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ENDORSED  
FILED  
Superior Court of California  
County of San Francisco  
NOV 04 2013  
CLERK OF THE COURT  
BY: MEREDITH GRIER  
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

10 CGC-13-535246

11 CONSUMER ADVOCACY GROUP, INC.,  
12 in the public interest,

13 Plaintiff,

14 v.

15 APEX TOOL GROUP, LLC, a Limited  
16 Liability Company; APEX BRANDS, INC.,  
17 a Delaware Corporation; ORCHARD  
SUPPLY HARDWARE STORES  
18 CORPORATION, a Delaware Corporation;  
19 ORCHARD SUPPLY HARDWARE, LLC, a  
20 Limited Liability Corporation; and DOES 1-  
20;

21 Defendants.

CASE NO.

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

22  
23 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
24 defendants APEX TOOL GROUP, LLC, APEX BRANDS, INC., ORCHARD SUPPLY  
25 HARDWARE STORES CORPORATION, ORCHARD SUPPLY HARDWARE, LLC, and  
26 DOES 1-20 as follows:  
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COMPLAINT FOR VIOLATION OF PROPOSITION 65, THE SAFE DRINKING WATER AND TOXIC  
ENFORCEMENT ACT OF 1986 (HEALTH AND SAFETY CODE § 25249.5, ET SEQ.)

**THE PARTIES**

- 1  
2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an  
3 organization qualified to do business in the State of California. CAG is a person within  
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting  
5 as a private attorney general, brings this action in the public interest as defined under  
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant APEX TOOL GROUP, LLC ("APEX TOOL GROUP") is a Delaware  
8 Limited Liability Company, doing business in the State of California at all relevant times  
9 herein.
- 10 3. Defendant APEX BRANDS, INC. ("APEX BRANDS") is a Delaware corporation, doing  
11 business in the State of California at all relevant times herein.
- 12 4. Defendant ORCHARD SUPPLY HARDWARE STORES CORPORATION  
13 ("ORCHARD SUPPLY HARDWARE STORES") is a Delaware corporation, doing  
14 business in the State of California at all relevant times herein.
- 15 5. Defendant ORCHARD SUPPLY HARDWARE, LLC ("ORCHARD SUPPLY  
16 HARDWARE") is a Delaware Limited Liability Company, doing business in the State of  
17 California at all relevant times herein.
- 18 6. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,  
19 and therefore sues these defendants by such fictitious names. Plaintiff will amend this  
20 complaint to allege their true names and capacities when ascertained. Plaintiff is  
21 informed, believes, and thereon alleges that each fictitiously named defendant is  
22 responsible in some manner for the occurrences herein alleged and the damages caused  
23 thereby.
- 24 7. At all times mentioned herein, the term "Defendants" includes APEX TOOL GROUP,  
25 APEX BRANDS, ORCHARD SUPPLY HARDWARE STORES, ORCHARD SUPPLY  
26 HARDWARE and DOES 1-20.

- 1 8. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
2 times mentioned herein have conducted business within the State of California.
- 3 9. Upon information and belief, at all times relevant to this action, each of the Defendants,  
4 including DOES 1-20, was an agent, servant, or employee of each of the other  
5 Defendants. In conducting the activities alleged in this Complaint, each of the  
6 Defendants was acting within the course and scope of this agency, service, or  
7 employment, and was acting with the consent, permission, and authorization of each of  
8 the other Defendants. All actions of each of the Defendants alleged in this Complaint  
9 were ratified and approved by every other Defendant or their officers or managing agents.  
10 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged  
11 wrongful conduct of each of the other Defendants.
- 12 10. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the  
13 Defendants was a person doing business within the meaning of Health and Safety Code  
14 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more  
15 employees at all relevant times.

16 **JURISDICTION**

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

3 13. Venue is proper in the County of San Francisco because one or more of the instances of  
4 wrongful conduct occurred, and continues to occur, in County of San Francisco and/or  
5 because Defendants conducted, and continue to conduct, business in County of San  
6 Francisco with respect to the consumer product that is the subject of this action.

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8 **BACKGROUND AND PRELIMINARY FACTS**

9 14. In 1986, California voters approved an initiative to address growing concerns about  
10 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to  
11 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,  
12 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking  
13 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections  
14 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources  
15 from contamination, to allow consumers to make informed choices about the products  
16 they buy, and to enable persons to protect themselves from toxic chemicals as they see  
17 fit.

18 15. Proposition 65 requires the Governor of California to publish a list of chemicals known to  
19 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*  
20 § 25249.8. The list, which the Governor updates at least once a year, contains over 700  
21 chemicals and chemical families. Proposition 65 imposes warning requirements and  
22 other controls that apply to Proposition 65-listed chemicals.

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

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

9 18. Plaintiff identified certain practices of manufacturers and distributors of Di (2-ethylhexy)  
10 phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons  
11 in California to the Proposition 65-listed chemicals of such products without first  
12 providing clear and reasonable warnings of such to the exposed persons prior to the time  
13 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

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

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22 **SATISFACTION OF PRIOR NOTICE**

23 20. On or about June 20, 2013, Plaintiff gave notice of alleged violations of Health and  
24 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
25 private action to APEX TOOL GROUP, APEX BRANDS, ORCHARD SUPPLY  
26 HARDWARE STORES, ORCHARD SUPPLY HARDWARE, and to the California  
27 Attorney General, County District Attorneys, and City Attorneys for each city containing  
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1 a population of at least 750,000 people in whose jurisdictions the violations allegedly  
2 occurred, concerning the products Hand Tools, containing DEHP.

3 21. Before sending the notices of alleged violation, Plaintiff investigated the consumer  
4 products involved, the likelihood that such products would cause users to suffer  
5 significant exposures to DEHP, and the corporate structure of each of the Defendants.

6 22. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the  
7 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for  
8 Plaintiff who executed the certificate had consulted with at least one person with relevant  
9 and appropriate expertise who reviewed data regarding the exposures to DEHP, the  
10 subject Proposition 65-listed chemical of this action. Based on that information, the  
11 attorney for Plaintiff who executed the Certificate of Merit believed there was a  
12 reasonable and meritorious case for this private action. The attorney for Plaintiff attached  
13 to the Certificate of Merit served on the Attorney General the confidential factual  
14 information sufficient to establish the basis of the Certificate of Merit.

15 23. Plaintiff's notices of alleged violations also included a Certificate of Service and a  
16 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
17 (Proposition 65) A Summary." *Health & Safety Code § 25249.7(d)*.

18 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
19 gave notices of the alleged violations to APEX TOOL GROUP, APEX BRANDS,  
20 ORCHARD SUPPLY HARDWARE STORES, ORCHARD SUPPLY HARDWARE,  
21 and the public prosecutors referenced in Paragraph 20.

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

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1 **FIRST CAUSE OF ACTION**

2 **(By CONSUMER ADVOCACY GROUP, INC. and against APEX TOOL GROUP,**  
3 **APEX BRANDS, ORCHARD SUPPLY HARDWARE STORES, ORCHARD**  
4 **SUPPLY HARDWARE, and DOES 1-20 for Violations of Proposition 65, The Safe**  
5 **Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code, §§***  
6 **25249.5, *et seq.*))**

7 **Hand Tools**

- 8 26. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
9 reference paragraphs 1 through 25 of this complaint as though fully set forth herein.
- 10 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
11 distributor, promoter, or retailer of Hand Tools, which includes but is not limited to  
12 “Crescent® Brand Adjustable Wrench Set, 1-5/16” (33mm) max. Jaw Capacity, 15/16”  
13 (24mm) max. Jaw Capacity, Tighter Fit 10” 250 mm, Tighter Fit 6” 150mm,  
14 “Guaranteed™ Forever”, “AT2610CVS”, “ATG-353”, barcode: 0 37103 25410 8”  
15 (“TOOLS”).
- 16 28. TOOLS contain DEHP.
- 17 29. Defendants knew or should have known that DEHP has been identified by the State of  
18 California as a chemical known to cause reproductive toxicity and therefore was subject  
19 to Proposition 65 warning requirements. Defendants were also informed of the presence  
20 of DEHP in TOOLS within Plaintiff's notice of alleged violations further discussed above  
21 at Paragraph 20.
- 22 30. Plaintiff's allegations regarding TOOLS concerns “[c]onsumer products exposure[s],”  
23 which “is an exposure that results from a person's acquisition, purchase, storage,  
24 consumption, or other reasonably foreseeable use of a consumer good, or any exposure  
25 that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, § 25602(b)*.  
26 TOOLS is a consumer product, and, as mentioned herein, exposures to DEHP took place  
27 as a result of such normal and foreseeable consumption and use.
- 28 31. Plaintiff is informed, believes, and thereon alleges that between June 20, 2010 and the  
present, each of the Defendants knowingly and intentionally exposed California

1 consumers and users of TOOLS, which Defendants manufactured, distributed, or sold as  
2 mentioned above, to DEHP, without first providing any type of clear and reasonable  
3 warning of such to the exposed persons before the time of exposure. Defendants have  
4 distributed and sold TOOLS in California. Defendants know and intend that California  
5 consumers will use and consume TOOLS, thereby exposing them to DEHP. Defendants  
6 thereby violated Proposition 65.

7 32. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
8 Persons sustain exposures by handling TOOLS without wearing gloves or any other  
9 personal protective equipment, or by touching bare skin or mucous membranes with  
10 gloves after handling TOOLS, as well as through direct and indirect hand to mouth  
11 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
12 TOOLS.

13 33. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
14 Proposition 65 as to TOOLS 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 TOOLS, so that a separate and distinct violation of Proposition 65  
18 occurred each and every time a person was exposed to DEHP by TOOLS as mentioned  
19 herein.

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

23 35. Based on the allegations herein, Defendants are liable for civil penalties of up to  
24 \$2,500.00 per day per individual exposure to DEHP from TOOLS, pursuant to Health  
25 and Safety Code section 25249.7(b).

26 36. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
27 filing this Complaint.  
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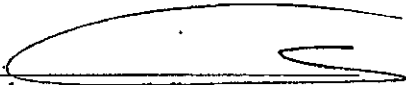
**PRAYER FOR RELIEF**

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: 11/4, 2013

YEROUSHALMI & ASSOCIATES

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