

ORIGINAL



FILED  
ALAMEDA COUNTY

2013 FEB 13 PM 3:17

CLERK OF THE SUPERIOR COURT

BY  DEPUTY

Reuben Yeroushalmi (SBN 193981)  
Daniel D. Cho (SBN 105409)  
Ben Yeroushalmi (SBN 232540)  
**YEROUSHALMI & ASSOCIATES**  
9100 Wilshire Boulevard, Suite 610E  
Beverly Hills, California 90212  
Telephone: 310.623.1926  
Facsimile: 310.623.1930

Attorneys for Plaintiff  
Consumer Advocacy Group, Inc.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA**

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

Plaintiff.

v.

ATA RETAIL SERVICES, INC., a  
California Corporation; TMD  
INTERNATIONAL, LLC, a Nevada  
Corporation; SAFEWAY INC., a Delaware  
Corporation; THE VONS COMPANIES,  
INC., DBA VONS, a Michigan Corporation;  
SMART & FINAL INC., a Delaware  
Corporation; and DOES 1-20;

Defendants.

CASE NO.

**RG13667350**

**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)**

**FILE BY  
FAX**

Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
defendants ATA RETAIL SERVICES, INC., TMD INTERNATIONAL, LLC, SAFEWAY  
INC., THE VONS COMPANIES, INC., DBA VONS, SMART & FINAL INC., and DOES 1-20  
as follows:

///

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. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an organization qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant ATA RETAIL SERVICES, INC. ("ATA") is a California Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
3. Defendant TMD INTERNATIONAL, LLC ("TMD") is a Nevada Corporation doing business in the State of California at all relevant times herein.
4. Defendant SAFEWAY, INC. ("SAFEWAY") is a Delaware Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
5. Defendant THE VONS COMPANIES, INC., DBA VONS ("VONS") is a Michigan Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
6. Defendant SMART & FINAL, INC. ("SMART & FINAL") is a Delaware Corporation, qualified to do business and doing business in the State of California at all relevant times herein.
7. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
8. At all times mentioned herein, the term "Defendants" includes ATA, TMD, SAFEWAY, VONS, SMART & FINAL, and DOES 1-20.

1 9. 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 10. Upon information and belief, at all times relevant to this action, each of the Defendants,  
4 including DOES I-20, was an agent, servant, or employee of each of the other  
5 Defendants. Defendant SAFEWAY is the parent company of Defendant VONS. In  
6 conducting the activities alleged in this Complaint, each of the Defendants was acting  
7 within the course and scope of this agency, service, or employment, and was acting with  
8 the consent, permission, and authorization of each of the other Defendants. All actions of  
9 each of the Defendants alleged in this Complaint were ratified and approved by every  
10 other Defendant or their officers or managing agents. Alternatively, each of the  
11 Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each  
12 of the other Defendants.

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

### 17 JURISDICTION

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

23 13. This Court has jurisdiction over Defendants named herein because Defendants either  
24 reside or are located in this State or are foreign corporations authorized to do business in  
25 California, are registered with the California Secretary of State, or who do sufficient  
26 business in California, have sufficient minimum contacts with California, or otherwise  
27 intentionally avail themselves of the markets within California through their manufacture,  
28

1 distribution, promotion, marketing, or sale of their products within California to render  
2 the exercise of jurisdiction by the California courts permissible under traditional notions  
3 of fair play and substantial justice.

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

8 **BACKGROUND AND PRELIMINARY FACTS**

- 9 15. 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 16. 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 17. 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  
27  
28

reasonable" warnings before exposing a person, knowingly and intentionally, to a Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

18. Proposition 65 provides that any person "violating or threatening to violate" the statute may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.

"Threaten to violate" means "to create a condition in which there is a substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

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

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

20. On January 1, 1988, the Governor of California added DEHP to the list of chemicals known to the State to cause cancer and on October 24, 2003, the Governor of California added DEHP to the list of chemicals known to the State to cause reproductive toxicity. (*Cal. Code Regs.* tit. 27, § 27001(b)). Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months after addition of DEHP to the list of chemicals known to the State to cause cancer and reproductive toxicity DEHP became fully subject to Proposition 65 warning requirements and discharge prohibitions.

#### **SATISFACTION OF PRIOR NOTICE**

21. On or about March 28, 2012, Plaintiff gave notice of alleged violations of Health and Safety Code section 25249.6, concerning consumer products exposures, subject to a private action to ATA, TMD, SMART & FINAL and to the California Attorney General, County District Attorneys, and City Attorneys for each city containing a population of at least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the product Shelf Liners.

1 22. On or about August 30, 2012, Plaintiff gave notice of alleged violations of Health and  
2 Safety Code section 25249.6, concerning consumer products exposures and occupational  
3 exposures, subject to a private action to ATA, TMD, SAFEWAY, VONS and to the  
4 California Attorney General, County District Attorneys, and City Attorneys for each city  
5 containing a population of at least 750,000 people in whose jurisdictions the violations  
6 allegedly occurred, concerning the product Liners.

7 23. Before sending the notices of alleged violation, Plaintiff investigated the consumer  
8 products involved, the likelihood that such products would cause users to suffer  
9 significant exposures to DEHP, and the corporate structure of each of the Defendants.

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

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

22 26. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
23 gave notices of the alleged violations to ATA, TMD, SAFEWAY, VONS, SMART &  
24 FINAL, and the public prosecutors referenced in Paragraph 21 and Paragraph 22.

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

1 FIRST CAUSE OF ACTION

2 (By CONSUMER ADVOCACY GROUP, INC. and against ATA, TMD, SMART &  
3 FINAL, and DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water  
and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))

4 **Shelf Liners**

5 28. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
6 reference paragraphs 1 through 27 of this complaint as though fully set forth herein.

7 29. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
8 distributor, promoter, or retailer of Shelf Liners including but not limited to, Culinary  
9 Elements™ Produce Bin Liner, Item #9200.

10 30. Shelf Liners contain DEHP.

11 31. Defendants knew or should have known that DEHP has been identified by the State of  
12 California as a chemical known to cause cancer and reproductive toxicity and therefore  
13 was subject to Proposition 65 warning requirements. Defendants were also informed of  
14 the presence of DEHP in Shelf Liners within Plaintiff's notice of alleged violations  
15 further discussed above at Paragraph 21.

16 32. Plaintiff's allegations regarding Shelf Liners concerns "[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). Shelf Liners are consumer products, and, as mentioned herein, exposures to  
21 DEHP took place as a result of such normal and foreseeable consumption and use.

22 33. Plaintiff is informed, believes, and thereon alleges that between March 28, 2009 and the  
23 present, each of the Defendants knowingly and intentionally exposed California  
24 consumers and users of Shelf Liners, which Defendants manufactured, distributed, or  
25 sold as mentioned above, to DEHP, without first providing any type of clear and  
26 reasonable warning of such to the exposed persons before the time of exposure.

27 Defendants have distributed and/or sold Shelf Liners in California. Defendants know and  
28

1 intend that California consumers will use and consume Shelf Liners thereby exposing  
2 them to DEHP Defendants thereby violated Proposition 65.

3 34. The principal routes of exposure are through dermal contact, ingestion and inhalation.

4 Persons sustain exposures by handling Shelf Liners without wearing gloves or any other  
5 personal protective equipment, or by touching bare skin or mucous membranes with  
6 gloves after handling Shelf Liners, as well as through direct and indirect hand to mouth  
7 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
8 Shelf Liners.

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

16 **SECOND CAUSE OF ACTION**

17 (By CONSUMER ADVOCACY GROUP, INC. and against ATA, TMD,  
18 SAFEWAY, VONS and DOES 1-20 for Violations of Proposition 65, The Safe  
19 Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§  
20 25249.5, *et seq.*))

21 **Liners**

22 36. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by  
23 reference paragraphs 1 through 37 of this complaint as though fully set forth herein.

24 37. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
25 distributor, promoter, or retailer of Liners including but not limited to, CULINARY  
26 ELEMENTS "produce bin LINER" "Easy-grip handle" "Generous 12x12 size" "Item #  
27 9200 Made in China" "GM DEPT 02058 Q4 P 865 6 8987 37 \$2.99" (Yellow) and  
28 CULINARY ELEMENTS "produce bin LINER" "Easy-grip handle" "Generous 12x12



size" "Item # 9200 Made in China" "GM DEPT 02058 Q1 P 865 4 8987 53 \$2.99"  
(Ivory).

38. Liners contain DEHP.

39. Defendants knew or should have known that DEHP has been identified by the State of California as a chemical known to cause cancer and reproductive and therefore was subject to Proposition 65 warning requirements. Defendants were also informed of the presence of DEHP in Liners within Plaintiff's notice of alleged violations further discussed above at Paragraph 22.

40. Plaintiff's allegations regarding Liners concerns "[c]onsumer products exposure[s]." which "is an exposure that results from a person's acquisition, purchase, storage,

consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, § 25602(b).

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

41. Plaintiff is informed, believes, and thereon alleges that between August 30, 2009 and the present, each of the Defendants knowingly and intentionally exposed California consumers and users of Liners, which Defendants manufactured, distributed, or sold as mentioned above, to DEHP, without first providing any type of clear and reasonable warning of such to the exposed persons before the time of exposure. Defendants have distributed and/or sold Liners in California. Defendants know and intend that California consumers will use and consume Liners thereby exposing them to DEHP. Defendants thereby violated Proposition 65.

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

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

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

11 45. Based on the allegations herein, Defendants are liable for civil penalties of up to  
12 \$2,500.00 per day per individual exposure to DEHP from Shelf Liners and Liners  
13 pursuant to Health and Safety Code section 25249.7(b).

14 46. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
15 filing this Complaint.

16 **PRAYER FOR RELIEF**

17 Plaintiff demands against each of the Defendants as follows:

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

23 Dated: FEBRUARY, 11, 2013

YEROUSHALMI & ASSOCIATES

24  
25  
26 BY: 

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