

COPY

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**LOS ANGELES
SUPERIOR COURT**

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**

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

14 **Plaintiff,**

15 **v.**

16 **WISE BUYS LIQUIDATORS, INC., a**
17 **Delaware Corporation, MEADWESTVACO**
18 **CORP., a Delaware corporation;**
19 **AMERICAN FAVORITE TOOLS, INC., a**
20 **California Corporation, A.D. SUTTON &**
21 SONS, a New York Corporation, and DOES
1-50

22 **Defendants.**

CASE NO. BC495382

CONSENT JUDGMENT [PROPOSED]

Dept: 20
Judge: Kevin Brazile
Complaint filed: November 8, 2012

23 **I. INTRODUCTION**

24 **1.1 This Consent Judgment is entered into by and between plaintiff Consumer**
25 **Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and**
26 **defendant A.D. Sutton & Sons, Inc. (hereinafter Defendant), with each a "Party" and**
27 **collectively referred to as the "Parties."**
28

CONSENT JUDGMENT [PROPOSED]

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Consumer Advocacy Group, Inc.

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES

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

14 Plaintiff,

15 v.

16 WISE BUYS LIQUIDATORS, INC., a
17 Delaware Corporation; MEADWESTVACO
18 CORP., a Delaware corporation;
19 AMERICAN FAVORITE TOOLS, INC., a
California Corporation; A.D. SUTTON &
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23 1. INTRODUCTION

24 1.1 This Consent Judgment is entered into by and between plaintiff Consumer
25 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and
26 defendant A.D. Sutton & Sons, Inc. ("hereinafter Defendant"), with each a "Party" and
27 collectively referred to as the "Parties."
28

1 1.2 Defendant employs ten or more persons, is a person in the course of doing
2 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
3 California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65"). Defendant
4 manufactures, distributes, and/or sells mesh duffel bags ("Covered Products").

5 **1.3 Notice of Violation.**

6 1.3.1 On or about April 20, 2012, CAG served Defendant and various public
7 enforcement agencies with a document entitled "60-Day Notice of Violation" (the "April 20,
8 2012 Notice") that alleged violations of Health & Safety Code § 25249.6 for allegedly failing to
9 warn individuals in California of exposures to di(2-ethylhexyl)phthalate (DEHP) contained in the
10 Covered Products.

11 1.3.2 No public enforcer has commenced or diligently prosecuted the allegations set
12 forth in the April 20, 2012 Notice.

13 **1.4 Complaint.**

14 On November 8, 2012, CAG filed a Complaint for civil penalties and injunctive relief
15 ("Complaint") in Los Angeles Superior Court, Case No. BC495382. The Complaint alleges,
16 among other things, that Defendant violated Proposition 65 by failing to give clear and
17 reasonable warnings of exposure to DEHP from the Covered Products.

18 **1.5 Consent to Jurisdiction**

19 For purposes of this Consent Judgment, the Parties stipulate that this Court has
20 jurisdiction over the allegations of violations contained in the Complaint and personal
21 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
22 City and County of Los Angeles and that this Court has jurisdiction to enter this Consent
23 Judgment as a full settlement and resolution of the allegations contained in the Complaint and
24 April 20, 2012 Notice and of all claims which were or could have been raised by any person or
25 entity based in whole or in part, directly or indirectly, on the facts alleged therein or arising
26 therefrom or related to.
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28

1 **1.6 No Admission**

2 The Parties enter into this Consent Judgment pursuant to a full and final settlement of any
3 and all claims between the Parties for the purpose of avoiding prolonged litigation. This Consent
4 Judgment shall not constitute an admission with respect to any material allegation of the
5 Complaint, each and every allegation of which Defendant denies, nor may this Consent
6 Judgment or compliance with it be used as evidence of any wrongdoing, misconduct, culpability
7 or liability on the part of Defendant.

8 **2. DEFINITIONS**

9 2.1 "Covered Products" means mesh duffle bags sold, distributed, and/or
10 manufactured by Defendant.

11 2.2 "Effective Date" means ten (10) days after Defendant's receipt of written notice
12 that this Consent Judgment has been entered by the Court.

13 2.3 "DEHP" means Di(2-ethylhexyl)phthalate

14 2.4 "Notice" means the April 20, 2012 Notice.

15 **3. INJUNCTIVE RELIEF/REFORMULATION**

16 3.1 Within 30 days of the Effective Date, Defendant shall not sell or offer for sale in
17 California Covered Products that contain DEHP with more than 0.1% DEHP by weight.

18 **4. SETTLEMENT PAYMENT**

19 4.1 Within fourteen (14) business days of the Effective Date or receipt of W-9 forms
20 from CAG, whichever is later, Defendant shall pay a total of \$35,000 in full and complete
21 settlement of all monetary claims by CAG related to the Complaint and April 20, 2012 Notice, as
22 follows.

23 4.2 **Reimbursement of Attorneys' Fees and Costs:** Within fourteen (14) business
24 days of the Effective Date, Defendant shall pay \$33,000 to "Yeroushalmi & Associates" as
25 reimbursement for the investigation fees and costs, testing costs, expert fees, attorney fees, and
26 other litigation costs and expenses for all work performed through the approval of this Consent
27 Judgment.
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1
2 **4.2.a Civil Penalties.** Defendant shall issue two separate checks for a total amount of
3 One thousand dollars (\$1,000) as penalties pursuant to Health & Safety Code § 25249.12: (a) one
4 check made payable to the State of California's Office of Environmental Health Hazard
5 Assessment (OEHHA) in the amount of \$750, representing 75% of the total penalty; and (b) one
6 check to Consumer Advocacy Group, Inc. in the amount of \$250, representing 25% of the total
7 penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be
8 issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of
9 \$750. The second 1099 shall be issued in the amount of \$250 to CAG and delivered to:
10 Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California
11 90212.

12 **4.3 Payment In Lieu of Civil Penalties:** Defendant shall pay \$1,000 in lieu of civil
13 penalties to "Consumer Advocacy Group, Inc." CAG will use this payment for investigation of
14 the public's exposure to Proposition 65 listed chemicals through various means, laboratory fees
15 for testing for Proposition 65 listed chemicals, expert fees for evaluating exposures through
16 various mediums, including but not limited to consumer product, occupational, and
17 environmental exposures to Proposition 65 listed chemicals, and the cost of hiring consulting
18 and retained experts who assist with the extensive scientific analysis necessary for those files in
19 litigation, in order to reduce the public's exposure to Proposition 65 listed chemicals by notifying
20 those persons and/or entities believed to be responsible for such exposures and attempting to
21 persuade those persons and/or entities to reformulate their products or the source of exposure to
22 completely eliminate or lower the level of Proposition 65 listed chemicals, thereby addressing
23 the same public harm as allegedly in the instant Action. Further, should the court require it,
24 CAG will submit under seal, an accounting of these funds as described above as to how the funds
25 were used. The check shall be made payable to "Consumer Advocacy Group, Inc." and delivered
26 to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E,
27 Beverly Hills, California 90212.
28

1 4.4 Payments shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Associates,
2 9100 Wilshire Blvd., Suite 610E, Beverly Hills, CA 90212.

3 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

4 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on
5 behalf of itself and in the public interest and Defendant and its officers, directors, insurers,
6 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
7 companies and their successors and assigns ("Defendant Releasees"), including but not limited to
8 each of its suppliers, customers, distributors, wholesalers, retailers, or any other person in the
9 course of doing business, and the successors and assigns of any of them, who may use, maintain,
10 distribute and/or sell the Covered Products ("Downstream Defendant Releasees"), for all claims
11 for violations of Proposition 65 up through the Effective Date based on exposure to DEHP from
12 the Covered Products as set forth in the Complaint and April 20, 2012 Notice. Defendant's
13 compliance with this Consent Judgment shall constitute compliance with Proposition 65 with
14 respect to DEHP from the Covered Products as set forth in the Complaint and April 20, 2012
15 Notice.

16 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
17 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
18 indirectly, any form of legal action and releases all claims, including, without limitation, all
19 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
20 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
21 fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown,
22 fixed or contingent (collectively "Claims"), against Defendant, Defendant Releasees, and
23 Downstream Defendant Releasees arising from any violation of Proposition 65 or any other
24 statutory or common law regarding the failure to warn about exposure to DEHP from the
25 Covered Products manufactured, distributed, and/or sold by Defendant, Defendant Releasees,
26 and Downstream Defendant Releasees. In furtherance of the foregoing, as to alleged exposures
27 to DEHP from Covered Products, CAG hereby waives any and all rights and benefits which it
28

1 now has, or in the future may have, conferred upon it with respect to the Claims arising from any
2 violation of Proposition 65 or any other statutory or common law regarding the failure to warn
3 about exposure to DEHP from Covered Products by virtue of the provisions of section 1542 of
4 the California Civil Code, which provides as follows:

5 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
6 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
7 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
8 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
9 DEBTOR.

10 CAG understands and acknowledges that the significance and consequence of this waiver of
11 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
12 resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from
13 any violation of Proposition 65 or any other statutory or common law regarding the failure to
14 warn about exposure to DEHP from the Covered Products, including but not limited to any
15 exposure to, or failure to warn with respect to exposure to DEHP from the Covered Products,
16 CAG will not be able to make any claim for those damages against Defendant or the Defendant
17 Releasees or Downstream Defendant Releasees. Furthermore, CAG acknowledges that it intends
18 these consequences for any such Claims arising from any violation of Proposition 65 or any
19 other statutory or common law regarding the failure to warn about exposure to DEHP from the
20 Covered Products as may exist as of the date of this release but which CAG does not know
21 exists, and which, if known, would materially affect their decision to enter into this Consent
22 Judgment, regardless of whether their lack of knowledge is the result of ignorance, oversight,
23 error, negligence, or any other cause.

24 5.3 CAG acting in the public interest releases Defendant, Defendant Releasees, and
25 Downstream Defendant Releasees from all Claims (as described in the previous paragraph) for
26 violations of Proposition 65 up through the Effective Date, only as to Claims for Covered
27 Products which were manufactured, distributed, and/or sold by A.D. Sutton or are in the stream
28 of commerce as of the Effective Date, as set forth or arising from the Complaint and April 20,
2012 Notice.

1 **6. ENFORCEMENT OF JUDGMENT**

2 6.1 The Parties may, by noticed motion or order to show cause before the Superior
3 Court of California, City and County of Los Angeles, giving the notice required by law, enforce
4 the terms and conditions contained herein. A Party may enforce any of the terms and conditions
5 of this Consent Judgment only after that Party first provides 30 days' notice to the Party
6 allegedly failing to comply with the terms and conditions of this Consent Judgment and attempts
7 to resolve such Party's failure to comply in an open and good faith manner.

8 6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
9 proceeding to enforce Section 3.1 of this Consent Judgment, CAG shall provide a Notice of
10 Violation ("NOV") to Defendant. The NOV shall include for each of the Covered Products: the
11 date(s) the alleged violation(s) was observed and the location at which the Covered Products
12 were offered for sale, and shall be accompanied by all test data obtained by CAG regarding the
13 Covered Products, including an identification of the component(s) of the Covered Products that
14 were tested.

15 6.2.1 **Non-Contested NOV.** CAG shall take no further action regarding the
16 alleged violation if, within 30 days of receiving such NOV, Defendant serves a Notice of
17 Election ("NOE") that meets one of the following conditions:

18 (a) The Covered Products were shipped by Defendant for sale in California
19 before the Effective Date, or
20

21 (b) Since receiving the NOV, Defendant has taken corrective action by either
22 (i) requesting that its customers in California remove the Covered Products identified in the
23 NOV from sale in California and destroy or return the Covered Products to Defendant, or (ii)
24 providing a clear and reasonable warning for the Covered Products identified in the NOV
25 pursuant to 27 Cal. Code Regs. § 25603.

26 6.2.2 **Contested NOV.** Defendant may serve an NOE informing CAG of its
27 election to contest the NOV within 30 days of receiving the NOV.
28

1 (a) In its election, Defendant may request that the sample(s) of the Covered
2 Products tested by CAG be subject to confirmatory testing at an EPA-accredited laboratory.

3 (b) If the confirmatory testing establishes that the Covered Products do not
4 contain DEHP in excess of the level allowed in Section 3.1, CAG shall take no further action
5 regarding the alleged violation. If the testing does not establish compliance with Section 3.1,
6 Defendant may withdraw its NOE to contest the violation and may serve a new NOE pursuant to
7 Section 6.2.1.

8 (c) If Defendant does not withdraw an NOE to contest the NOV, the Parties
9 shall meet and confer for a period of no less than 30 days before CAG may seek an order
10 enforcing the terms of this Consent Judgment.

11 6.3. In any proceeding brought by either Party to enforce this Consent Judgment,
12 the prevailing party shall be entitled to recover its attorney's fees and costs.

13 **7. ENTRY OF CONSENT JUDGMENT**

14 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
15 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
16 Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

17 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
18 shall terminate and become null and void, and the actions shall revert to the status that existed
19 prior to the execution date of this Consent Judgment; (b) no term of this Consent Judgment or
20 any draft thereof, or of the negotiation, documentation, or other part or aspect of the Parties'
21 settlement discussions, shall have any effect, nor shall any such matter be admissible in evidence
22 for any purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and
23 confer to determine whether to modify the terms of the Consent Judgment and to resubmit it for
24 approval.
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1 **8. MODIFICATION OF JUDGMENT**

2 8.1 This Consent Judgment may be modified only upon written agreement of the
3 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
4 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

5 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
6 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

7 **9. RETENTION OF JURISDICTION**

8 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
9 terms of this Consent Judgment.

10 **10. DUTIES LIMITED TO CALIFORNIA**

11 This Consent Judgment shall have no effect on Covered Products sold outside the State of
12 California.

13 **11. SERVICE ON THE ATTORNEY GENERAL**

14 11.1 CAG shall serve a copy of this Consent Judgment, signed by both Parties, on the
15 California Attorney General so that the Attorney General may review this Consent Judgment
16 prior to its submittal to the Court for approval. No sooner than forty five (45) days after the
17 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
18 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
19 the Parties may then submit it to the Court for approval.

20 **12. ATTORNEY FEES**

21 12.1 Except as specifically provided in Section 4, each Party shall bear its own costs
22 and attorney fees in connection with this action.

23 **13. ENTIRE AGREEMENT**

24 13.1 This Consent Judgment contains the sole and entire agreement and understanding
25 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
26 negotiations, commitments and understandings related hereto. No representations, oral or
27 otherwise, express or implied, other than those contained herein have been made by any Party
28

1 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
2 deemed to exist or to bind any of the Parties.

3 **14. GOVERNING LAW**

4 14.1 The validity, construction and performance of this Consent Judgment shall be
5 governed by the laws of the State of California, without reference to any conflicts of law
6 provisions of California law.

7 14.2 The Parties, including their counsel, have participated in the preparation of this
8 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
9 Consent Judgment was subject to revision and modification by the Parties and has been accepted
10 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty
11 or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
12 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
13 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
14 resolved against the drafting Party should not be employed in the interpretation of this Consent
15 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

16 **15. EXECUTION AND COUNTERPARTS**

17 15.1 This Consent Judgment may be executed in counterparts and by means of
18 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
19 one document.

20 **16. NOTICES**

21 16.1 Any notices under this Consent Judgment shall be by personal delivery or First
22 Class Mail.
23

24 If to CAG:

25 Reuben Yeroushalmi, Esq.
26 9100 Wilshire Boulevard, Suite 610E
27 Beverly Hills, CA 90212
(310) 623-1926

28 If to A.D. Sutton & Sons:

1 David Sutton
2 A.D. Sutton & Sons
3 20 W. 33rd St.
4 New York, NY 10001

5 With a copy to:

6 Malcolm Weiss
7 Hunton Williams LLP
8 550 South Hope Street, Ste. 2000
9 Los Angeles, CA 90071

10 **17. AUTHORITY TO STIPULATE**

11 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
12 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf
13 of the party represented and legally to bind that party.

14 AGREED TO:

15 Date: 12-23-13, 2013

13 AGREED TO:

14 Date: 12/23, 2013

17 By: 
18 Plaintiff, CONSUMER ADVOCACY
19 GROUP, INC.

17 By: 
18 Defendant, A.D. SUTTON & SONS

21 **IT IS SO ORDERED.**

22 Date: 3/27/14

23 **KEVIN C. BRAZILE**

24 JUDGE OF THE SUPERIOR COURT