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10 Consumer Advocacy Group, Inc.

**ENDORSED
FILED**
Superior Court of California
County of San Francisco

FEB 13 2013

CLERK OF THE COURT
BY: MEREDITH GRIER
Deputy Clerk

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 NEXT PRODUCTS (USA), LLC, a New
18 Jersey Limited Liability Company, THE TJX
19 COMPANIES, INC., DBA TJ MAXX, a
20 Delaware Corporation, T.J. MAXX OF CA,
21 LLC, a Delaware Limited Liability
22 Company, and DOES 1-20;
23 Defendants.

CGC CASE NO. 13-528729

COMPLAINT FOR PENALTY AND
INJUNCTION

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)

BY FAX

24 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendants,
25 NEXT PRODUCTS (USA), LLC, THE TJX COMPANIES, INC., DBA TJ MAXX, and T.J.
26 MAXX OF CA, LLC as follows:

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28 ///
///

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 NEXT PRODUCTS (USA), LLC ("NEXT") is a New Jersey Limited Liability Company, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant THE TJX COMPANIES, INC., DBA TJ MAXX ("TJX") is a Delaware Corporation, doing business in the State of California at all relevant times herein.
4. Defendant T.J. MAXX OF CA, LLC, (T.J. MAXX) is a Delaware Limited Liability Company, qualified to do business and doing business in the State of California at all relevant times herein.
5. 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.
6. At all times mentioned herein, the term "Defendants" includes NEXT, TJX, T.J. MAXX and DOES 1-20.
7. 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.
8. 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

1 authorization of each of the other Defendants. Defendant TJX is the parent company of
2 Defendant T.J. MAXX. All actions of each of the Defendants alleged in this Complaint
3 were ratified and approved by every other Defendant or their officers or managing agents.
4 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
5 wrongful conduct of each of the other Defendants.

- 6 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
7 Defendants was a person doing business within the meaning of Health and Safety Code
8 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
9 employees at all relevant times.

10 JURISDICTION

- 11 10. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
12 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
13 those given by statute to other trial courts. This Court has jurisdiction over this action
14 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
15 violations of Proposition 65 in any Court of competent jurisdiction.
- 16 11. This Court has jurisdiction over Defendants named herein because Defendants either
17 reside or are located in this State or are foreign corporations authorized to do business in
18 California, are registered with the California Secretary of State, or who do sufficient
19 business in California, have sufficient minimum contacts with California, or otherwise
20 intentionally avail themselves of the markets within California through their manufacture,
21 distribution, promotion, marketing, or sale of their products within California to render
22 the exercise of jurisdiction by the California courts permissible under traditional notions
23 of fair play and substantial justice.
- 24 12. Venue is proper in the County of San Francisco because one or more of the instances of
25 wrongful conduct occurred, and continues to occur, in the County of San Francisco
26 and/or because Defendants conducted, and continue to conduct, business in the County of
27 San Francisco with respect to the consumer product that is the subject of this action.

28 BACKGROUND AND PRELIMINARY FACTS

1 13. In 1986, California voters approved an initiative to address growing concerns about
2 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
3 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
4 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
5 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
6 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
7 from contamination, to allow consumers to make informed choices about the products
8 they buy, and to enable persons to protect themselves from toxic chemicals as they see
9 fit.

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

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

21 16. Proposition 65 provides that any person “violating or threatening to violate” the statute
22 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.

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

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

27 17. Plaintiff identified certain practices of manufacturers and distributors of lead-bearing
28 products of exposing, knowingly and intentionally, persons in California to the

1 Proposition 65-listed chemicals of such products without first providing clear and
2 reasonable warnings of such to the exposed persons prior to the time of exposure.

3 Plaintiff later discerned that Defendants engaged in such practice.

4 18. On October 1, 1992, the Governor of California added Lead and Lead compounds to the
5 list of chemicals known to the State to cause cancer (*Cal. Code Regs.* tit. 27, § 27001(b)).
6 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
7 after addition of Lead and lead compounds to the list of chemicals known to the State to
8 cause cancer, Lead and lead compounds became fully subject to Proposition 65 warning
9 requirements and discharge prohibitions.

10 19. On February 27, 1987, the Governor of California added Lead to the list of chemicals
11 known to the State to cause reproductive toxicity (*Cal. Code Regs.* tit. 27, § 27001(c)).
12 Lead is known to the State to cause developmental, female, and male reproductive
13 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
14 months after addition of Lead to the list of chemicals known to the State to cause
15 reproductive toxicity, Lead became fully subject to Proposition 65 warning requirements
16 and discharge prohibitions.

17 **SATISFACTION OF PRIOR NOTICE**

18 20. On or about February 28, 2012, Plaintiff gave notice of alleged violations of Health and
19 Safety Code section 25249.6, concerning consumer products exposures and occupational
20 exposures, subject to a private action to NEXT, TJX, T.J. MAXX, and to the California
21 Attorney General, County District Attorneys, and City Attorneys for each city containing
22 a population of at least 750,000 people in whose jurisdictions the violations allegedly
23 occurred, concerning the product Computer Cameras.

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

27 22. 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 lead,
3 respectively, which are the subject Proposition 65-listed chemicals of this action. Based
4 on that information, the attorney for Plaintiff who executed the Certificate of Merit
5 believed there was a reasonable and meritorious case for this private action. The attorney
6 for 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 23. Plaintiff's notices 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 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
13 gave notices of the alleged violations to NEXT, TJX, T.J. MAXX, and the public
14 prosecutors referenced in Paragraph 20.

15 25. 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 NEXT, TJX, T.J. MAXX, and DOES 1-**
20 **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 **Computer Cameras**

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

25 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
26 distributor, promoter, or retailer of Computer Cameras (hereinafter "Cameras"),
27 including but not limited to Smart Webcam® "No software installation required" 3.0
28 Mega Pixels, 3 Strong White LED, 800 x 600, Built-in Microphone, Item No. 85491.

- 1 28. Plaintiff is informed, believes, and thereon alleges that Cameras contain Lead.
- 2 29. Defendants knew or should have known that Lead has been identified by the State of
3 California as a chemical known to cause cancer and reproductive toxicity and therefore
4 was subject to Proposition 65 warning requirements. Defendants were also informed of
5 the presence of Lead in Cameras within Plaintiff's notice of alleged violations further
6 discussed above at Paragraph 20.
- 7 30. Plaintiff's allegations regarding Cameras concern "[c]onsumer products exposure[s],"
8 which "is an exposure that results from a person's acquisition, purchase, storage,
9 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
10 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
11 Cameras are consumer products, and, as mentioned herein, exposures to Lead took place
12 as a result of such normal and foreseeable consumption and use.
- 13 31. Plaintiff is informed, believes, and thereon alleges that between February 28, 2009 and
14 the present, each of the Defendants knowingly and intentionally exposed California
15 consumers and users of Cameras, which Defendants manufactured, distributed, or sold as
16 mentioned above, to Lead, without first providing any type of clear and reasonable
17 warning of such to the exposed persons before the time of exposure. Defendants have
18 distributed and sold Cameras in California. Defendants know and intend that California
19 consumers will use and consume Cameras thereby exposing them to Lead. Defendants
20 thereby violated Proposition 65.
- 21 32. The principal routes of exposure are through dermal contact, ingestion and inhalation.
22 Persons sustain exposures by handling Cameras without wearing gloves or any other
23 personal protective equipment, or by touching bare skin or mucous membranes with
24 gloves after handling Cameras, as well as through hand to mouth contact, hand to mucous
25 membrane, or breathing in particulate matter dispersed from Cameras.
- 26 33. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
27 Proposition 65 as to Cameras have been ongoing and continuous to the date of the
28 signing of this complaint, as Defendants engaged and continue to engage in conduct

1 which violates Health and Safety Code section 25249.6, including the manufacture,
2 distribution, promotion, and sale of Cameras, so that a separate and distinct violation of
3 Proposition 65 occurred each and every time a person was exposed to Lead by Cameras
4 as mentioned herein.

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

8 35. Based on the allegations herein, Defendants are liable for civil penalties of up to
9 \$2,500.00 per day per individual exposure to Lead from Cameras, pursuant to Health and
10 Safety Code section 25249.7(b).

11 36. In the absence of equitable relief, the general public will continue to be involuntarily
12 exposed to Lead that is contained in Cameras, creating a substantial risk of irreparable
13 harm. Thus, by committing the acts alleged herein, Defendants have caused irreparable
14 harm for which there is no plain, speedy, or adequate remedy at law.

15 37. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
16 filing this Complaint.

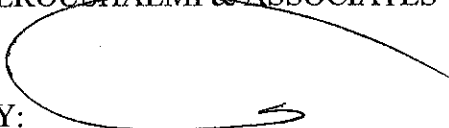
17 **PRAYER FOR RELIEF**

18 Plaintiff demands against each of the Defendants as follows:

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

24 Dated: FEBRUARY 13, 2013

YEROUSHALMI & ASSOCIATES

25
26 BY: 
27 Reuben Yeroushalmi
28 Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.