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8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF LOS ANGELES – CENTRAL DISTRICT  
11

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

14 Plaintiff,

15 v.

16 P&G-Clairol, Inc., a Delaware corporation;  
17 and Does 1-50

18 Defendants.  
19  
20

CASE NO.

**BC 461764**

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:

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THE PARTIES

1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" OR "CAG") is a 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 P&G-Clairol, Inc. ("Clairol") is a company incorporated in the State of Delaware.
3. 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.
4. At all times mentioned herein, the term "Defendants" includes Clairol and Does 1-50.
5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
6. 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 alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each of the other Defendants.
7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the Defendants was a person doing business within the meaning of Health and Safety Code

1 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more  
2 employees at all relevant times.

### 3 JURISDICTION

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

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

20 10. 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 BACKGROUND AND PRELIMINARY FACTS

25 11. In 1986, California voters approved an initiative to address growing concerns about  
26 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to  
27 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,  
28 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking

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

6 12. 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 13. 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 14. 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 15. Plaintiff identified certain practices of manufacturers and distributors of diaminotoluene-  
24 bearing products of exposing, knowingly and intentionally, persons in California to the  
25 Proposition 65-listed chemicals of such products without first providing clear and  
26 reasonable warnings of such to the exposed persons prior to the time of exposure.  
27 Plaintiff later discerned that Defendants engaged in such practice.  
28

1 16. On January 1, 1990, the Governor of California added Diaminotoluene (mixed) to the list  
2 of chemicals known to the State to cause cancer (*Cal. Code Regs. tit. 27, § 27001(b)*).  
3 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months  
4 after addition of Diaminotoluene (mixed) compounds to the list of chemicals known to  
5 the State to cause cancer, Diaminotoluene (mixed) compounds became fully subject to  
6 Proposition 65 warning requirements and discharge prohibitions.

7 **SATISFACTION OF PRIOR NOTICE**

8 17. On or about November 30, 2010 Plaintiff gave notice of alleged violations of Health and  
9 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
10 private action to Clairol, identified in the notice as "P&G-Clairol, Inc.," as well as to the  
11 California Attorney General, County District Attorneys, and City Attorneys for each city  
12 containing a population of at least 750,000 people in whose jurisdictions the violations  
13 allegedly occurred, concerning the consumer product identified as "**Clairol® Perfect 10**  
14 "**nice'n easy**" ® **Permanent Hair Color** (including but not limited to color "Light Ash  
15 Brown")."

16 18. Before sending the notice of alleged violation, Plaintiff investigated the consumer  
17 products involved, the likelihood that such products would cause users to suffer  
18 significant exposures to Diaminotoluene (mixed), and the corporate structure of the  
19 Defendants.

20 19. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the  
21 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for  
22 Plaintiff who executed the certificate had consulted with at least one person with relevant  
23 and appropriate expertise who reviewed data regarding the exposures to Diaminotoluene  
24 (mixed), respectively, which are the subject Proposition 65-listed chemicals of this  
25 action. Based on that information, the attorney for Plaintiff who executed the Certificate  
26 of Merit believed there was a reasonable and meritorious case for this private action. The  
27 attorney for Plaintiff attached to the Certificate of Merit served on the Attorney General  
28

1 the confidential factual information sufficient to establish the basis of the Certificate of  
2 Merit.

3 20. Plaintiff's notice of alleged violations also included a Certificate of Service and a  
4 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
5 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

6 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
7 gave notice of the alleged violations to Clairol and the public prosecutors referenced in  
8 Paragraph 17.

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

12  
13  
14 **FIRST CAUSE OF ACTION**

15 **(By Consumer Advocacy Group, Inc. and against P & G-Clairol, Inc. for Violations of**  
16 **Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health &***  
***Safety Code*, §§ 25249.5, *et seq.*))**

17 **Clairol® Perfect 10 "nice'n easy" ® Permanent Hair Color**  
18 **(including but not limited to color "Light Ash Brown")**

19 23. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference  
20 paragraphs 1 through 22 of this complaint as though fully set forth herein.

21 24. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
22 distributor, promoter, or retailer of "**Clairol® Perfect 10 "nice'n easy" ® Permanent**  
23 **Hair Color** (including but not limited to color "Light Ash Brown")" ("Hair Color"), a  
24 consumer product designed for personal use.

25 25. Plaintiff is informed, believes, and thereon alleges that Hair Color contains  
26 Diaminotoluene (mixed).

27 26. Defendants knew or should have known that Diaminotoluene (mixed) has been identified  
28 by the State of California as a chemical known to cause cancer and therefore was subject

1 to Proposition 65 warning requirements. Defendants were also informed of the presence  
2 of Diaminotoluene (mixed) in the Hair Color within Plaintiff's notice of alleged  
3 violations further discussed above at Paragraph 17.

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

11 28. The principal routes of exposure were and are through dermal contact, ingestion, and  
12 inhalation caused when users of Hair Color, while wearing colorist gloves per the  
13 product's instructions or not wearing colorist gloves, pour the contents of the no-ammonia  
14 conditioning cream haircolor tube into cream developer applicator bottle, replace the  
15 applicator cap securely on the cream developer bottle, shake developer bottle well until  
16 contents were thoroughly mixed, apply color to their hair, or that of another, and left on  
17 for ten (10) minutes if refreshing hair color, twenty (20) minutes for natural hair, and  
18 thirty (30) minutes for relaxed hair, before rinsing thoroughly. In doing so, users permit  
19 bare skin, including scalp, and in some instances eyes and hands, to touch the product  
20 containing Diaminotoluene (mixed). Additionally when users rinse the product from  
21 their hair, users permit the product containing Diaminotoluene (mixed) to come into  
22 contact with the bare skin on the user's face and body and in some instances the user's  
23 mouth. In doing so, users also breathe in fumes emanating from Hair Color.

24 29. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
25 Proposition 65 as to Hair Color have been ongoing and continuous to the date of the  
26 signing of this complaint, as Defendants engaged and continue to engage in conduct  
27 which violates Health and Safety Code section 25249.6, including the manufacture,  
28 distribution, promotion, and sale of Hair Color, so that a separate and distinct violation of

1 Proposition 65 occurred each and every time a person was exposed to Diaminotoluene  
2 (mixed) by Hair Color as mentioned herein.

3 30. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
4 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
5 violations alleged herein will continue to occur into the future.

6 31. Based on the allegations herein, Defendants are liable for civil penalties of up to  
7 \$2,500.00 per day per individual exposure to Diaminotoluene (mixed) from Hair Color,  
8 pursuant to Health and Safety Code section 25249.7(b).

9 32. In the absence of equitable relief, the general public and Defendants' employees will  
10 continue to be involuntarily exposed to Diaminotoluene (mixed) that is contained in Hair  
11 Color, creating a substantial risk of irreparable harm. Thus, by committing the acts  
12 alleged herein, Defendants have caused irreparable harm for which there is no plain,  
13 speedy, or adequate remedy at law.

14 33. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
15 filing this Complaint.

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 16, 2011

YEROUSHALMI & ASSOCIATES

24  
25  
26 BY: 

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