

DEC 30 2010

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BY Shaunya Wesley, Deputy

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

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF LOS ANGELES

13 BC452176

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

CASE NO.

16 Plaintiff,

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

17 v.

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

18 THE COLEMAN COMPANY, INC., a
19 Delaware Corporation, WISCONSIN
20 PHARMACAL CO., LLC, a Wisconsin
21 Limited Liability Company, AIRBORNE
22 SALES CO. INC., a California Corporation,
23 THE SURPLUS STORE, a California
24 Corporation, and DOES 1-50;

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

25 Defendants.

26 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendants as
27 follows:

28 **THE PARTIES**

1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" OR "CAG") is a non-profit corporation qualified to do business in the State of California. CAG is a person within

COPY

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

- 5 2. Defendant The Coleman Company, Inc., is a Delaware corporation, qualified to do
6 business and doing business in the State of California at all relevant times herein.
- 7 3. Defendant Wisconsin Pharmacal Co., LLC is a Wisconsin Limited Liability Company,
8 qualified to do business and doing business in the State of California at all relevant times
9 herein.
- 10 4. Defendant Airborne Sales Co., Inc., is a California Corporation, qualified to do business
11 and doing business in the State of California at all relevant times herein.
- 12 5. Defendant The Surplus Store is an unknown business entity, qualified to do business and
13 doing business in the state of California at all relevant times herein.
- 14 6. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-50,
15 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
16 Complaint to allege their true names and capacities when ascertained. Plaintiff is
17 informed, believes, and thereon alleges that each fictitiously named defendant is
18 responsible in some manner for the occurrences herein alleged and the damages caused
19 thereby.
- 20 7. At all times mentioned herein, the term "Defendants" includes The Coleman company,
21 Inc., Wisconsin Pharmacal Co., LLC, Airborne Sales Co., Inc, The Surplus Store, and
22 Does 1-50.
- 23 8. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
24 times mentioned herein has conducted business within the State of California.
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1 9. At all times relevant to this action, each of the Defendants, including Does 1-50, was an
2 agent, servant, or employee of each of the other Defendants. In conducting the activities
3 alleged in this Complaint, each of the Defendants was acting within the course and scope
4 of this agency, service, or employment, and was acting with the consent, permission, and
5 authorization of each of the other Defendants. All actions of each of the Defendants
6 alleged in this Complaint were ratified and approved by every other Defendant or their
7 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
8 and/or facilitated the alleged wrongful conduct of each of the other Defendants.
9

10 10. Alternatively, at times relevant to this action, Airborne Sales Co. Inc. so controlled
11 Defendant The Surplus Store as to render The Surplus Store the mere instrumentality of
12 Watch Club. Therefore, it is in furtherance of the ends of justice, that the Corporate form
13 of Defendant The Surplus Store should be disregarded.
14

15 11. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
16 Defendants was a person doing business within the meaning of Health and Safety Code
17 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
18 employees at all relevant times.
19

20 JURISDICTION

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

15
16 **BACKGROUND AND PRELIMINARY FACTS**

- 17 15. In 1986, California voters approved an initiative to address growing concerns about
18 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
19 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
20 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
21 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
22 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
23 from contamination, to allow consumers to make informed choices about the products
24 they buy, and to enable persons to protect themselves from toxic chemicals as they see
25 fit.
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1 16. Proposition 65 requires the Governor of California to publish a list of chemicals known to
2 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
3 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
4 chemicals and chemical families. Proposition 65 imposes warning requirements and
5 other controls that apply to Proposition 65-listed chemicals.
6

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

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

21 19. Through research and investigation, Plaintiff identified certain practices of Defendants of
22 exposing, knowingly and intentionally, persons in California to the Proposition 65-listed
23 chemicals of the consumer products discussed below without first providing clear and
24 reasonable warnings of such to the exposed persons prior to the time of exposure.
25

SATISFACTION OF PRIOR NOTICE

- 1
- 2 20. On or about June 21, 2010, Plaintiff gave notice of alleged violations of Health and
- 3 Safety Code section 25249.6, concerning consumer products exposures, subject to a
- 4 private action to The Coleman Company, Inc., Wisconsin Pharmacal Co., LLC, Airborne
- 5 Sales Co., Inc. dba The Surplus Store, and to the California Attorney General, County
- 6 District Attorneys, and City Attorneys for each city containing a population of at least
- 7 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
- 8 consumer product Coleman Insect Repellent Long Lasting 25% DEET.
- 9
- 10 21. Before sending the notice of alleged violations, Plaintiff investigated the consumer
- 11 product involved, and the likelihood that such product would cause users to suffer
- 12 significant exposures to the relevant Proposition 65-listed chemical at issue.
- 13
- 14 22. Plaintiff's notice of alleged violations included a Certificate of Merit executed by the
- 15 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
- 16 Plaintiff who executed the certificate had consulted with at least one person with relevant
- 17 and appropriate expertise who reviewed data regarding the exposures to Di-*n*-propyl
- 18 isocinchomeronate (MGK Repellent 326), which is the subject Proposition 65-listed
- 19 chemical of this action. Based on that information, the attorney for Plaintiff who
- 20 executed the Certificate of Merit believed there was a reasonable and meritorious case for
- 21 this private action. The attorney for Plaintiff attached to the Certificate of Merit served
- 22 on the Attorney General the confidential factual information sufficient to establish the
- 23 bases of the Certificate of Merit.
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1 23. Plaintiff's notice of alleged violation 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 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
5 gave notice of the alleged violations to The Coleman Company, Inc., Wisconsin
6 Pharmacal Co., LLC, The Surplus Store, and the public prosecutors referenced in
7 Paragraph 20.

8 25. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
9 any applicable district attorney or city attorney has commenced and is diligently
10 prosecuting an action against the Defendants.
11

12 **FIRST CAUSE OF ACTION**

13 **(By Consumer Advocacy Group, Inc. and against The Coleman Company, Inc., Wisconsin**
14 **Pharmacal Co., LLC, Airborne Sales Co., Inc., The Surplus Store, and Does 1-50 for**
15 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
16 **(Health & Safety Code, §§ 25249.5, et seq.))**

17 **Coleman Insect Repellent Long Lasting 25% DEET**

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

20 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
21 distributor, promoter, or retailer of Coleman Insect Repellent Long Lasting 25% DEET
22 (hereinafter "Coleman Insect Repellent"), a consumer product designed for use on
23 humans to repel various insects on exposed skin surfaces.
24

25 28. Plaintiff is informed, believes, and thereon alleges that Coleman Insect Repellent
26 contains Di-*n*-propyl isocinchomeronate (MGK Repellent 326).
27
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1 29. On May 1, 1996, the Governor of California added Di-*n*-propyl isocinchomeronate
2 (MGK Repellent 326) to the list of chemicals known to the State to cause cancer (*Cal.*
3 *Code Regs.* tit. 27, § 27001(b)). Pursuant to Health and Safety Code sections 25249.9
4 and 25249.10, twenty (20) months after addition of Di-*n*-propyl isocinchomeronate
5 (MGK Repellent 326) to the list of chemicals known to the State to cause cancer, Di-*n*-
6 propyl isocinchomeronate (MGK Repellent 326) became fully subject to Proposition 65
7 warning requirements and discharge prohibitions.
8

9 30. Defendants knew or should have known that Di-*n*-propyl isocinchomeronate (MGK
10 Repellent 326) has been identified by the State of California as a chemical known to
11 cause cancer and therefore were subject to Proposition 65 warning requirements.
12 Defendants were also informed of the presence of Di-*n*-propyl isocinchomeronate (MGK
13 Repellent 326) in the Coleman Insect Repellent within Plaintiff's notice of alleged
14 violation further discussed above at Paragraph 18.
15

16 31. Plaintiff's allegations regarding Coleman Insect Repellent concern "[c]onsumer products
17 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
18 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
19 exposure that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, §
20 25602(b). Coleman Insect Repellent is a consumer product, and, as mentioned in herein,
21 exposures to Di-*n*-propyl isocinchomeronate (MGK Repellent 326) took place as a result
22 of such normal and foreseeable consumption and use.
23

24 32. Plaintiff is informed, believes, and thereon alleges that between March 16, 2007 and the
25 present, each of the Defendants knowingly and intentionally exposed California
26 consumers and users of Coleman Insect Repellent, which Defendants manufactured,
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1 distributed, or sold as mentioned above, to Di-*n*-propyl isocinchomeronate (MGK
2 Repellent 326), without first providing any type of clear and reasonable warning of such
3 to the exposed persons before the time of exposure. Defendants have distributed and sold
4 Coleman Insect Repellent in California. Defendants know and intend that California
5 consumers will use and consume Coleman Insect Repellent thereby exposing them to Di-
6 *n*-propyl isocinchomeronate (MGK Repellent 326). Defendants thereby violated
7 Proposition 65.
8

9 33. The principal routes of exposure are through dermal contact, ingestion, and inhalation.

10 Exposure through dermal contact is caused when users of the product apply Coleman
11 Insect Repellent to skin or clothing. Thereby users and other persons in proximity to the
12 user permit bare skin to touch the solution containing Di-*n*-propyl isocinchomeronate
13 (MGK Repellent 326). A route of exposure by inhalation also occurs when users and
14 other persons in proximity to the user inadvertently inhale the product spray, fumes, or
15 mist of Coleman Insect Repellent. Persons also sustained exposures by touching the skin
16 with hands after it has been sprayed, as well as hand to mouth contact and hand to
17 mucous membrane contact. Consumers have sustained multiple exposures during
18 multiple spray treatments. The foregoing routes of exposure assume use of the product in
19 accordance with its instructions.
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22 34. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
23 Proposition 65 as to Coleman Insect Repellent have been ongoing and continuous to the
24 date of the signing of this Complaint, as Defendants engaged and continue to engage in
25 conduct which violates Health and Safety Code section 25249.6, including the
26 manufacture, distribution, promotion, and sale of Coleman Insect Repellent, so that a
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