

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Robert Draper

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Consumer Protection Group, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CONSUMER PROTECTION GROUP, LLC,
in the public interest,

Plaintiff,

v.

A.D. Sutton & Sons, Inc., a New York
Corporation

Defendant.

CASE NO. **19STCV29979**

**PLAINTIFF CONSUMER
PROTECTION GROUP, LLC'S
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.*)

UNLIMITED CIVIL
(Demand exceeds \$25,000)

Plaintiff CONSUMER PROTECTION GROUP, LLC alleges a cause of action against
Defendant A.D. SUTTON & SONS, INC. ("DEFENDANT").

THE PARTIES

1. Plaintiff, CONSUMER PROTECTION GROUP LLC ("Plaintiff" or "CPG"), is
an organization qualified to do business in the State of California. CPG is a person within the
meaning of Health and Safety Code section 25249.11, subdivision (a). CPG, acting as a private

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

3 2. Defendant is a New York based Corporation, doing business in the State of
4 California at all relative times herein.

5 3. Plaintiff is informed and believes, and thereon alleges that Defendant at all times
6 mentioned herein has conducted business within the State of California.

7 4. Upon information and belief, at all times relevant to this action, Defendant was
8 an agent, servant, or employee of the Defendant. In conducting the activities alleged in this
9 Complaint, Defendant was acting within the course and scope of this agency, service, or
10 employment, and was acting with the consent, permission, and authorization of the Defendant.

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

15 JURISDICTION

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

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

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

5 **BACKGROUND AND PRELIMINARY FACTS**

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

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

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

25 12. Proposition 65 provides that any person “violating or threatening to violate” the
26 statute may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
27 25249.7. “Threaten to violate” means “to create a condition in which there is a substantial
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1 probability that a violation will occur." *Health & Safety Code* § 25249.11(e). Defendant is also
2 liable for civil penalties of up to \$2,500.00 per day per violation, recoverable in a civil action.
3 *Health & Safety Code* § 25249.7(b).

4 13. On January 1, 1988, the Governor of California added Di(2-ethylhexyl)
5 phthalate ("DEHP") to the list of chemicals known to the state to cause cancer. Thereafter, on
6 October 24, 2003, the Governor of California added DEHP to the list of chemicals known to
7 the state to cause developmental toxicity and male reproductive toxicity.

8 14. Plaintiff identified certain practices of manufacturers and distributors of
9 products bearing DEHP, exposing, knowingly, and intentionally, persons in California to said
10 Proposition 65-listed chemical without first providing clear and reasonable warnings to the
11 exposed persons prior to the time of exposure. Plaintiff later learned that Defendant has
12 engaged in such practice.

13 SATISFACTION OF PRIOR NOTICE

14 15. On or about November 26, 2018 Plaintiff gave notice of alleged violations of
15 Health and Safety Code section 25249.6, concerning consumer product exposures, subject to a
16 private action to SUTTON, Ross Stores, Inc., and to the California Attorney General, County
17 District Attorneys, and City Attorneys for each County containing a population of at least
18 750,000 people in whose jurisdiction the violations allegedly occurred, concerning a fridge pack
19 cooler ("COOLER") containing DEHP.

20 16. Before sending the notice of alleged violations, Plaintiff investigated the
21 consumer products involved, the likelihood that such products would cause users to suffer
22 significant exposures to DEHP, and the corporate structure of the Defendant.

23 17. Plaintiff's notices of alleged violations included a Certificate of Merit executed
24 by the attorney for the noticing party, CPG. The Certificate of Merit stated that the attorney for
25 Plaintiff who executed the certificate had consulted with at least one person with relevant and
26 appropriate expertise who reviewed data regarding the exposures to DEHP, the subject
27 Proposition 65-listed chemicals of this action. Based on that information, the attorney for
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1 Plaintiff who executed the Certificate of Merit believed there was a reasonable and meritorious
2 case for this private action. The attorney for Plaintiff attached to the Certificate of Merit served
3 on the Attorney General the confidential factual information sufficient to establish the basis of
4 the Certificate of Merit.

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

8 19. Plaintiff is commencing this action more than sixty (60) days from the dates that
9 Plaintiff gave notices of the alleged violation to SUTTON and the public prosecutors referenced
10 in Paragraphs 15.

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

14 **FIRST CAUSE OF ACTION**

15 (By CONSUMER PROTECTION GROUP, LLC against A. D. SUTTON & SONS,
16 INC., for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act
17 of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))

18 **FRIDGE PACK COOLER**

19 21. Plaintiff repeats and incorporates by reference paragraphs 1 through 20 of this
20 complaint as though fully set forth herein. The Defendant is, and at all times mentioned herein
21 was a manufacturer of the COOLER.

22 22. Plaintiff is informed, believes, and thereon alleges that the COOLER contains
23 DEHP.

24 23. Defendant knew or should have known that DEHP has been identified by the
25 State of California as a chemical known to cause Cancer, developmental toxicity, female
26 reproductive toxicity, and male reproductive toxicity and therefore was subject to Proposition
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1 65 warning requirements. Defendant was also informed of the presence of DEHP in the
2 COOLER within Plaintiff's notice of alleged violations further discussed above at
3 Paragraph 14.

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

10 25. Plaintiff is informed, believes, and thereon alleges that between November 26,
11 2015 and the present, Defendant knowingly and intentionally exposed California consumers
12 and users of the COOLER, which Defendant manufactured, distributed, or sold as mentioned
13 above, to DEHP, without first providing any type of clear and reasonable warning of such to
14 the exposed persons before the time of exposure. Defendant has distributed and sold the
15 COOLER in California. Defendant knows and intend that California consumers will use and
16 consume the COOLER, thereby exposing them to DEHP. Defendant thereby violated
17 Proposition 65.

18 26. The principal routes of exposure with regard to the COOLER are and were
19 through dermal contact and ingestion. Persons sustain exposures by handling or otherwise
20 using the COOLER with bare skin, without wearing gloves, or by touching bare skin or mucous
21 membranes with the COOLER after handling the COOLER as well as through direct and
22 indirect hand to mouth contact, hand to food to mouth, direct contact to food then to mouth,
23 hand to mucous membrane, or breathing in particulate matter dispersed from the COOLER.

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

4 28. Plaintiff is informed, believes, and thereon alleges that each violation of
5 Proposition 65 mentioned herein is ever continuing. Plaintiff further alleges and believes that
6 the violations alleged herein will continue to occur into the future.

7 29. Based on the allegations herein, Defendant is liable for civil penalties of up to
8 \$2,500.00 per day per individual exposure to DEHP from the COOLER pursuant to Health and
9 Safety Code section 25249.7(b).

10 30. In the absence of equitable relief, the general public will continue to be
11 involuntarily exposed to DEHP that is contained in the COOLER, creating a substantial risk of
12 irreparable harm. Thus, by committing the acts alleged herein, Defendant has caused irreparable
13 harm for which there is no plain, speedy, or adequate remedy at law.

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

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PRAYER FOR RELIEF

Plaintiff demands against the Defendant as follows:

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

Dated: August 22, 2019

BLACKSTONE LAW, APC

By: 
Michael Nicholas Jones
Attorneys for Plaintiff,
Consumer Protection Group, LLC