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10 Consumer Advocacy Group, Inc.

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**ORIGINAL FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

FEB 13 2013

John A. Clark, Executive Officer/Clerk  
BY Iskaylia Chambers Deputy

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **LOS ANGELES – CENTRAL DISTRICT**

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

15 Plaintiff,

16 v.

17 SMART & FINAL INC. a Delaware  
18 Corporation, and DOES 1-20;

19 Defendants.

CASE NO. **BC500801**

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)

20  
21 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against the  
22 defendants SMART & FINAL INC and DOES 1-20 as follows:

23  
24 **THE PARTIES**

- 25 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff” or “CAG”) is an  
26 organization qualified to do business in the State of California. CAG is a person within  
27 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting  
28

COPY

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

3 2. Defendant SMART & FINAL INC is a Delaware Corporation, qualified to do business  
4 and doing business in the State of California at all relevant times herein.

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

11 4. At all times mentioned herein, the term "Defendants" includes SMART & FINAL and  
12 DOES 1-20.

13 5. Plaintiff is informed and believes, and thereon alleges that the Defendants at all times  
14 mentioned herein have conducted business within the State of California.

15 6. Upon information and belief, at all times relevant to this action, the Defendants, including  
16 DOES 1-20, was an agent, servant, or employee of the other Defendants. In conducting  
17 the activities alleged in this Complaint, the Defendants were acting within the course and  
18 scope of this agency, service, or employment, and were acting with the consent,  
19 permission, and authorization of each of the other Defendants. All actions of the  
20 Defendants alleged in this Complaint were ratified and approved by every other  
21 Defendant or their officers or managing agents. Alternatively, the Defendants aided,  
22 conspired with and/or facilitated the alleged wrongful conduct of each of the other  
23 Defendants.

24 7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, the  
25 Defendants were people doing business within the meaning of Health and Safety Code  
26 section 25249.11, subdivision (b), and that the Defendant had ten (10) or more employees  
27 at all relevant times.



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. On January 1, 1988, the Governor of California added DEHP to the list of chemicals  
21 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP  
22 to the list of chemicals known to the State to cause developmental male reproductive  
23 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)  
24 months after addition of DEHP to the list of chemicals known to the State to cause  
25 reproductive toxicity, DEHP became fully subject to Proposition 65 warning  
26 requirements and discharge prohibitions.

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

6 **SATISFACTION OF PRIOR NOTICE**

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

13 18. Before sending the notice of alleged violation, Plaintiff investigated the consumer  
14 products involved, the likelihood that such products would cause users to suffer  
15 significant exposures to DEHP, and the corporate structure of the Defendant.

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

25 20. Plaintiff's notice of alleged violations also included Certificates of Service and a  
26 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
27 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).  
28

1 21. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
2 gave notices of the alleged violations to SMART & FINAL, and the public prosecutors  
3 referenced in Paragraph 17.

4 22. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
5 any applicable district attorney or city attorney has commenced and is diligently  
6 prosecuting an action against the Defendant.

7  
8 **FIRST CAUSE OF ACTION**

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

12 **Aprons**

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

15 24. The Defendant is, and at all times mentioned herein was, a manufacturer, distributor,  
16 promoter, or retailer of Aprons ("Aprons").

17 25. Aprons contain DEHP.

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

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

1 28. Plaintiff is informed, believes, and thereon alleges that between March 28, 2009 and the  
2 present, the Defendants knowingly and intentionally exposed California consumers and  
3 users of Aprons, which the Defendants manufactured, distributed, or sold as mentioned  
4 above, to DEHP, without first providing any type of clear and reasonable warning of such  
5 to the exposed persons before the time of exposure. Defendants have distributed and sold  
6 Aprons in California. Defendants knew and intend that California consumers will use  
7 and consume Aprons, thereby exposing them to DEHP. Defendant thereby violated  
8 Proposition 65.

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

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

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

25 32. Based on the allegations herein, the Defendant is liable for civil penalties of up to  
26 \$2,500.00 per day per individual exposure to DEHP from Aprons, pursuant to Health and  
27 Safety Code section 25249.7(b).  
28

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

3 **PRAYER FOR RELIEF**

4 Plaintiff demands against the Defendant as follows:

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

10  
11  
12 Dated: FEBRUARY 11, 2013

YEROUSHALMI & ASSOCIATES

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14  
15 BY: 

16 Reuben Yeroushalmi  
17 Attorneys for Plaintiff,  
18 Consumer Advocacy Group, Inc.  
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