

1 REUBEN YEROUSHALMI (SBN 193981)
2 DANIEL D. CHO (SBN 105409)
3 BEN YEROUSHALMI (SBN 232540)
4 **YEROUSHALMI & ASSOCIATES**
5 9100 Wilshire Boulevard, Suite 610E
6 Beverly Hills, California 90212
7 Telephone: 310.623.1926
8 Facsimile: 310.623.1930

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 MCDONALD'S RESTAURANTS OF)
18 CALIFORNIA, INC ., a California)
19 Corporation; and DOES 1-5000;)

20 Defendants.)
21)
22)
23)
24)
25)
26)
27)
28)

CASE NO.

BC468792

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)

Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendants
McDonald's Restaurants of California, Inc., and Does 1-5000 as follows:

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CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

AUG 31 2011

John A. Clarke, Executive Officer/Clerk
By A. Et LAFLEUR-CLAYTON, Deputy

COPY

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 Cal. 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 Cal. Health and Safety Code section 25249.7, subdivision (d).
2. Defendant McDonald's Restaurants of California, Inc. ("McDonald's") is a company incorporated in the State of California.
3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-5000, 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. Plaintiff is informed, believes, and thereon alleges that McDonald's, and Does 1-5000, at all times mentioned herein, have conducted business within the State of California.
5. At all times mentioned herein, "Defendants" include McDonald's, and Does 1-5000.
6. At all times relevant to this action, each of the Defendants, including Does 1-5000, 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.

1 7. 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 Cal. Health and Safety
3 Code section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or
4 more employees.

5 **JURISDICTION**

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

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

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

23 **BACKGROUND AND PRELIMINARY FACTS**

24 11. In 1986, California voters approved an initiative to address growing concerns about
25 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
26 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
27 Proposed Law, Gen. Elect. (Nov. 4, 1986) at p.3. The initiative, The Safe Drinking
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1 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
2 25249.5, *et seq.* ("Proposition 65"), helps protect California's drinking water sources
3 from contamination, allows consumers to make informed choices about the products they
4 buy, and enables persons to protect themselves from toxic chemicals as they see fit.

5 12. 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. *Cal. Health & Safety*
7 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains over
8 700 chemicals and families. Proposition 65 imposes warning requirements and other
9 controls that apply to Proposition 65-listed chemicals.

10 13. 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 (*Cal. 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 (*Cal. Health & Safety Code* § 25249.6).

16 14. Proposition 65 provides that any person "violating or threatening to violate" the statute
17 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
18 "Threaten to violate" means "to create a condition in which there is a substantial
19 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

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

22 15. Through research and investigation, Plaintiff identified a widespread practice of owners,
23 operators, Franchisees and managers of restaurants with adjacent areas where smoking of
24 tobacco or tobacco products is permitted, of exposing, knowingly and intentionally,
25 persons in California to the Proposition 65-listed chemicals contained in second-hand
26 tobacco smoke or environmental tobacco smoke without first providing clear and
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1 reasonable warnings of such to the exposed persons prior to exposure. Plaintiff later
 2 discerned that Defendants engaged in such practice, thereby violating Proposition 65.

3 16. Plaintiff is informed, believes, and thereon alleges that second-hand tobacco smoke and
 4 environmental tobacco smoke contains Tobacco Smoke, a chemical known to the State of
 5 California to cause Cancer and Reproductive Toxicity.

6 17. Plaintiff is informed, believes, and thereon alleges that second-hand tobacco smoke and
 7 environmental tobacco smoke contain the following chemicals known to the State of
 8 California to cause cancer or reproductive toxicity (Constituent Chemicals):

9				
10	Carbon disulfide	Arsenic (inorganic arsenic compounds)	Dibenz[a,h]anthracene	N-Nitrosodiethylamine
11	1, 1 -Dimethylhydrazine (UDMH)	Benz[a]anthracene	Dibenz[a,j]acridine	N-Nitrosodi-n-butylamine
12	1,3-Butadiene	Benzene	Dibenzo[a,e]pyrene	N-Nitrosomethylethylamine
	1-Naphthylamine	Benzo[a]pyrene	Dibenzo[a,h]pyrene	N-Nitrosomorpholine
13	2-Naphthylamine	Benzo[b]fluoranthene	Dibenzo[a,i]pyrene	N-Nitrosonicotine
	2-Nitropropane	Benzo[j]fluoranthene	Dibenzo[a,l]pyrene	N-Nitrosopiperidine
14	4-Aminobiphenyl (4-amino-diphenyl)	Benzo[k]fluoranthene	Dichlorodiphenyltrichloroethane (DDT)	N-Nitrosopyrrolidine
15	7H-Dibenzo[c,g]carbazole	Cadmium	Formaldehyde (gas)	Ortho-Anisidine
	Acetaldehyde	Captan	Hydrazine	Ortho-Toluidine
16	Acetamide	Chromium (hexavalent compounds)	Lead and lead compounds	Urethane (Ethyl carbamate)
17	Acrylonitrile	Chrysene	Nickel and certain nickel compounds	Carbon monoxide
18	Aniline	Dibenz[a,h]acridine	N-Nitrosodiethanolamine	Nicotine
19	Urethane	Lead	Toluene	

20
 21 18. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
 22 after addition of Tobacco Smoke and each of the Constituent Chemicals to the list of
 23 chemicals known to the State to cause cancer (*Cal. Code Regs. 27 §27001(b)*) or
 24 reproductive toxicity (*Cal. Code Regs. 27§ 27001(c)*), Tobacco Smoke and each of the
 25 Constituent Chemicals became fully subject to Proposition 65 warning requirements and
 26 discharge prohibitions. Tobacco Smoke and each of the Constituent Chemicals are now
 27 fully subject to Proposition 65 warning requirements and discharge prohibitions.

1 24. Plaintiff is commencing this action more than sixty (60) days from the date that Plaintiff
2 gave notice of the alleged violations to McDonald's, their Franchisees and to the public
3 prosecutors referenced in Paragraph 20.

4 25. 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 McDonald's Restaurants of California,
10 Inc., and Does 1-5000 For Violation Of Proposition 65, The Safe Drinking Water And
11 Toxic Enforcement Act Of 1986 (Cal. Health & Safety Code § 25249.5, et seq.)**

12 **Environmental Exposures to Second-Hand Tobacco Smoke And Environmental Tobacco
13 Smoke**

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

16 27. An "[e]nvironmental exposure" is an exposure which may foreseeably occur as the result
17 of contact with an environmental medium, including, but not limited to, ambient air,
18 indoor air, drinking water, standing water, running water, soil, vegetation, or manmade or
19 natural substances, either through inhalation, ingestion, skin contact or otherwise.

20 Environmental exposures include all exposures which are not consumer products
21 exposures, or occupational exposure." *Cal. Code Regs. tit. 27, § 25602(c)*. Defendants
22 failed to provide clear and reasonable Proposition 65-compliant warnings to exposed
23 persons prior to the knowing and intentional exposures described herein, and thereby
24 violated Proposition 65.

- 25 i. The sources of exposure are numerous. The locations where exposures
26 occurred and continue to occur are at each McDonald's and their
27 Franchisees' restaurant, including but not limited to McDonald's and their
28 Franchisees' restaurants, that have outdoor seating areas adjacent to the

1 store or other designated smoking area wherein the smoking of tobacco is
2 not expressly prohibited and which does not contain conspicuously posted
3 "no smoking" signs (hereinafter "Locations").
4

5 28. Each of the Defendants, including McDonald's and their Franchisees', allowed, and
6 allows, individuals to smoke cigarettes, and other tobacco products at each of the
7 Locations, thereby exposing customers, members of the public, visitors, and vendors to
8 Tobacco Smoke and the Constituent Chemicals found in second-hand tobacco smoke or
9 environmental tobacco smoke. Each of the Defendants, including McDonald's and their
10 Franchisees' maintains exclusive control over at least one of the relevant outdoor seating
11 areas, as these areas constitute a portion of the property each of the Defendants owns or
12 leases for use as a restaurant. The amount of control over the relevant outdoor seating
13 areas possessed by each of the Defendants, including McDonald's and its Franchisees, is
14 sufficient to prohibit or allow smoking or to post Proposition 65-compliant warnings and
15 to control the quality of ambient air entering and circulating the relevant outdoor seating
16 areas and adjacent stores. Furthermore, Plaintiff believes that McDonald's and their
17 Franchisees' maintains and possesses sufficient control over each of the relevant
18 Locations to prohibit or allow smoking or to require posting of Proposition 65-compliant
19 warnings and to control the quality of the ambient air entering and circulating the relevant
20 outdoor seating areas and adjacent stores, despite the operation or control of any Location
21 by another entity.

22 29. Each of the Defendants, including McDonald's and their Franchisees', permitted, and
23 permits, persons to smoke tobacco in these outdoor seating areas and often facilitated the
24 smoking of tobacco by providing ashtrays for the convenience of those persons who
25 smoke at the Locations. When persons, including customers and employees of each of
26 the Defendants loiter in, walk through or traverse zones in and adjacent to the relevant
27 outdoor seating areas, they are exposed to Tobacco Smoke and the Constituent Chemicals
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1 present in the ambient air. Plaintiff's investigations show that infants and pregnant
2 women are often among the exposed persons. Persons are also exposed when entrance
3 doors to the Locations are open and Tobacco Smoke and the Constituent Chemicals enter
4 the restaurants, the indoor premises of which are otherwise non-smoking areas.

5 30. The route of exposure to Tobacco Smoke and the Constituent Chemicals is inhalation
6 contact caused when exposed persons breathe in the ambient air containing second-hand
7 tobacco smoke or environmental tobacco smoke, causing exposure of Tobacco Smoke
8 and the Constituent Chemicals to the mouth, throat, bronchi, esophagi, and lungs.
9 Exposure of Tobacco Smoke and the Constituent Chemicals generates risks of cancer and
10 reproductive toxicity to the exposed persons.

11 31. Plaintiff is informed, believes, and thereon alleges between November 9, 2007 and the
12 present, each of the Defendants knowingly and intentionally exposed persons in
13 California to Tobacco Smoke and its Constituent Chemicals, without first providing any
14 type of clear and reasonable warning of such to the exposed persons before the time of
15 exposure, as described above. These exposures occurred on, but not beyond, the property
16 owned or controlled by Defendants. Defendants thereby violated Proposition 65.

17 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
18 Proposition 65 as to second-hand tobacco smoke and environmental tobacco smoke have
19 been ongoing and continuous to the date of the signing of this complaint, so that a
20 separate and distinct violation of Proposition 65 occurred each and every time a person
21 was exposed to Tobacco Smoke and the Constituent Chemicals as described herein.

22 33. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
23 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
24 violations alleged herein will continue to occur in the future.

25 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
26 \$2,500.00 per day per individual exposure to Tobacco Smoke and its Constituent
27 Chemicals, pursuant to Health and Safety Code section 25249.7(b).
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1 35. In the absence of equitable relief, California consumers, the general public, and others
2 will continue to be involuntarily exposed to Tobacco Smoke and its Constituent
3 Chemicals, creating a substantial risk of irreparable harm. Thus, by committing the acts
4 alleged herein, Defendants have caused irreparable harm for which there is no plain,
5 speedy, or adequate remedy at law.

6 36. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
7 filing this Complaint.

8 **SECOND CAUSE OF ACTION**

9 **(By Consumer Advocacy Group, Inc. and against McDonald's Restaurants of California,
10 Inc., and Does 1-5000 For Violation Of Proposition 65, The Safe Drinking Water And
11 Toxic Enforcement Act Of 1986 (Cal. Health & Safety Code § 25249.5, et seq.)**

12 **Occupational Exposures to Second-Hand Tobacco Smoke and Environmental Tobacco
13 Smoke**

14 37. Plaintiff, Consumer Advocacy Group, Inc. repeats and incorporates by reference
15 paragraphs 1 through 37 of this complaint as though fully set forth herein.

16 38. Plaintiff's allegations concern an "[o]ccupational exposure", which "means an exposure
17 to any employee in his or her employer's workplace." *Cal. Code Regs. 27 § 25602(f)*.
18 Exposures of Tobacco Smoke and its Constituent Chemicals to Defendants' employees
19 occurred through the course of their employment.

20 39. The sources of exposure are numerous. The locations of exposure were at the Locations
21 discussed above. Each of the Defendants was an employer employing employees at each
22 of the Locations each day between November 9, 2007 and the present.

23 40. Each of the Defendants, including McDonald's and their Franchisees', allowed, and
24 allows, individuals to smoke cigarettes, and other tobacco products at each of the
25 Locations, thereby exposing its employees to Tobacco Smoke and the Constituent
26 Chemicals found in second-hand tobacco smoke or environmental tobacco smoke. Each
27 of the Defendants, including McDonald's and their Franchisees', maintains exclusive
28 control over at least one of the relevant outdoor seating areas, as these areas constitute a

1 portion of the property each of the Defendants owns or leases for use as a restaurant. The
2 amount of control over the relevant outdoor seating areas possessed by each of the
3 Defendants, including McDonald's and their Franchisees', is sufficient to prohibit or
4 allow smoking or to post Proposition 65-compliant warnings and to control the quality of
5 ambient air entering and circulating the relevant outdoor seating areas and adjacent
6 stores. Furthermore, Plaintiff believes that each of the Defendants, including
7 McDonald's and their Franchisees', maintains and possesses sufficient control over each
8 of the relevant Locations to prohibit or allow smoking or to require posting of Proposition
9 65-compliant warnings and to control the quality of the ambient air entering and
10 circulating the relevant outdoor seating areas and adjacent stores, despite the operation or
11 control of any Location by another entity.

12 41. Each of the Defendants, including McDonald's and their Franchisees', permitted, and
13 permits, persons to smoke tobacco in these outdoor seating areas and often facilitated the
14 smoking of tobacco by providing ashtrays for the convenience of those persons who
15 smoke at the Locations. When persons, including customers and employees of each of
16 the Defendants loiter in, walk through or traverse zones in and adjacent to the relevant
17 outdoor seating areas, they are exposed to Tobacco Smoke and the Constituent Chemicals
18 present in the ambient air. Plaintiff's investigations show that infants and pregnant
19 women are often among the exposed persons. Persons are also exposed when entrance
20 doors to the Locations are open and Tobacco Smoke and the Constituent Chemicals enter
21 the restaurants, the premises of which are otherwise non-smoking areas. Employees of
22 each of the Defendants suffered, and suffer, additional exposures when they empty
23 ashtrays or otherwise clean or service the relevant outdoor seating areas. Because of the
24 foregoing, employees of each of the Defendants suffered, and suffer, exposures of
25 significant duration on a regular basis, without receiving warnings.

26 42. The route of exposure to Tobacco Smoke and the Constituent Chemicals is inhalation
27 contact caused when exposed persons, including the employees of each of the
28

1 Defendants, breathe in the ambient air containing second-hand tobacco smoke or
2 environmental tobacco smoke, causing exposure of Tobacco Smoke and the Constituent
3 Chemicals to the mouth, throat, bronchi, esophagi, and lungs. Exposure of Tobacco
4 Smoke and the Constituent Chemicals generates risks of Cancer and Reproductive
5 Toxicity to the exposed persons.

6 43. Plaintiff is informed, believes, and thereon alleges that on each day between November 9,
7 2007 and the present each of the Defendants knowingly and intentionally exposed
8 persons, including its employees, in California to Tobacco Smoke and its Constituent
9 Chemicals, without first giving clear and reasonable warning of such to the exposed
10 persons before the time of exposure, as described above. Defendants thereby violated
11 Proposition 65.

12 44. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
13 Proposition 65 as to second-hand tobacco smoke and environmental tobacco smoke have
14 been ongoing and continuous to the date of the signing of this complaint, so that a
15 separate and distinct violation of Proposition 65 occurred each and every time a person
16 was exposed to Tobacco Smoke and the Constituent Chemicals as described herein.

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

20 46. Based on the allegations herein, Defendants are liable for civil penalties of up to
21 \$2,500.00 per day per individual exposure to Tobacco Smoke and its Constituent
22 Chemicals, pursuant to Health and Safety Code section 25249.7(b).

23 47. In the absence of equitable relief, California consumers, the general public, and others
24 will continue to be involuntarily exposed to Tobacco Smoke and its Constituent
25 Chemicals, creating a substantial risk of irreparable harm. Thus, by committing the acts
26 alleged herein, Defendants have caused irreparable harm for which there is no plain,
27 speedy, or adequate remedy at law.
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1 48. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
2 filing this Complaint.

3
4 **PRAYER FOR RELIEF**

5 Plaintiff demands against each of the Defendants as follows:

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

11
12 Dated: August 30/11

YEROUSHALMI & ASSOCIATES

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15 BY: 

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