

OCT 21 2011

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By A.E. LaFleur-Clayton, Deputy

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9 Attorneys for Plaintiff,
10 Consumer Advocacy Group, Inc.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF LOS ANGELES

13 **BC 47 19 89**

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

CASE NO.

16 Plaintiff,

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

17 v.

18 ESAW INDUSTRIES, INC., a New Jersey
19 Corporation, and DOES 1-20;

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Cal. Health & Safety Code*, §
25249.5, *et seq.*)

20 Defendants.

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" OR "CAG") is an
25 organization qualified to do business in the State of California. CAG is a person within
26 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
27
28

COPY

1 as a private attorney general, brings this action in the public interest as defined under
2 Health and Safety Code section 25249.7, subdivision (d).

3 2. Defendant, ESAW INDUSTRIES, INC. is a corporation duly organized and existing
4 under the laws of the state of New Jersey.

5 3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,
6 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
7 Complaint to allege their true names and capacities when ascertained. Plaintiff is
8 informed, believes, and thereon alleges that each fictitiously named defendant is
9 responsible in some manner for the occurrences herein alleged and the damages caused
10 thereby.

11 4. As to the first cause of action only, the term "Defendants" includes Esaw Industries, Inc.,
12 and Does 1-20.

13 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
14 times mentioned herein has conducted business within the State of California.

15 6. At all times relevant to this action, each of the Defendants, including Does 1-20, was an
16 agent, servant, or employee of each of the other Defendants. In conducting the activities
17 alleged in this Complaint, each of the Defendants was acting within the course and scope
18 of this agency, service, or employment, and was acting with the consent, permission, and
19 authorization of each of the other Defendants. All actions of each of the Defendants
20 alleged in this Complaint were ratified and approved by every other Defendant or their
21 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
22 and/or facilitated the alleged wrongful conduct of each of the other Defendants.
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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

6 **JURISDICTION**

7 8. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
8 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
9 those given by statute to other trial courts. This Court has jurisdiction over this action
10 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
11 violations of Proposition 65 in any Court of competent jurisdiction.
12

13 9. This Court has jurisdiction over Defendants named herein because Defendants either
14 reside or are located in this State or are foreign corporations authorized to do business in
15 California, are registered with the California Secretary of State, or who do sufficient
16 business in California, have sufficient minimum contacts with California, or otherwise
17 intentionally avail themselves of the markets within California through their manufacture,
18 distribution, promotion, marketing, or sale of their products within California to render
19 the exercise of jurisdiction by the California courts permissible under traditional notions
20 of fair play and substantial justice.
21

22 10. Venue is proper in the County of Los Angeles because one or more of the instances of
23 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
24 because Defendants conducted, and continue to conduct, business in the County of Los
25 Angeles with respect to the consumer product that is the subject of this action.
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1 **BACKGROUND AND PRELIMINARY FACTS**

- 2 11. In 1986, California voters approved an initiative to address growing concerns about
3 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
4 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
5 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
6 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
7 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
8 from contamination, to allow consumers to make informed choices about the products
9 they buy, and to enable persons to protect themselves from toxic chemicals as they see
10 fit.
11
12
13 12. Proposition 65 requires the Governor of California to publish a list of chemicals known to
14 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
15 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
16 chemicals and chemical families. Proposition 65 imposes warning requirements and
17 other controls that apply to Proposition 65-listed chemicals.
18
19 13. All businesses with ten (10) or more employees that operate or sell products in California
20 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
21 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
22 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
23 reasonable" warnings before exposing a person, knowingly and intentionally, to a
24 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).
25
26 14. Proposition 65 provides that any person "violating or threatening to violate" the statute
27 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
28

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

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

5
6 15. Through research and investigation, Plaintiff identified certain practices of Defendants of
7 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
8 chemicals of the consumer products discussed below without first providing clear and
9 reasonable warnings of such to the exposed persons prior to the time of exposure.

10 **SATISFACTION OF PRIOR NOTICE**

11
12 16. On or about May 26, 2011, Plaintiff gave notice of alleged violations of Health and
13 Safety Code section 25249.6, concerning consumer products exposures, subject to a
14 private action to Esaw Industries, Inc., and to the California Attorney General, County
15 District Attorneys, and City Attorneys for each city containing a population of at least
16 750,000 people in whose jurisdictions the violations allegedly occurred concerning the
17 consumer product **PolyTron™ Universal AC/DC Adapter-500mA, Model # 450-52.**

18
19 17. Before sending the notice of alleged violations, Plaintiff investigated the consumer
20 product involved, and the likelihood that such product would cause users to suffer
21 significant exposures to the relevant Proposition 65-listed chemical at issue.

22
23 18. Plaintiff's notice of alleged violations included a Certificate of Merit executed by the
24 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
25 Plaintiff who executed the certificate had consulted with at least one person with relevant
26 and appropriate expertise who reviewed data regarding the exposures to lead, which is the
27 subject Proposition 65-listed chemical of this action. Based on that information, the
28

1 attorney for Plaintiff who executed the Certificate of Merit believed there was a
2 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
3 to the Certificate of Merit served on the Attorney General the confidential factual
4 information sufficient to establish the bases of the Certificate of Merit.

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

9
10 20. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
11 gave notice of the alleged violations to Esaw Industries, Inc. and the public prosecutors
12 referenced in Paragraph 16.

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

16
17
18 **FIRST CAUSE OF ACTION**

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

22 **PolyTron™ Universal AC/DC Adapter-500mA, Model # 450-52 "Adapter"**

23 22. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
24 distributor, promoter, or retailer of the PolyTron™ Universal AC/DC Adapter-500mA,
25 Model # 450-52 (hereinafter "Adapter") a consumer product designed for use to decorate
26 a dwelling or commercial structure.

27 23. Plaintiff is informed, believes, and thereon alleges that the Adapter contains lead.
28

1 24. On February 27, 1987, the Governor of California added lead to the list of chemicals
2 known to the State to cause reproductive toxicity (*Cal. Code Regs.* tit. 27, § 27001(c)).

3 25. On October 1, 1992 the Governor added lead and lead components to the list of
4 chemicals known to the State to cause cancer (*Cal. Code Regs.* tit. 27, § 27001(b)).

5 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
6 after addition of lead to the list of chemicals known to the State to cause cancer, lead
7 became fully subject to Proposition 65 warning requirements and discharge prohibitions.

8
9 26. Defendants knew or should have known that lead has been identified by the State of
10 California as a chemical known to cause cancer and therefore were subject to Proposition
11 65 warning requirements. Defendants were also informed of the presence of lead in the
12 Adapter within Plaintiff's notice of alleged violation further discussed above at Paragraph
13 16.
14

15 27. Plaintiff's allegations regarding Adapter concern "[c]onsumer products exposure[s],"
16 which "is an exposure that results from a person's acquisition, purchase, storage,
17 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
18 that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, § 25602(b).

19 Adapter is a consumer product, and, as mentioned in herein, exposures to lead took place
20 as a result of such normal and foreseeable consumption and use.
21

22 28. Plaintiff is informed, believes, and thereon alleges that between May 26, 2008 and the
23 present, each of the Defendants knowingly and intentionally exposed California
24 consumers and users of Adapter, which Defendants manufactured, distributed, or sold as
25 mentioned above, to lead, without first providing any type of clear and reasonable
26 warning of such to the exposed persons before the time of exposure. Defendants have
27
28

1 distributed and sold Adapter in California. Defendants know and intend that California
2 consumers will use and consume Adapter thereby exposing them to lead. Defendants
3 thereby violated Proposition 65.
4

5 29. The principal routes of exposure are through dermal contact, ingestion, and inhalation.

6 Persons sustain exposures by handling the Adapter without wearing gloves or by
7 touching bare skin or mucous membranes with gloves after handling Adapter, as well as
8 hand to mouth contact, hand to mucous membrane, or breathing in particulate matter
9 emanating from the Adapter during application and installation, as well as through
10 environmental mediums that carry the lead and lead compounds once contained within
11 the Adapter.
12

13 30. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
14 Proposition 65 as to Adapter have been ongoing and continuous to the date of the signing
15 of this Complaint, as Defendants engaged and continue to engage in conduct which
16 violates Health and Safety Code section 25249.6, including the manufacture, distribution,
17 promotion, and sale of Adapter, so that a separate and distinct violation of Proposition 65
18 occurred each and every time a person was exposed to lead by Adapter as mentioned
19 herein.
20

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

25 32. Based on the allegations herein, Defendants are liable for civil penalties of up to
26 \$2,500.00 per day per individual exposure to lead from Adapter, pursuant to Health and
27 Safety Code section 25249.7(b).
28

1 33. In the absence of equitable relief, California consumers, the general public, and others
2 will continue to be involuntarily exposed to lead that is contained in Adapter, creating a
3 substantial risk of irreparable harm. Thus, by committing the acts alleged herein,
4 Defendants have caused irreparable harm for which there is no plain, speedy, or adequate
5 remedy at law.
6

7 34. Plaintiff has engaged in good faith efforts to resolve the claim alleged herein prior to
8 filing this Complaint.
9

10 **PRAYER FOR RELIEF**

11 Plaintiff demands against each of the Defendants, including Esaw Industries Inc. and

12 Does 1-20, as follows:

- 13
- 14 1. A permanent injunction mandating Proposition 65-compliant warnings as to the
15 respective consumer product of each defendant;
 - 16 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
 - 17 3. Costs of suit;
 - 18 4. Reasonable attorney fees and costs; and
 - 19 5. Any further relief that the court may deem just and equitable.
20
- 21

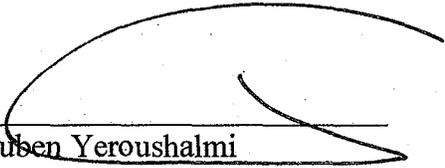
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23 Dated: Alb 12/11

YEROUSHALMI & ASSOCIATES

24

25

26 BY: 
27 Reuben Yeroushalmi
28 Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.