warning requirements and
25 other controls that apply to Proposition 65-listed chemicals.
- 26 11. All businesses with ten (10) or more employees that operate or sell products in California
27 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
28 from knowingly discharging Proposition 65-listed chemicals into sources of drinking

1 water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear and
2 reasonable” warnings before exposing a person, knowingly and intentionally, to a
3 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

4 12. Proposition 65 provides that any person "violating or threatening to violate" the statute
5 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.

6 "Threaten to violate" means "to create a condition in which there is a substantial
7 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

8 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
9 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

10 13. Plaintiff identified certain practices of manufacturers and distributors of 3,3’

11 Dimethylbenzidine (ortho-Tolidine) and 3,3’ Dimethylbenzidine dihydrochloride
12 products of exposing, knowingly and intentionally, persons in California to the
13 Proposition 65-listed chemicals of such products without first providing clear and
14 reasonable warnings of such to the exposed persons prior to the time of exposure.

15 Plaintiff later discerned that Defendants engaged in such practice.

16 14. On January 1, 1988, 3,3’-Dimethylbenzidine (ortho-Tolidine) first appeared on the

17 Governor’s Proposition 65 list of Chemicals known to cause cancer. (Cal. Code Regs.,
18 title 22, §12000, subdivision (b)). Pursuant to Health and Safety Code section 25249.9,
19 twenty months after first appearing on the Governor’s Proposition 65 list, 3,3’-
20 Dimethylbenzidine (ortho-Tolidine) became subject to Proposition 65 warning
21 requirements.
22

23 15. On April 1, 1992, 3,3’-Dimethylbenzidine dihydrochloride first appeared on the

24 Governor’s Proposition 65 list of Chemicals known to cause cancer. (Cal. Code Regs.,
25 title 22, §12000, subdivision (b)). Pursuant to Health and Safety Code section 25249.9,
26 twenty months after first appearing on the Governor’s Proposition 65 list, 3,3’-
27

1 Dimethylbenzidine dihydrochloride became subject to Proposition 65 warning
2 requirements.

3 **SATISFACTION OF PRIOR NOTICE**

- 4 16. On or about July 9, 2010 Plaintiff gave notice of alleged violations of Health and Safety
5 Code section 25249.6, concerning consumer products exposures, subject to a private
6 action to Bayer Corp., identified in the notice as "Bayer Corporation.," as well as to the
7 California Attorney General, County District Attorneys, and City Attorneys for each city
8 containing a population of at least 750,000 people in whose jurisdictions the violations
9 allegedly occurred, concerning the consumer product identified as "Clinistix® Reagent
10 Strips for Urinalysis BAYER 2844"
- 11 17. Before sending the notice of alleged violation, Plaintiff investigated the consumer
12 products involved, the likelihood that such products would cause users to suffer
13 significant exposures to lead, and the corporate structure of each of the Defendants.
- 14 18. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
15 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
16 Plaintiff who executed the certificate had consulted with at least one person with relevant
17 and appropriate expertise who reviewed data regarding the exposures to 3,3'
18 Dimethylbenzidine (ortho-Tolidine) and 3,3' Dimethylbenzidine dihydrochloride,
19 respectively, which are the subject Proposition 65-listed chemicals of this action. Based
20 on that information, the attorney for Plaintiff who executed the Certificate of Merit
21 believed there was a reasonable and meritorious case for this private action. The attorney
22 for Plaintiff attached to the Certificate of Merit served on the Attorney General the
23 confidential factual information sufficient to establish the basis of the Certificate of
24 Merit.
- 25 19. Plaintiff's notice of alleged violations also included a Certificate of Service and a
26 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
27 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
28

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 Bayer Corp., and the public prosecutors
3 referenced in Paragraph 16.

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.

7
8 **FIRST CAUSE OF ACTION**

9 **(BY Consumer Advocacy Group, Inc. and against Bayer Corporation, and DOES 1 – 50**
10 **For Violation Of Proposition 65, The Safe Drinking Water And Toxic Enforcement Act**
11 **Of 1986 (Health & Saf. Code, §§ 25249.5, et seq.)**

12
13 22. Plaintiff, Consumer Advocacy Group, Inc., repeats and incorporates by reference the
14 previous paragraphs of this complaint as though fully set forth herein.

15 23. Each Defendant is and at all times mentioned herein was a manufacturer or distributor of
16 “Clinistix® Reagent Strips for Urinalysis” designed for testing the concentration of
17 glucose in urine. Hereinafter, shall be referred to as “Urinalysis Strips”
18

19 24. Plaintiff is informed, believes, and thereon alleges that each Defendant knowingly and
20 intentionally exposed users of the Urinalysis Strips that it manufactured or distributed, as
21 mentioned above, to 3,3'-Dimethylbenzidine (ortho-Tolidine), and 3,3'-
22 Dimethylbenzidine dihydrochloride, chemicals designated by the State of California to
23 cause cancer, without first giving clear and reasonable warning of such to the persons
24 exposed. Defendants thereby violated Health and Safety Code sections 25249.5, et seq.
25 (“Proposition 65”).
26
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28

1 25. Between January 25, 2007, and January 25, 2010, persons using the Urinalysis Strips
2 sustained exposure by dermal contact to 3,3'-Dimethylbenzidine (ortho-Tolidine)
3 contained in the Urinalysis Strips by handling the Urinalysis Strips and liberating the
4 3,3'-Dimethylbenzidine (ortho-Tolidine) and 3,3'-Dimethylbenzidine dihydrochloride.
5 Said persons thereby allowed their bare skin to touch the solution containing 3,3'-
6 Dimethylbenzidine (ortho-Tolidine) and 3,3'-Dimethylbenzidine dihydrochloride. Since
7 3,3'-Dimethylbenzidine (ortho-Tolidine) and 3,3'-Dimethylbenzidine dihydrochloride
8 absorbs through human skin, the foregoing exposure was significant and warranted a
9 Proposition 65 warning.
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11

12 **PRAYER FOR RELIEF**

13 Plaintiff demands against each Defendant as follows:

- 14 1. A permanent injunction;
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16 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b) of
17 \$2,500.00 per day per violation;
18
19 3. Costs of suit;
20
21 5. Reasonable attorney's fees and costs; and
22
23 6. Any further relief that the court may deem just and equitable.

24 Dated: 12/28/10

25 YEROUSHALMI & ASSOCIATES

26 

27 Reuben Yeroushalmi
28 Attorney for Plaintiff,
Consumer Advocacy Group, Inc.