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OF ORIGINAL FILED
Los Angeles Superior Court

MAR 10 2015

Sherri R. Carter, Executive Officer/Clerk
By: Moses Soto, Deputy

6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.

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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES**

11 **BC 575031**
~~BC 574930~~

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

CASE NO.

14 Plaintiff,

COMPLAINT FOR PENALTY AND
INJUNCTION

15 v.

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

16 PEP BOYS-MANNY, MOE & JACK OF
DELAWARE, INC., a Delaware
17 Corporation; PEP BOYS-MANNY, MOE &
18 JACK OF CA, INC., a California
19 Corporation; THE PEP BOYS-MANNY,
MOE & JACK, INC., a Pennsylvania
20 Corporation; and DOES 1-20;
21 Defendants.

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

22 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
23 Defendants PEP BOYS-MANNY, MOE & JACK OF DELAWARE, INC., PEP BOYS-
24 MANNY, MOE & JACK OF CA, INC., THE PEP BOYS-MANNY, MOE & JACK, INC. and
25 DOES 1-20 as follows:

26 **THE PARTIES**

27 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
28 organization qualified to do business in the State of California. CAG is a person within

ORIGINAL

1 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
2 as a private attorney general, brings this action in the public interest as defined under
3 Health and Safety Code section 25249.7, subdivision (d).

4 2. Defendant PEP BOYS-MANNY, MOE & JACK OF DELAWARE, INC. ("PEP BOYS
5 OF DE") is a Delaware Corporation doing business in the State of California at all
6 relevant times herein.

7 3. Defendant PEP BOYS-MANNY, MOE & JACK OF CA, INC. ("PEP BOYS OF CA") is
8 a California Corporation doing business in the State of California at all relevant times
9 herein.

10 4. Defendants THE PEP BOYS-MANNY, MOE & JACK, INC. ("PEP BOYS, INC.") is a
11 Pennsylvania Corporation doing business in the State of California at all relevant times
12 herein.

13 5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
14 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
15 complaint to allege their true names and capacities when ascertained. Plaintiff is
16 informed, believes, and thereon alleges that each fictitiously named defendant is
17 responsible in some manner for the occurrences herein alleged and the damages caused
18 thereby.

19 6. At all times mentioned herein, the term "Defendants" includes PEP BOYS OF DE, PEP
20 BOYS OF CA, PEP BOYS, INC., and DOES 1-20.

21 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
22 times mentioned herein have conducted business within the State of California.

23 8. Upon information and belief, at all times relevant to this action, each of the Defendants,
24 including DOES 1-20, was an agent, servant, or employee of each of the other
25 Defendants. In conducting the activities alleged in this Complaint, each of the
26 Defendants was acting within the course and scope of this agency, service, or
27 employment, and was acting with the consent, permission, and authorization of each of
28 the other Defendants. All actions of each of the Defendants alleged in this Complaint

1 were ratified and approved by every other Defendant or their officers or managing agents.
2 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
3 wrongful conduct of each of the other Defendants.

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

8 JURISDICTION

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

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

22 12. 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.

26 BACKGROUND AND PRELIMINARY FACTS

27 13. In 1986, California voters approved an initiative to address growing concerns about
28 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to

1 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
2 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
3 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
4 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
5 from contamination, to allow consumers to make informed choices about the products
6 they buy, and to enable persons to protect themselves from toxic chemicals as they see
7 fit.

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

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

19 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
20 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
21 "Threaten to violate" means "to create a condition in which there is a substantial
22 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

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

25 17. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
26 Phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons
27 in California to the Proposition 65-listed chemicals of such products without first
28

1 providing clear and reasonable warnings of such to the exposed persons prior to the time
2 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

3 18. 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 **SATISFACTION OF PRIOR NOTICE**

11 19. On or about April 28, 2014, Plaintiff gave notice of alleged violations of Health and
12 Safety Code section 25249.6, concerning consumer products exposures, subject to a
13 private action to PEP BOYS OF DE, PEP BOYS OF CA, PEP BOYS, INC. and to the
14 California Attorney General, County District Attorneys, and City Attorneys for each city
15 containing a population of at least 750,000 people in whose jurisdictions the violations
16 allegedly occurred, concerning the product Handheld Tools containing DEHP.

17 20. Before sending the notice of alleged violations, Plaintiff investigated the consumer
18 products involved, the likelihood that such products would cause users to suffer
19 significant exposures to DEHP and the corporate structure of each of the Defendants.

20 21. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
21 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
22 Plaintiff who executed the certificate had consulted with at least one person with relevant
23 and appropriate expertise who reviewed data regarding the exposures to DEHP, the
24 subject Proposition 65-listed chemicals of this action. Based on that information, the
25 attorney for Plaintiff who executed the Certificate of Merit believed there was a
26 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
27 to the Certificate of Merit served on the Attorney General the confidential factual
28 information sufficient to establish the basis of the Certificate of Merit.

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

4 23. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
5 gave notices of the alleged violation to PEP BOYS OF DE, PEP BOYS OF CA, PEP
6 BOYS, INC. and the public prosecutors referenced in Paragraph 19.

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

10 **FIRST CAUSE OF ACTION**

11 **(By CONSUMER ADVOCACY GROUP, INC. and against PEP BOYS OF DE, PEP**
12 **BOYS OF CA, PEP BOYS, INC., and DOES 1-20 for Violations of Proposition 65, The**
13 **Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§**
14 **25249.5, *et seq.*))**

15 **Handheld Tools with Vinyl Grip**

16 25. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
17 reference paragraphs 1 through 24 of this complaint as though fully set forth herein. Each
18 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
19 promoter, or retailer of Handheld Tools with Vinyl Grip, which includes but is not
20 limited to, "OEM® "Piston Ring Installer" "25049" "OEM® Tools for Professionals"
21 Barcode 0 76812 25049 0" ("TOOLS").

22 26. TOOLS contain DEHP.

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

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

5 TOOLS are consumer products, and, as mentioned herein, exposures to DEHP took place
6 as a result of such normal and foreseeable use.

7 29. Plaintiff is informed, believes, and thereon alleges that between April 28, 2011 and the
8 present, each of the Defendants knowingly and intentionally exposed their California
9 consumers and users of TOOLS, which Defendants manufactured, distributed, or sold as
10 mentioned above, to DEHP, without first providing any type of clear and reasonable
11 warning of such to the exposed persons before the time of exposure. Defendants have
12 distributed and sold TOOLS in California. Defendants know and intend that California
13 consumers will use TOOLS, thereby exposing them to DEHP. Defendants thereby
14 violated Proposition 65.

15 30. The principal routes of exposure are through dermal contact, ingestion and inhalation.
16 Persons sustain exposures by handling TOOLS without wearing gloves or any other
17 personal protective equipment, or by touching bare skin or mucous membranes with
18 gloves after handling TOOLS, as well as through direct and indirect hand to mouth
19 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
20 TOOLS.

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

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1 32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
3 violations alleged herein will continue to occur into the future.

4 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
5 \$2,500.00 per day per individual exposure to DEHP from TOOLS, pursuant to Health
6 and Safety Code section 25249.7(b).

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

9 **PRAYER FOR RELIEF**

10 Plaintiff demands against each of the Defendants as follows:

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

16
17
18 Dated: March 9, 2015

YEROUSHALMI & YEROUSHLAMI

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21 BY: 

22 Reuben Yeroushalmi
23 Attorneys for Plaintiff,
24 Consumer Advocacy Group, Inc.
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