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ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco

**01/20/2022**  
**Clerk of the Court**  
BY: KAREN VALDES  
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

**CGC-22-597740**

PRECILA BALABBO,

Plaintiff,

vs.

A.D. SUTTON & SONS, INC. &  
CHARMING CHARLIE BRANDS CO.,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

**(Violation of Health & Safety Code § 25249.5 et  
seq.)**

Plaintiff Precila Balabbo ("Plaintiff"), by and through her attorneys, alleges the following cause of action in the public interest of the citizens of the State of California.

**BACKGROUND OF THE CASE**

1. Plaintiff brings this representative action on behalf of all California citizens to enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part, "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

2. This complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California to enforce the People's right to be informed of the health hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in Madison & Dakota clear totes sold and/or distributed by defendant A.D. Sutton & Sons, Inc..

1 (“Sutton”) and/or defendant Charming Charlie Brands Co.. (“Charming”) (collectively,  
2 “Defendants”) in California.

3 3. DEHP is a harmful chemical known to the State of California to cause cancer and  
4 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical known  
5 to the State to cause cancer and it has come under the purview of Proposition 65 regulations since  
6 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).  
7 On October 24, 2003, the State of California listed DEHP as a chemical known to cause  
8 reproductive toxicity.

9 4. Proposition 65 requires all businesses with ten (10) or more employees that operate  
10 within California or sell products therein to comply with Proposition 65 regulations. Included in  
11 such regulations is the requirement that businesses must label any product containing a Proposition  
12 65-listed chemical that will create an exposure above safe harbor levels with a “clear and  
13 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed  
14 chemical.

15 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
16 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be  
17 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code  
18 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the  
19 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §  
20 25249.7.

21 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,  
22 without a requisite exposure warning, Madison & Dakota clear totes (the “Products”) that expose  
23 persons to DEHP when used for their intended purpose.

24 7. Defendants’ failure to warn consumers and other individuals in California of the  
25 health hazards associated with exposure to DEHP in conjunction with the sale and/or distribution  
26 of the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and civil  
27 penalties described herein.

8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendants to provide purchasers or users of the Products with required warnings related to the dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code § 25249.7(a).

10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

## PARTIES

11. Plaintiff is a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals in products sold in California and to improve human health by reducing hazardous substances contained in such items. She brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

12. Defendant Sutton, through its business, effectively imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant Sutton is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

13. Defendant Charming, through its business, effectively imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant Charming is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

## VENUE AND JURISDICTION

14. Venue is proper in the County of San Francisco because one or more of the instances of wrongful conduct occurred, and continue to occur in this county and/or because Defendants conducted, and continue to conduct, business in the County of San Francisco with respect to the Products.

1           15.     This Court has jurisdiction over this action pursuant to California Constitution  
2 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those  
3 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement  
4 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has  
5 jurisdiction over this lawsuit.

6           16.     This Court has jurisdiction over Defendants because each defendant is either a  
7 citizen of the State of California, has sufficient minimum contacts with the State of California, is  
8 registered with the California Secretary of State as foreign corporations authorized to do business  
9 in the State of California, and/or has otherwise purposefully availed itself of the California market.  
10 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent  
11 and permissible with traditional notions of fair play and substantial justice.

#### 12                               **STATUTORY BACKGROUND**

13           17.     The people of the State of California declared in Proposition 65 their right “[t]o be  
14 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive  
15 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

16           18.     To effect this goal, Proposition 65 requires that individuals be provided with a  
17 “clear and reasonable warning” before being exposed to substances listed by the State of California  
18 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

19                 No person in the course of doing business shall knowingly and intentionally expose any  
20                 individual to a chemical known to the state to cause cancer or reproductive toxicity without  
                    first giving clear and reasonable warning to such individual...

21           19.     An exposure to a chemical in a consumer product is one “which results from a  
22 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a  
23 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §  
24 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...  
25 shall provide a warning to any person to whom the product is sold or transferred unless the product  
26 is packaged or labeled with a clear and reasonable warning.”  
27  
28

20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or more of the following methods individually or in combination:<sup>1</sup>

- a. A warning that appears on a product's label or other labeling.
- b. Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs, menus, or a combination thereof.
- c. The warnings provided pursuant to subparagraphs (a) and (b) shall be prominently placed upon a product's labels or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.
- d. A system of signs, public advertising identifying the system and toll-free information services, or any other system that provides clear and reasonable warnings.

21. Proposition 65 provides that any “person who violates or threatens to violate” the statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase “threaten to violate” is defined to mean creating “a condition in which there is a substantial probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

## FACTUAL BACKGROUND

22. On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical known to cause

<sup>1</sup> Alternatively, a person in the course of doing business may elect to comply with the warning requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30, 2016, and operative on August 30, 2018.

1 reproductive toxicity. In summary, DEHP was listed under Proposition 65 as a chemical known to  
2 the State to cause cancer and reproductive toxicity.

3 23. The consumer exposures that are the subject of this Complaint result from dermal  
4 absorption. The primary route of exposure to DEHP is through dermal absorption directly through  
5 the skin when consumers use, touch, or handle the Products. Some amount of exposure through  
6 ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth.  
7 No clear and reasonable warning is provided with the Products regarding the health hazards of  
8 exposure to the DEHP.

9 24. Defendants have manufactured, processed, marketed, distributed, offered to sell  
10 and/or sold the Products in California since at least September 13, 2021. The Products continue to  
11 be distributed and sold in California without the requisite warning information.

12 25. At all times relevant to this action, Defendants have knowingly and intentionally  
13 exposed users and/or consumers of the Products to DEHP without first giving a clear and  
14 reasonable exposure warning to such individuals.

15 26. As a proximate result of acts by each defendant, as a person in the course of doing  
16 business within the meaning of H&S Code § 25249.11, individuals throughout the State of  
17 California, including in San Francisco County, have been exposed to DEHP without a clear and  
18 reasonable warning on the Products. The individuals subject to the violative exposures include  
19 normal and foreseeable users and consumers that use the Products, as well as all others exposed to  
20 the Products.

#### 21 **SATISFACTION OF NOTICE REQUIREMENTS**

22 27. Plaintiff purchased the Product from Charming. At the time of purchase Charming  
23 and Sutton did not provide a Proposition 65 exposure warning for DEHP or any other Proposition  
24 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

25 28. The Product was sent to a testing laboratory to determine the phthalate  
26 concentration of the Product.

27 29. The laboratory provided the results of its analysis. Results of this test concluded  
28 there was excess presence of DEHP content (the "Chemical Test Report").

30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist to determine if, based on the findings of the Chemical Test Report and the reasonable and foreseeable use of the Product, exposure to DEHP will occur at levels that require Proposition 65 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California Code of Regulations.

31. Plaintiff received from the analytical chemist an exposure assessment report which concluded that persons in California who use the Products will be exposed to levels of DEHP that require a Proposition 65 exposure warning.

32. On September 13, 2021, Plaintiff gave notice of alleged violation of Health and Safety Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to DEHP from use of the Products without proper warning, subject to a private action to Defendants and to the California Attorney General’s office and the offices of the County District attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein the herein violations allegedly occurred.

33. The Notice complied with all procedural requirements of Proposition 65 including the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at least one person with relevant and appropriate expertise who reviewed relevant data regarding DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a private action.

34. After receiving the Notice, and to Plaintiff's best information and belief, none of the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a cause of action against Defendants under Proposition 65 to enforce the alleged violations which are the subject of the Notice.

35. Plaintiff is commencing this action more than sixty (60) days from the date of the Notice to Defendants, as required by law.

### FIRST CAUSE OF ACTION

**(By Plaintiff against Defendants for the Violation of Proposition 65)**

1           36.     Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 35 of  
2 this Complaint as though fully set forth herein.

3           37.     Defendants have, at all times mentioned herein, acted as distributor, and/or retailer  
4 of the Products.

5           38.     Use of the Products exposes users to DEHP, a hazardous chemical found on the  
6 Proposition 65 list of chemicals known to be hazardous to human health.

7           39.     The Product does not comply with the Proposition 65 warning requirements.

8           40.     Plaintiff, based on her best information and belief, avers that at all relevant times  
9 herein, and at least since September 13, 2021, continuing until the present, that Defendants have  
10 continued to knowingly and intentionally expose California users and consumers of the Product to  
11 DEHP without providing required warnings under Proposition 65.

12           41.     The exposures that are the subject of the Notice result from the purchase,  
13 acquisition, handling and recommended use of the Products. The primary route of exposure to  
14 DEHP is through dermal absorption directly through the skin when consumers use, touch, or  
15 handle the Products. Some amount of exposure through ingestion can occur by touching the  
16 Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning  
17 is provided with the Products regarding the health hazards of exposure to the DEHP.

18           42.     Plaintiff, based on her best information and belief, avers that such exposures will  
19 continue every day until clear and reasonable warnings are provided to purchasers and users or  
20 until this known toxic chemical is removed from the Products.

21           43.     Defendants have knowledge that the normal and reasonably foreseeable use of the  
22 Products exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur  
23 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of  
24 the Products to consumers in California

25           44.     Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
26 Complaint.



