

ENDORSED
FILED
San Francisco County Superior Court

AUG 27 2012

CLERK OF THE COURT
BY: DEBORAH STEPPE
Deputy Clerk

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
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9 Attorneys for Plaintiff,
10 Consumer Advocacy Group, Inc.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN FRANCISCO**

13 **CGC - 12 - 523742**

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

16 Plaintiff,

17 v.

18 JAY FRANCO & SONS, INC., a New York
19 Corporation and DOES 1-20;

20 Defendants.

CASE NO.

COMPLAINT FOR PENALTY,
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)

21 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against defendant
22 JAY FRANCO & SONS, INC., and Does 1-20 as follows:

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BY FAX

THE PARTIES

- 1
2 1. Plaintiff Consumer Advocacy Group, Inc. (“Plaintiff” or “CAG”) is an organization
3 qualified to do business in the State of California. CAG is a person within the meaning
4 of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private
5 attorney general, brings this action in the public interest as defined under Health and
6 Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant Jay Franco & Sons, Inc. (“Franco”) is a New York corporation who has been
8 doing business in the State of California at all relevant times herein.
- 9 3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,
10 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
11 complaint to allege their true names and capacities when ascertained. Plaintiff is
12 informed, believes, and thereon alleges that each fictitiously named defendant is
13 responsible in some manner for the occurrences herein alleged and the damages caused
14 thereby.
- 15 4. At all times mentioned herein, the term “Defendants” includes Franco and Does 1-20.
- 16 5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
17 times mentioned herein have conducted business within the State of California.
- 18 6. At all times relevant to this action, each of the Defendants, including Does 1-20, was an
19 agent, servant, or employee of each of the other Defendants. In conducting the activities
20 alleged in this Complaint, each of the Defendants was acting within the course and scope
21 of this agency, service, or employment, and was acting with the consent, permission, and
22 authorization of each of the other Defendants. All actions of each of the Defendants
23 alleged in this Complaint were ratified and approved by every other Defendant or their
24 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
25 and/or facilitated the alleged wrongful conduct of each of the other Defendants.
- 26 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
27 Defendants was a person doing business within the meaning of Health and Safety Code
28

1 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
2 employees at all relevant times.

3 **JURISDICTION**

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

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

17 10. Venue is proper in the County of San Francisco because one or more of the instances of
18 wrongful conduct occurred, and continues to occur, in the County of San Francisco
19 and/or because Defendants conducted, and continue to conduct, business in the County of
20 San Francisco with respect to the consumer product that is the subject of this action.

21 **BACKGROUND AND PRELIMINARY FACTS**

22 11. In 1986, California voters approved an initiative to address growing concerns about
23 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
24 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
25 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
26 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
27 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
28 from contamination, to allow consumers to make informed choices about the products

1 they buy, and to enable persons to protect themselves from toxic chemicals as they see
2 fit.

3 12. Proposition 65 requires the Governor of California to publish a list of chemicals known to
4 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
5 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
6 chemicals and chemical families. Proposition 65 imposes warning requirements and
7 other controls that apply to Proposition 65-listed chemicals.

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

14 14. 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 15. Plaintiff identified certain practices of manufacturers and distributors of DEHP-bearing
21 products of exposing, knowingly and intentionally, persons in California to the
22 Proposition 65-listed chemicals of such products without first providing clear and
23 reasonable warnings of such to the exposed persons prior to the time of exposure.
24 Plaintiff later discerned that Defendants engaged in such practice.

25 16. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
26 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
27 to the list of chemicals known to the State to cause developmental male reproductive
28 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)

1 months after addition of DEHP to the list of chemicals known to the State to cause
2 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
3 requirements and discharge prohibitions.

4 **SATISFACTION OF PRIOR NOTICE**

- 5 17. On or about October 19, 2011, Plaintiff gave notice of alleged violations of Health and
6 Safety Code section 25249.6, concerning consumer products exposures and occupational
7 exposures, subject to a private action to Jay Franco & Sons, Inc., and to the California
8 Attorney General, County District Attorneys, and City Attorneys for each city containing
9 a population of at least 750,000 people in whose jurisdictions the violations allegedly
10 occurred, concerning the product Children's Vinyl Placemats.
- 11 18. Before sending the notices of alleged violation, Plaintiff investigated the consumer
12 products involved, the likelihood that such products would cause users to suffer
13 significant exposures to DEHP, and the corporate structure of each of the Defendants.
- 14 19. Plaintiff's notice of alleged violation 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 DEHP, the
18 subject Proposition 65-listed chemical of this action. Based on that information, the
19 attorney for Plaintiff who executed the Certificate of Merit believed there was a
20 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
21 to the Certificate of Merit served on the Attorney General the confidential factual
22 information sufficient to establish the basis of the Certificate of Merit.
- 23 20. Plaintiff's notices of alleged violations also included a Certificate of Service and a
24 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
25 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
- 26 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
27 gave notices of the alleged violations to Franco, and the public prosecutors referenced in
28 Paragraph 17.

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

4 **FIRST CAUSE OF ACTION**

5 **(By Consumer Advocacy Group, Inc. and against JAY FRANCO & SONS, INC.
6 and Does 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic
7 Enforcement Act of 1986 (Health & Safety Code, §§ 25249.5, et seq.))**

8 **Children's Vinyl Placemats**

9 23. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
10 paragraphs 1 through 22 of this complaint as though fully set forth herein.

11 24. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
12 distributor, promoter, or retailer of Children's Vinyl Placemats ("Mats"), including but
13 not limited to The Amazing Spider-Man Placemat, RN# 18389, a children's consumer
14 product used in close proximity to food.

15 25. Plaintiff is informed, believes, and thereon alleges that Mats contains DEHP.

16 26. Defendants knew or should have known that DEHP and has been identified by the State
17 of California as chemicals known to cause cancer and reproductive toxicity and therefore
18 was subject to Proposition 65 warning requirements. Defendants were also informed of
19 the presence of DEHP in Mats within Plaintiff's notice of alleged violations further
20 discussed above at Paragraph 17.

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

27 28. Plaintiff is informed, believes, and thereon alleges that between October 19, 2009 and the
28 present, each of the Defendants knowingly and intentionally exposed their employees and

1 California consumers and users of Mats, which Defendants manufactured, distributed, or
2 sold as mentioned above, to DEHP, without first providing any type of clear and
3 reasonable warning of such to the exposed persons before the time of exposure.

4 Defendants have distributed and sold Mats in California. Defendants know and intend
5 that California consumers will use and consume Mats, thereby exposing them to DEHP.
6 Defendants thereby violated Proposition 65.

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

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

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

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

27 33. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
28 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.

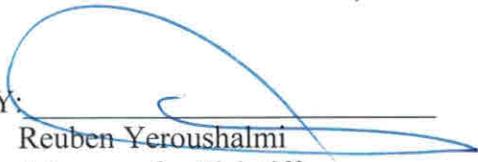
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9 Dated: August 27, 2012

YEROUSHALMI & ASSOCIATES

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12 BY: 
13 Reuben Yeroushalmi
14 Attorneys for Plaintiff,
15 Consumer Advocacy Group, Inc.

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