

1 Reuben Yeroushalmi (SBN 193981)  
2 Daniel D. Cho (SBN 105409)  
3 Ben Yeroushalmi (SBN 232540)  
4 **YEROUSHALMI & ASSOCIATES**  
5 9100 Wilshire Boulevard, Suite 610E  
6 Beverly Hills, California 90212  
7 Telephone: 310.623.1926  
8 Facsimile: 310.623.1930

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

CONFORMED COPY  
OF ORIGINAL FILED  
Los Angeles Superior Court

NOV 16 2012

John A. Clarke, Executive Officer/Clerk  
By SHAUNYA WESLEY, Deputy

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **LOS ANGELES – CENTRAL DISTRICT**

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

15 Plaintiff,

16 v.

17 THE KROGER CO., an Ohio Corporation,  
18 THE KROGER CO. OF MICHIGAN, a  
19 Michigan Corporation, RALPH'S  
20 GROCERY COMPANY CORPORATION  
21 DBA FOODS CO, an Ohio Corporation, and  
22 DOES 1-20;

23 Defendants.

CASE NO.

BC 495786

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)

24 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
25 defendants THE KROGER CO., THE KROGER CO. OF MICHIGAN, RALPH'S GROCERY  
26 COMPANY CORPORATION DBA FOODS CO, and DOES 1-20 as follows:

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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 THE KROGER CO. ("KROGER") is an Ohio Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant THE KROGER CO. OF MICHIGAN ("KROGER MICHIGAN") is a Michigan corporation, doing business in the State of California at all relevant times herein.
4. Defendant RALPH'S GROCERY COMPANY CORPORATION DBA FOODS CO ("RALPH'S"), is an Ohio Corporation, 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 KROGER, KROGER MICHIGAN, RALPH'S, 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. Upon information and belief, 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

1 Defendants was acting within the course and scope of this agency, service, or  
2 employment, and was acting with the consent, permission, and authorization of each of  
3 the other Defendants. Defendant KROGER is the parent company of Defendant  
4 RALPH'S. All actions of each of the Defendants alleged in this Complaint were ratified  
5 and approved by every other Defendant or their officers or managing agents.

6 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged  
7 wrongful conduct of each of the other Defendants.

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

#### 12 JURISDICTION

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

3 **BACKGROUND AND PRELIMINARY FACTS**

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

13 14. 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 15. All businesses with ten (10) or more employees that operate or sell products in California  
19 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited  
20 from knowingly discharging Proposition 65-listed chemicals into sources of drinking  
21 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and  
22 reasonable" warnings before exposing a person, knowingly and intentionally, to a  
23 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

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

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

10 18. Plaintiff identified certain practices of manufacturers and distributors of DEHP-bearing  
11 products of exposing, knowingly and intentionally, persons in California to the  
12 Proposition 65-listed chemicals of such products without first providing clear and  
13 reasonable warnings of such to the exposed persons prior to the time of exposure.  
14 Plaintiff later discerned that Defendants engaged in such practice.

15 **SATISFACTION OF PRIOR NOTICE**

16 19. On or about March 9, 2012, Plaintiff gave notice of alleged violations of Health and  
17 Safety Code section 25249.6, concerning consumer products exposures and occupational  
18 exposures, subject to a private action to KROGER, KROGER MICHIGAN, RALPH'S,  
19 and to the California Attorney General, County District Attorneys, and City Attorneys for  
20 each city containing a population of at least 750,000 people in whose jurisdictions the  
21 violations allegedly occurred, concerning the product Can Openers.

22 20. On or about March 9, 2012, Plaintiff gave notice of alleged violations of Health and  
23 Safety Code section 25249.6, concerning consumer products exposures and occupational  
24 exposures, subject to a private action to KROGER, KROGER MICHIGAN, RALPH'S,  
25 and to the California Attorney General, County District Attorneys, and City Attorneys for  
26 each city containing a population of at least 750,000 people in whose jurisdictions the  
27 violations allegedly occurred, concerning the product Serving Tongs.

- 1 21. On or about March 27, 2012, Plaintiff gave notice of alleged violations of Health and  
2 Safety Code section 25249.6, concerning consumer products exposures and occupational  
3 exposures, subject to a private action to KROGER, KROGER MICHIGAN, RALPH'S,  
4 and to the California Attorney General, County District Attorneys, and City Attorneys for  
5 each city containing a population of at least 750,000 people in whose jurisdictions the  
6 violations allegedly occurred, concerning the product Serving Tongs.
- 7 22. Before sending the notices of alleged violation, Plaintiff investigated the consumer  
8 products involved, the likelihood that such products would cause users to suffer  
9 significant exposures to DEHP, and the corporate structure of each of the Defendants.
- 10 23. Plaintiff's notices of alleged violation included Certificates of Merit executed by the  
11 attorney for the noticing party, CAG. The Certificates of Merit stated that the attorney  
12 for Plaintiff who executed the certificates had consulted with at least one person with  
13 relevant and appropriate expertise who reviewed data regarding the exposures to DEHP,  
14 the subject Proposition 65-listed chemicals of this action. Based on that information, the  
15 attorney for Plaintiff who executed the Certificates of Merit believed there was a  
16 reasonable and meritorious case for this private action. The attorney for Plaintiff attached  
17 to the Certificates of Merit served on the Attorney General the confidential factual  
18 information sufficient to establish the basis of the Certificates of Merit.
- 19 24. Plaintiff's notices of alleged violations also included Certificates of Service and a  
20 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
21 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
- 22 25. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
23 gave notices of the alleged violations to KROGER, KROGER MICHIGAN, RALPH'S,  
24 and the public prosecutors referenced in Paragraphs 19, 20, and 21.
- 25 26. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
26 any applicable district attorney or city attorney has commenced and is diligently  
27 prosecuting an action against the Defendants.
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**FIRST CAUSE OF ACTION**

(By CONSUMER ADVOCACY GROUP, INC. and against KROGER, KROGER MICHIGAN, RALPH'S, and DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))

**Can Openers**

27. Plaintiff CONSUMER ADVOCACY GROUP repeats and incorporates by reference paragraphs 1 through 26 of this complaint as though fully set forth herein.

28. Each of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor, promoter, or retailer of Can Openers ("Can Openers"), including Everyday Living® 3-in-1 Can Opener, Item #68408.

29. Can Openers contain DEHP.

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

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

32. Plaintiff is informed, believes, and thereon alleges that between March 9, 2009 and the present, each of the Defendants knowingly and intentionally exposed their employees and California consumers and users of Can Openers, which Defendants manufactured, distributed, or sold as mentioned above, to DEHP, without first providing any type of clear and reasonable warning of such to the exposed persons before the time of exposure. Defendants have distributed and sold Can Openers in California. Defendants know and

1 intend that California consumers will use and consume Can Openers, thereby exposing  
2 them to DEHP. Defendants thereby violated Proposition 65.

3 33. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
4 Persons sustain exposures by handling Can Openers without wearing gloves or any other  
5 personal protective equipment, or by touching bare skin or mucous membranes with  
6 gloves after handling Can Openers, as well as through direct and indirect hand to mouth  
7 contact, hand to mucous membrane, or breathing in particulate matter dispersed from Can  
8 Openers. And as to the employees of Defendants, employees may be exposed to DEHP  
9 in the course of their employment by handling, distributing, and selling Can Openers.

10 34. Plaintiff is informed, believes, and thereon alleges that each of the violations by  
11 Defendants of Proposition 65 as to Can Openers has been ongoing and continuous to the  
12 date of the signing of this complaint, as Defendants engaged and continue to engage in  
13 conduct which violates Health and Safety Code section 25249.6, including the  
14 manufacture, distribution, promotion, and sale of Can Openers, so that a separate and  
15 distinct violation of Proposition 65 occurred each and every time a person was exposed to  
16 DEHP by Can Openers as mentioned herein.

17 35. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
18 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
19 violations alleged herein will continue to occur into the future.

20 36. Based on the allegations herein, Defendants are liable for civil penalties of up to  
21 \$2,500.00 per day per individual exposure to DEHP from Can Openers, pursuant to  
22 Health and Safety Code section 25249.7(b).

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1 intend that California consumers will use and consume Serving Tongs, thereby exposing  
2 them to DEHP. Defendants thereby violated Proposition 65.

3 43. The principal routes of exposure are through dermal contact, ingestion and inhalation.

4 Persons sustain exposures by handling Serving Tongs without wearing gloves or any  
5 other personal protective equipment, or by touching bare skin or mucous membranes with  
6 gloves after handling Serving Tongs, as well as through direct and indirect hand to mouth  
7 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
8 Serving Tongs. And as to the employees of Defendants, employees may be exposed to  
9 DEHP in the course of their employment by handling, distributing, and selling Serving  
10 Tongs.

11 44. Plaintiff is informed, believes, and thereon alleges that each of the violations by  
12 Defendants of Proposition 65 as to Serving Tongs has been ongoing and continuous to  
13 the date of the signing of this complaint, as Defendants engaged and continue to engage  
14 in conduct which violates Health and Safety Code section 25249.6, including the  
15 manufacture, distribution, promotion, and sale of Serving Tongs, so that a separate and  
16 distinct violation of Proposition 65 occurred each and every time a person was exposed to  
17 DEHP by Serving Tongs as mentioned herein.

18 45. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
19 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
20 violations alleged herein will continue to occur into the future.

21 46. Based on the allegations herein, Defendants are liable for civil penalties of up to  
22 \$2,500.00 per day per individual exposure to DEHP from Serving Tongs, pursuant to  
23 Health and Safety Code section 25249.7(b).

24 47. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
25 filing this Complaint.

1 **PRAYER FOR RELIEF**

2 Plaintiff demands against each of the Defendants as follows:

- 3 1. A permanent injunction mandating Proposition 65-compliant warnings;
- 4 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
- 5 3. Costs of suit;
- 6 4. Reasonable attorney fees and costs; and
- 7 5. Any further relief that the court may deem just and equitable.
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11 Dated: November 15, 2012

YEROUSHALMI & ASSOCIATES

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14 BY: \_\_\_\_\_

15 Reuben Yeroushalmi

16 ~~Attorneys for Plaintiff,~~

17 Consumer Advocacy Group, Inc.

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