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10 Consumer Advocacy Group, Inc.

**ENDORSED
FILED
ALAMEDA COUNTY**

OCT 25 2011

CLERK OF THE SUPERIOR COURT
By Tasha Perry, Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA

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

15 Plaintiff,

16 v.

17 ORIENTAL TRADING COMPANY, INC.,
18 a Delaware Corporation, and DOES 1-20;

19 Defendants.

CASE NO. *PG* 116013 88

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)

20
21 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendants
22 ORIENTAL TRADING COMPANY, INC., and DOES 1-20, as follows:

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24 ///

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26 ///

COPY

THE PARTIES

- 1
2 1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" or "CAG") is an organization
3 qualified to do business in the State of California. CAG is a person within the meaning
4 of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private
5 attorney general, brings this action in the public interest as defined under Health and
6 Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant ORIENTAL TRADING COMPANY, INC. ("ORIENTAL") is a Delaware
8 corporation, qualified to do business and doing business in the State of California at all
9 relevant times herein.
- 10 3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,
11 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
12 complaint to allege their true names and capacities when ascertained. Plaintiff is
13 informed, believes, and thereon alleges that each fictitiously named defendant is
14 responsible in some manner for the occurrences herein alleged and the damages caused
15 thereby.
- 16 4. At all times mentioned herein, the term "Defendants" includes ORIENTAL TRADING
17 COMPANY, INC., and Does 1-20.
- 18 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
19 times mentioned herein have conducted business within the State of California.
- 20 6. At all times relevant to this action, each of the Defendants, including Does 1-20, was an
21 agent, servant, or employee of each of the other Defendants. In conducting the activities
22 alleged in this Complaint, each of the Defendants was acting within the course and scope
23 of this agency, service, or employment, and was acting with the consent, permission, and
24 authorization of each of the other Defendants. All actions of each of the Defendants
25 alleged in this Complaint were ratified and approved by every other Defendant or their
26 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
27 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 Health and Safety Code
3 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
4 employees at all relevant times.

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 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 Alameda because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of Alameda and/or
21 because Defendants conducted, and continue to conduct, business in the County of
22 Alameda with respect to the consumer product that is the subject of this action.

23
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 Diethyl Hexyl
24 Phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons
25 in California to the Proposition 65-listed chemicals of such products without first
26 providing clear and reasonable warnings of such to the exposed persons prior to the time
27 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

1 16. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
2 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
3 to the list of chemicals known to the State to cause developmental male reproductive
4 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
5 months after addition of DEHP to the list of chemicals known to the State to cause
6 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
7 requirements and discharge prohibitions.

8 **SATISFACTION OF PRIOR NOTICE**

9 17. On or about February 23, 2011, Plaintiff gave notice of alleged violations of Health and
10 Safety Code section 25249.6, concerning consumer products exposures, subject to a
11 private action to Defendants and to the California Attorney General, County District
12 Attorneys, and City Attorneys for each city containing a population of at least 750,000
13 people in whose jurisdictions the violations allegedly occurred, concerning the product
14 Valentine Boy Fun Buttons (1unit)(Item #32/1085)(PO#677848).

15 18. Before sending the notices of alleged violation, Plaintiff investigated the consumer
16 products involved, the likelihood that such products would cause users to suffer
17 significant exposures to DEHP, and the corporate structure of each of the Defendants.

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

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

4 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
5 gave notices of the alleged violations to Defendants, and the public prosecutors
6 referenced in Paragraph 17.

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

10 **FIRST CAUSE OF ACTION**

11 **(By Consumer Advocacy Group, Inc. and against ORIENTAL TRADING COMPANY,
12 INC., and Does 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic
13 Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

14 **Valentine Boy Fun Buttons (1unit)(Item #32/1085)(PO#677848)**

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

17 24. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
18 distributor, promoter, or retailer of Valentine Boy Fun Buttons (1unit)(Item
19 #32/1085)(PO#677848). (hereinafter "Buttons"), a consumer product designed for use for
20 transporting products and goods from Defendant's stores.

21 25. Plaintiff is informed, believes, and thereon alleges that the Buttons contain DEHP.

22 26. Defendants knew or should have known that DEHP has been identified by the State of
23 California as a chemical known to cause cancer and reproductive toxicity and therefore
24 was subject to Proposition 65 warning requirements. Defendants were also informed of
25 the presence of DEHP in Buttons within Plaintiff's notice of alleged violations further
26 discussed above at Paragraph 19.

27 27. Plaintiff's allegations regarding Buttons concern "[c]onsumer products exposure[s],"
28 which "is an exposure that results from a person's acquisition, purchase, storage,

1 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
2 that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, § 25602(b).*

3 Buttons is a consumer product, and, as mentioned herein, exposures to DEHP took place
4 as a result of such normal and foreseeable consumption and use.

5 28. Plaintiff is informed, believes, and thereon alleges that between February 23, 2008 and
6 the present, each of the Defendants knowingly and intentionally exposed their employees
7 and California consumers and users of Buttons, which Defendants manufactured,
8 distributed, or sold as mentioned above, to DEHP, without first providing any type of
9 clear and reasonable warning of such to the exposed persons before the time of exposure.
10 Defendants have distributed and sold Buttons in California. Defendants know and intend
11 that California consumers will use and consume Buttons thereby exposing them to
12 DEHP. Defendants thereby violated Proposition 65.

13 29. The principal routes of exposure are through dermal contact, ingestion and inhalation.
14 Persons sustain exposures by handling Buttons without wearing gloves or any other
15 personal protective equipment, or by touching bare skin or mucous membranes with
16 gloves after handling Buttons, as well as through hand to mouth contact, hand to mucous
17 membrane, or breathing in particulate matter dispersed from Buttons.

18 30. Plaintiff is informed, believes, and thereon alleges that each of Defendants’ violations of
19 Proposition 65 as to Buttons have been ongoing and continuous to the date of the signing
20 of this complaint, as Defendants engaged and continue to engage in conduct which
21 violates Health and Safety Code section 25249.6, including the manufacture, distribution,
22 promotion, and sale of Buttons, so that a separate and distinct violation of Proposition 65
23 occurred each and every time a person was exposed to DEHP by Button as mentioned
24 herein.

25 31. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
26 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
27 violations alleged herein will continue to occur into the future.

28

1 32. Based on the allegations herein, Defendants are liable for civil penalties of up to
2 \$2,500.00 per day per individual exposure to DEHP from Buttons, pursuant to Health and
3 Safety Code section 25249.7(b).

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

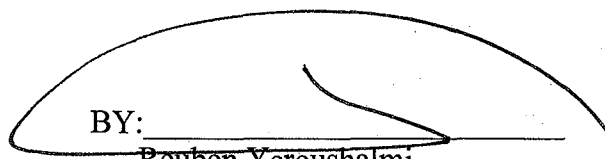
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7 **PRAYER FOR RELIEF**

8 Plaintiff demands against each of the Defendants as follows:

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

14
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16 Dated: October 12, 2011

YEROUSHALMI & ASSOCIATES

17
18
19 BY: 

20 Reuben Yeroushalmi
21 Attorneys for Plaintiff,
22 Consumer Advocacy Group, Inc.