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ORIGINAL FILED**
Superior Court of California
County of Los Angeles

NOV 20 2013

Sherri R. Carter, Executive Officer/Clerk
By Cristina Grijalva, Deputy

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

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11 **CONSUMER ADVOCACY GROUP, INC.,**
12 in the public interest,

13 Plaintiff,

14 v.

15 **SMART & FINAL STORES, LLC, a**
16 **Delaware Limited Liability Company;**
17 **AMERIFOODS TRADING COMPANY**
18 **LLC, a California Limited Liability**
19 **Company; SMART & FINAL HOLDINGS,**
20 **INC., a Delaware Corporation; SMART &**
FINAL LLC, a Delaware Limited Liability
Company; and DOES 1-20;

21 Defendants.

CASE NO. **BC 528121**

**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)**

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23 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
24 defendants SMART & FINAL STORES, LLC; AMERIFOODS TRADING COMPANY LLC;
25 SMART & FINAL HOLDINGS, INC.; SMART & FINAL LLC; and DOES 1-20 as follows:

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THE PARTIES

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2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
3 organization qualified to do business in the State of California. CAG is a person within
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
5 as a private attorney general, brings this action in the public interest as defined under
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant SMART & FINAL STORES, LLC ("SMART & FINAL STORES") is a
8 Delaware Limited Liability Company, doing business in the State of California at all
9 relevant times herein.
- 10 3. Defendant AMERIFOODS TRADING COMPANY LLC ("AMERIFOODS TRADING
11 COMPANY") is a California Limited Liability Company, doing business in the State of
12 California at all relevant times herein.
- 13 4. Defendant SMART & FINAL HOLDINGS, INC. ("SMART & FINAL HOLDINGS") is
14 incorporated in Delaware, doing business in the State of California at all relevant times
15 herein.
- 16 5. Defendant SMART & FINAL LLC ("SMART & FINAL LLC") is a Delaware Limited
17 Liability Company, doing business in the State of California at all relevant times herein.
- 18 6. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
19 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
20 complaint to allege their true names and capacities when ascertained. Plaintiff is
21 informed, believes, and thereon alleges that each fictitiously named defendant is
22 responsible in some manner for the occurrences herein alleged and the damages caused
23 thereby.
- 24 7. At all times mentioned herein, the term "Defendants" include SMART & FINAL
25 STORES, AMERIFOODS TRADING COMPANY, SMART & FINAL HOLDINGS,
26 SMART & FINAL LLC, and DOES 1-20.

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

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

16 **JURISDICTION**

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

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

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

7 **BACKGROUND AND PRELIMINARY FACTS**

8 14. In 1986, California voters approved an initiative to address growing concerns about
9 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
10 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
11 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
12 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
13 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
14 from contamination, to allow consumers to make informed choices about the products
15 they buy, and to enable persons to protect themselves from toxic chemicals as they see
16 fit.

17 15. Proposition 65 requires the Governor of California to publish a list of chemicals known to
18 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
19 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
20 chemicals and chemical families. Proposition 65 imposes warning requirements and
21 other controls that apply to Proposition 65-listed chemicals.

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

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

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

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

19 **SATISFACTION OF PRIOR NOTICE**

20 20. On or about July 15, 2013 Plaintiff gave notice of alleged violations of Health and Safety
21 Code section 25249.6, concerning consumer products exposures, subject to a private
22 action to AMERIFOODS TRADING COMPANY, SMART & FINAL HOLDINGS,
23 SMART & FINAL LLC, DOES 1-20 and to the California Attorney General, County
24 District Attorneys, and City Attorneys for each city containing a population of at least
25 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the
26 products Aprons containing DEHP.
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- 1 21. On or about August 1, 2013, Plaintiff gave notice of alleged violations of Health and
2 Safety Code section 25249.6, concerning consumer products exposures, subject to a
3 private action to SMART & FINAL STORES LLC, and to the California Attorney
4 General, County District Attorneys, and City Attorneys for each city containing a
5 population of at least 750,000 people in whose jurisdictions the violations allegedly
6 occurred, concerning the products Aprons containing DEHP.
- 7 22. 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 23. Plaintiff's notices 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 24. 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 25. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
23 gave notices of the alleged violations to DEFENDANTS, and the public prosecutors
24 referenced in Paragraph 20 and 21.
- 25 26. 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.
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FIRST CAUSE OF ACTION

(By CONSUMER ADVOCACY GROUP, INC. and against AMERIFOODS TRADING COMPANY, SMART & FINAL HOLDINGS, SMART & FINAL LLC, SMART & FINAL STORES, LLC 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.*))

Aprons

27. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by reference paragraphs 1 through 26 of this complaint as though fully set forth herein.
28. AMERIFOODS TRADING COMPANY, SMART & FINAL HOLDINGS, SMART & FINAL LLC, SMART & FINAL STORES, LLC AND DOES 1-20 is, and at all times mentioned herein was, a manufacturer, distributor, promoter, or retailer of Aprons, which includes but is not limited to: "First Street™ Clear Vinyl Bib Apron, 1 Count, 25 in x 37 in, barcode: 0 41512 09741 6" ("APRONS").
29. APRONS contain DEHP.
30. AMERIFOODS TRADING COMPANY, SMART & FINAL HOLDINGS, SMART & FINAL LLC, AND SMART & FINAL STORES, LLC knew or should have known that DEHP has been identified by the State of California as a chemical known to cause cancer and reproductive toxicity and therefore was subject to Proposition 65 warning requirements. Defendants were also informed of the presence of DEHP in APRONS within Plaintiff's notice of alleged violations further discussed above at Paragraph 20 and 21.
31. Plaintiff's allegations regarding APRONS concern "[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)*. APRONS are consumer products, and, as mentioned herein, exposures to DEHP took place as a result of such normal and foreseeable consumption and use.

1 32. Plaintiff is informed, believes and thereon alleges that between July 15, 2010 and the
2 present, AMERIFOODS TRADING COMPANY, SMART & FINAL HOLDINGS,
3 SMART & FINAL LLC, and DOES 1-20 knowingly and intentionally exposed their
4 California consumers and users of APRONS, which they manufactured, distributed, or
5 sold as mentioned above, to DEHP, without first providing any type of clear and
6 reasonable warning of such to the exposed persons before the time of exposure.
7 AMERIFOODS TRADING COMPANY, SMART & FINAL HOLDINGS, SMART &
8 FINAL LLC, and DOES 1-20 have distributed and sold APRONS in California. They
9 know and intend that California consumers will use and consume APRONS, thereby
10 exposing them to DEHP. AMERIFOODS TRADING COMPANY, SMART & FINAL
11 HOLDINGS, SMART & FINAL LLC, and DOES 1-20 thereby violated Proposition 65.

12 33. Plaintiff is informed, believes and thereon alleges that between August 1, 2010 and the
13 present, SMART & FINAL STORES, LLC, and DOES 1-20 knowingly and intentionally
14 exposed their California consumers and users of APRONS, which they manufactured,
15 distributed, or sold as mentioned above, to DEHP, without first providing any type of
16 clear and reasonable warning of such to the exposed persons before the time of exposure.
17 SMART & FINAL STORES, LLC and DOES 1-20 have distributed and sold APRONS
18 in California. They know and intend that California consumers will use and consume
19 APRONS, thereby exposing them to DEHP. SMART & FINAL STORES, LLC and
20 DOES 1-20 thereby violated Proposition 65.

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

1 35. Plaintiff is informed, believes, and thereon alleges that Defendants, and DOES 1-20
2 violations of Proposition 65 as to APRONS have been ongoing and continuous to the date
3 of the signing of this complaint, as they engaged and continue to engage in conduct
4 which violates Health and Safety Code section 25249.6, including the manufacture,
5 distribution, promotion, and sale of APRONS, so that a separate and distinct violation of
6 Proposition 65 occurred each and every time a person was exposed to DEHP by
7 APRONS as mentioned herein.

8 36. 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 37. Based on the allegations herein, Defendants, and DOES 1-20 are liable for civil penalties
12 of up to \$2,500.00 per day per individual exposure to DEHP from APRONS, pursuant to
13 Health and Safety Code section 25249.7(b).

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

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17 **PRAYER FOR RELIEF**

18 Plaintiff demands against each of the Defendants as follows:

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

24 Dated: 11/19/13

YEROUSHALMI & ASSOCIATES

25 BY: 

26 Reuben Yeroushalmi
27 Attorneys for Plaintiff,
28 Consumer Advocacy Group, Inc.