

MAR 02 2012

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By A. LaFleur-Clayton, Deputy
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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13
14 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

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

17 Plaintiff,

18 v.

19 OATEY CO., an Ohio Corporation and
20 DOES 1-20;

21 Defendants.

22 CASE NO. BC480121

23 COMPLAINT FOR PENALTY,
24 INJUNCTION, AND RESTITUTION

25 Violation of Proposition 65, the Safe
26 Drinking Water and Toxic Enforcement
27 Act of 1986 (*Health & Safety Code*, §
28 25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

29 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
30 defendants OATEY CO., and DOES 1-20, as follows:

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COPY

THE PARTIES

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 OATEY CO. ("OATEY") is an Ohio 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 Oatey 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.
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.
- 17 10. Venue is proper in the County of Los Angeles because one or more of the instances of
18 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
19 because Defendants conducted, and continue to conduct, business in the County of Los
20 Angeles with respect to the consumer product that is the subject of this action.

21
22 **BACKGROUND AND PRELIMINARY FACTS**

- 23 11. In 1986, California voters approved an initiative to address growing concerns about
24 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
25 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
26 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
27 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
28 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources

1 from contamination, to allow consumers to make informed choices about the products
2 they buy, and to enable persons to protect themselves from toxic chemicals as they see
3 fit.

4 12. Proposition 65 requires the Governor of California to publish a list of chemicals known to
5 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
6 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
7 chemicals and chemical families. Proposition 65 imposes warning requirements and
8 other controls that apply to Proposition 65-listed chemicals.

9 13. All businesses with ten (10) or more employees that operate or sell products in California
10 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
11 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
12 water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear and
13 reasonable” warnings before exposing a person, knowingly and intentionally, to a
14 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

15 14. Proposition 65 provides that any person "violating or threatening to violate" the statute
16 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
17 "Threaten to violate" means "to create a condition in which there is a substantial
18 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
19 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
20 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

21 15. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
22 Phthalate (“DEHP”)-bearing products of exposing, knowingly and intentionally, persons
23 in California to the Proposition 65-listed chemicals of such products without first
24 providing clear and reasonable warnings of such to the exposed persons prior to the time
25 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

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

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

5 **SATISFACTION OF PRIOR NOTICE**

- 6 17. On or about July 6, 2011 Plaintiff gave notice of alleged violations of Health and Safety
7 Code section 25249.6, concerning consumer products exposures, subject to a private
8 action to Defendants and to the California Attorney General, County District Attorneys,
9 and City Attorneys for each city containing a population of at least 750,000 people in
10 whose jurisdictions the violations allegedly occurred, concerning the product Tube
11 Nailers.
- 12 18. Before sending the notices of alleged violation, Plaintiff investigated the consumer
13 products involved, the likelihood that such products would cause users to suffer
14 significant exposures to DEHP, and the corporate structure of each of the Defendants.
- 15 19. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
16 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
17 Plaintiff who executed the certificate had consulted with at least one person with relevant
18 and appropriate expertise who reviewed data regarding the exposures to DEHP, which is
19 the subject of the Proposition 65-listed chemicals of this action. Based on that
20 information, the attorney for Plaintiff who executed the Certificate of Merit believed
21 there was a reasonable and meritorious case for this private action. The attorney for
22 Plaintiff attached to the Certificate of Merit served on the Attorney General the
23 confidential factual information sufficient to establish the basis of the Certificate of
24 Merit.
- 25 20. Plaintiff's notices of alleged violations also included a Certificate of Service and a
26 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
27 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
- 28

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

4 22. 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 OATEY CO. and Does 1-20 for**
10 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
11 **(Health & Safety Code, §§ 25249.5, et seq.))**
12 **Tube Nailers**

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

15 24. Each of the Defendants are, and at all times mentioned herein were, a manufacturer,
16 distributor, promoter, or retailer of Tube Nailers, an exemplar of which includes but is
17 not limited to Vinyl Coated Tube Nailers (Product No. 33967) (hereinafter "Nailers"), a
18 consumer product designed to help support pipes.

19 25. Plaintiff is informed, believes, and thereon alleges that Nailers contain DEHP.

20 26. Defendants knew or should have known that DEHP has been identified by the State of
21 California as a chemical known to cause cancer and reproductive toxicity and therefore
22 was subject to Proposition 65 warning requirements. Defendants were also informed of
23 the presence of DEHP in Nailers within Plaintiff's notice of alleged violations further
24 discussed above at Paragraph 17.

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

1 Nailers are a consumer product, and, as mentioned herein, exposures to DEHP took place
2 as a result of such normal and foreseeable consumption and use.

3 28. Plaintiff is informed, believes, and thereon alleges that between July 6, 2008 and the
4 present, each of the Defendants knowingly and intentionally exposed their employees and
5 California consumers and users of Nailers, which Defendants manufactured, distributed,
6 or sold as mentioned above, to DEHP, without first providing any type of clear and
7 reasonable warning of such to the exposed persons before the time of exposure.

8 Defendants have distributed and sold Nailers in California. Defendants know and intend
9 that California consumers will use and consume Nailers thereby exposing them to DEHP.
10 Defendants thereby violated Proposition 65.

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

12 Persons sustain exposures, including but not limited to handling Nailers without wearing
13 gloves or any other personal protective equipment, or by touching bare skin or mucous
14 membranes with gloves after handling Nailers, as well as through hand to mouth contact,
15 hand to mucous membrane, or breathing in particulate matter dispersed from Nailers.

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

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

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

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

3
4 **PRAYER FOR RELIEF**

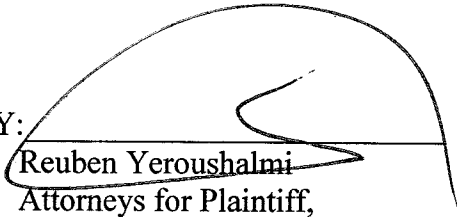
5 Plaintiff demands against each of the Defendants as follows:

- 6 1. A permanent injunction mandating Proposition 65-compliant warnings;
7 2. Penalties pursuant to 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: 3/1/12, 2012

YEROUSHALMI & ASSOCIATES

13
14
15 BY:


16 Reuben Yeroushalmi
17 Attorneys for Plaintiff,
18 Consumer Advocacy Group, Inc.