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ORIGINAL FILED
Superior Court Of California
County Of Los Angeles

JUN 20 2014

Sherri R. Carter, Executive Officer/Clerk
By: Judi Lara, Deputy

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

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

CASE NO. **BC 549442**

12 Plaintiff,

COMPLAINT FOR PENALTY AND
INJUNCTION

13 v.

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

14 EL TAPATIO MARKETS, INC; a California
15 Corporation, and DOES 1-20,

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

16 Defendants.

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23 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
24 defendants, EL TAPATIO MARKETS, INC., and DOES 1-20 as follows:
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2 **THE PARTIES**

- 3 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
4 organization qualified to do business in the State of California. CAG is a person within
5 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
6 as a private attorney general, brings this action in the public interest as defined under
7 Health and Safety Code section 25249.7, subdivision (d).
- 8 2. Defendant EL TAPATIO MARKETS, INC. ("TAPATIO") is a California corporation,
9 doing business in the State of California at all relevant times herein.
- 10 3. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
11 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
12 complaint to allege their true names and capacities when ascertained. Plaintiff is
13 informed, believes, and thereon alleges that each fictitiously named defendant is
14 responsible in some manner for the occurrences herein alleged and the damages caused
15 thereby.
- 16 4. At all times mentioned herein, the term "Defendants" includes TAPATIO and DOES 1-
17 20.
- 18 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
19 times mentioned herein have conducted business within the State of California.
- 20 6. Upon information and belief, at all times relevant to this action, each of the Defendants,
21 including DOES 1-20, was an agent, servant, or employee of each of the other
22 Defendants. In conducting the activities alleged in this Complaint, each of the
23 Defendants was acting within the course and scope of this agency, service, or
24 employment, and was acting with the consent, permission, and authorization of each of
25 the other Defendants. All actions of each of the Defendants alleged in this Complaint
26 were ratified and approved by every other Defendant or their officers or managing agents.

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

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

7 **JURISDICTION**

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

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

- 21 10. Venue is proper in the County of Los Angeles because one or more of the instances of
22 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
23 because Defendants conducted, and continue to conduct, business in the County of Los
24 Angeles with respect to the consumer product that is the subject of this action.

25
26 **BACKGROUND AND PRELIMINARY FACTS**

1 11. 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 12. 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 13. 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 14. 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).

1 15. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl
2 Phthalate ("DEHP")-bearing products of exposing, knowingly and intentionally, persons
3 in California to the Proposition 65-listed chemicals of such products without first
4 providing clear and reasonable warnings of such to the exposed persons prior to the time
5 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

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

13 SATISFACTION OF PRIOR NOTICE

14 17. On or about October 29, 2013, Plaintiff gave notice of alleged violations of Health and
15 Safety Code section 25249.6, concerning consumer products exposures, subject to a
16 private action to TAPATIO, and to the California Attorney General, County District
17 Attorneys, and City Attorneys for each city containing a population of at least 750,000
18 people in whose jurisdictions the violations allegedly occurred, concerning the product
19 Kitchen Tools containing DEHP.

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

23 19. Plaintiff's notices of alleged violation included a Certificate of Merit executed by the
24 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
25 Plaintiff who executed the certificate had consulted with at least one person with relevant
26 and appropriate expertise who reviewed data regarding the exposures to DEHP, the
27 subject Proposition 65-listed chemical of this action. Based on that information, the

1 attorney for Plaintiff who executed the Certificate of Merit believed there was a
2 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
3 to the Certificate of Merit served on the Attorney General the confidential factual
4 information sufficient to establish the basis of the Certificate of Merit.

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

8 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
9 gave notices of the alleged violations to TAPATIO, and the public prosecutors referenced
10 in Paragraph 17.

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

14
15 **FIRST CAUSE OF ACTION**
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17 **(By CONSUMER ADVOCACY GROUP, INC. and against TAPATIO, and DOES 1-20 for**
18 **Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986**
19 **(Health & Safety Code, §§ 25249.5, et seq.))**

20 **KITCHEN TOOLS**

21 23. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
22 reference paragraphs 1 through 22 of this complaint as though fully set forth herein.

23 24. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
24 distributor, promoter, or retailer of KITCHEN TOOLS, which includes but is not limited
25 to "Fan Palm Ware® "Stainless Steel", 6" Peeler, "ITEM NO.: U0063" UPC: 4 934421
26 006302" ("KITCHEN TOOLS").

27 25. KITCHEN TOOLS contains DEHP.

1 26. Defendants knew or should have known that DEHP has been identified by the State of
2 California as a chemical known to cause cancer and reproductive toxicity and therefore
3 was subject to Proposition 65 warning requirements. Defendants were also informed of
4 the presence of DEHP in KITCHEN TOOLS within Plaintiff's notice of alleged
5 violations further discussed above at Paragraph 17.

6 27. Plaintiff's allegations regarding KITCHEN TOOLS concern "[c]onsumer products
7 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
8 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
9 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
10 *25602(b)*. KITCHEN TOOLS are consumer products, and, as mentioned herein,
11 exposures to DEHP took place as a result of such normal and foreseeable consumption
12 and use.

13 28. Plaintiff is informed, believes, and thereon alleges that between October 29, 2010 and the
14 present, each of the Defendants knowingly and intentionally exposed California
15 consumers and users of KITCHEN TOOLS, which Defendants manufactured, distributed,
16 or sold as mentioned above, to DEHP, without first providing any type of clear and
17 reasonable warning of such to the exposed persons before the time of exposure.

18 Defendants have distributed and sold KITCHEN TOOLS in California. Defendants
19 know and intend that California consumers will use and consume KITCHEN TOOLS,
20 thereby exposing them to DEHP. Defendants thereby violated Proposition 65.

21 29. The principal routes of exposure are through dermal contact, ingestion and inhalation.

22 Persons sustain exposures by handling KITCHEN TOOLS without wearing gloves or any
23 other personal protective equipment, or by touching bare skin or mucous membranes with
24 gloves after handling KITCHEN TOOLS, as well as through direct and indirect hand to
25 mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed
26 from KITCHEN TOOLS. And as to Defendants' employees, employees may be exposed
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1 to DEHP in the course of their employment by handling, distributing, and selling
2 KITCHEN TOOLS.

3 30. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
4 Proposition 65 as to KITCHEN TOOLS have been ongoing and continuous to the date of
5 the signing of this complaint, as Defendants engaged and continue to engage in conduct
6 which violates Health and Safety Code section 25249.6, including the manufacture,
7 distribution, promotion, and sale of KITCHEN TOOLS, so that a separate and distinct
8 violation of Proposition 65 occurred each and every time a person was exposed to DEHP
9 by KITCHEN TOOLS as mentioned herein.

10 31. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
11 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
12 violations alleged herein will continue to occur into the future.

13 32. Based on the allegations herein, Defendants are liable for civil penalties of up to
14 \$2,500.00 per day per individual exposure to DEHP from KITCHEN TOOLS, pursuant
15 to Health and Safety Code section 25249.7(b).

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

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19 **PRAYER FOR RELIEF**

20 Plaintiff demands against each of the Defendants as follows:

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

1 Dated: JUNE 20, 2014

YEROUSHALMI & ASSOCIATES

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4 BY: 
5 Reuben Yeroushalmi
6 Attorneys for Plaintiff,
7 Consumer Advocacy Group, Inc.
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