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10 Consumer Advocacy Group, Inc.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

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

15 Plaintiff,

16 v.

17 GINSEY INDUSTRIES, INC., a
18 Pennsylvania Corporation, and DOES 1-20;

19 Defendants.

CASE NO. CGC-11-516572

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 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
21 defendants GINSEY INDUSTRIES, INC., and DOES 1-20, as follows:

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BY FAX

**ENDORSED
FILED**
Superior Court of California
County of San Francisco
DEC 13 2011
CLERK OF THE COURT
BY: ROSSALY DE LA VEGA
Deputy Clerk

THE PARTIES

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1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an organization 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 GINSEY INDUSTRIES, INC. ("GINSEY") is a Pennsylvania corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20, 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 GINSEY INDUSTRIES, INC., and Does 1-20.
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 1-20, 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 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 San Francisco because one or more of the instances of
20 wrongful conduct occurred, and continues to occur, in the County of San Francisco
21 and/or because Defendants conducted, and continue to conduct, business in the County of
22 San Francisco with respect to the consumer product that is 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. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
28 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections

1 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
2 from contamination, to allow consumers to make informed choices about the products
3 they buy, and to enable persons to protect themselves from toxic chemicals as they see
4 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. *Health & Safety Code*
7 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
8 chemicals and chemical families. Proposition 65 imposes warning requirements and
9 other controls that apply to Proposition 65-listed chemicals.

10 13. All businesses with ten (10) 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 (*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 (*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. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
23 Phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons
24 in California to the Proposition 65-listed chemicals of such products without first
25 providing clear and reasonable warnings of such to the exposed persons prior to the time
26 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

27 16. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
28 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP

1 to the list of chemicals known to the State to cause developmental male reproductive
2 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
3 months after addition of DEHP to the list of chemicals known to the State to cause
4 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
5 requirements and discharge prohibitions.

6 17. Plaintiff identified certain practices of manufacturers and distributors of Dibutyl
7 Phthalate ("DBP")-bearing products of exposing, knowingly and intentionally, persons in
8 California to the Proposition 65-listed chemicals of such products without first providing
9 clear and reasonable warnings of such to the exposed persons prior to the time of
10 exposure. Plaintiff later discerned that Defendants engaged in such practice.

11 18. On December 2, 2005, the Governor added DBP to the list of chemicals known to the
12 State to cause developmental male reproductive toxicity. Pursuant to Health and Safety
13 Code sections 25249.9 and 25249.10, twenty (20) months after addition of DBP to the list
14 of chemicals known to the State to cause reproductive toxicity, DBP became fully subject
15 to Proposition 65 warning requirements and discharge prohibitions.

16 **SATISFACTION OF PRIOR NOTICE**

17 19. On or about May 6, 2011, Plaintiff gave notice of alleged violations of Health and Safety
18 Code section 25249.6, concerning consumer products exposures, occupational exposures,
19 and environmental exposures, subject to a private action to Defendants and to the
20 California Attorney General, County District Attorneys, and City Attorneys for each city
21 containing a population of at least 750,000 people in whose jurisdictions the violations
22 allegedly occurred, concerning the product AquaTouch™ Gemstone Bath Mat™.

23 20. Before sending the notices of alleged violation, Plaintiff investigated the consumer
24 products involved, the likelihood that such products would cause users to suffer
25 significant exposures to DEHP and DBP, and the corporate structure of each of the
26 Defendants.

27 21. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
28 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for

1 Plaintiff who executed the certificate had consulted with at least one person with relevant
2 and appropriate expertise who reviewed data regarding the exposures to DEHP and DBP,
3 which is the subject of the Proposition 65-listed chemicals of this action. Based on that
4 information, the attorney for Plaintiff who executed the Certificate of Merit believed
5 there was a reasonable and meritorious case for this private action. The attorney for
6 Plaintiff attached to the Certificate of Merit served on the Attorney General the
7 confidential factual information sufficient to establish the basis of the Certificate of
8 Merit.

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

12 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
13 gave notices of the alleged violations to Defendants, and the public prosecutors
14 referenced in Paragraph 19.

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

18 FIRST CAUSE OF ACTION

19 (By Consumer Advocacy Group, Inc. and against GINSEY INDUSTRIES, INC., and Does
20 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act
21 of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))

22 **Aquatouch™ Gemstone Bath Mat™**

23 25. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
24 paragraphs 1 through 24 of this complaint as though fully set forth herein.

25 26. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
26 distributor, promoter, or retailer of Aquatouch™ Gemstone Bath Mat™ (hereinafter
27 "Bath Mat"), a consumer product designed for personal use in the shower or bathtub.

1 27. Plaintiff is informed, believes, and thereon alleges that the Bath Mat contains DEHP and
2 DBP.

3 28. Defendants knew or should have known that DEHP and DBP have been identified by the
4 State of California as chemical known to cause cancer and reproductive toxicity and
5 therefore were subject to Proposition 65 warning requirements. Defendants were also
6 informed of the presence of DEHP and DBP in Bath Mat within Plaintiff's notice of
7 alleged violations further discussed above at Paragraph 19.

8 29. Plaintiff's allegations regarding Bath Mat concern "[c]onsumer products exposure[s],"
9 which "is an exposure that results from a person's acquisition, purchase, storage,
10 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
11 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
12 Bath Mat is a consumer product, and, as mentioned herein, exposures to DEHP and DBP
13 took place as a result of such normal and foreseeable consumption and use.

14 30. Plaintiff's allegations regarding Bath Mat also concern "[o]ccupational exposure[s],"
15 which are exposures "to any employees in his or her employer's workplace." *Cal. Code*
16 *Reg. tit. 27, § 25602(f)*. As mentioned herein, employees were exposed to DEHP and
17 DBP in their employer's workplace as a result of handling Bath Mat, in conjunction with
18 packaging, shipping, distributing and/or selling Bath Mat, among other activities, without
19 having first been given clear and reasonable warnings that such handling would cause
20 exposures to DEHP and DBP.

21 31. Plaintiff is informed, believes, and thereon alleges that between May 6, 2008 and the
22 present, each of the Defendants knowingly and intentionally exposed their employees and
23 California consumers and users of Bath Mat, which Defendants manufactured,
24 distributed, or sold as mentioned above, to DEHP and DBP, without first providing any
25 type of clear and reasonable warning of such to the exposed persons before the time of
26 exposure. Defendants have distributed and sold Bath Mat in California. Defendants
27 know and intend that California consumers will use and consume Bath Mat thereby
28 exposing them to DEHP and DBP. Defendants thereby violated Proposition 65.

1 32. The principal routes of exposure are through dermal contact, ingestion and inhalation.

2 Persons sustain exposures by handling Bath Mat without wearing gloves or any other
3 personal protective equipment, or by touching bare skin or mucous membranes with
4 gloves after handling Bath Mat, as well as through hand to mouth contact, hand to
5 mucous membrane, or breathing in particulate matter dispersed from Bath Mat.

6 33. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
7 Proposition 65 as to Bath Mat have been ongoing and continuous to the date of the
8 signing of this complaint, as Defendants engaged and continue to engage in conduct
9 which violates Health and Safety Code section 25249.6, including the manufacture,
10 distribution, promotion, and sale of Bath Mat, so that a separate and distinct violation of
11 Proposition 65 occurred each and every time a person was exposed to DEHP and DBP by
12 Bath mat as mentioned herein.

13 34. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
14 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
15 violations alleged herein will continue to occur into the future.

16 35. Based on the allegations herein, Defendants are liable for civil penalties of up to
17 \$2,500.00 per day per individual exposure to DEHP and DBP from Bath Mat, pursuant to
18 Health and Safety Code section 25249.7(b).

19 36. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
20 filing this Complaint.

PRAYER FOR RELIEF

Plaintiff demands against each of the Defendants as follows:

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

Dated: 12/12, 2011

YEROUSHALMI & ASSOCIATES

BY: _____
Reuben Yeroushalmi
Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.