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Attorneys for Plaintiff,
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

DEFENDANTS

CASE NO. 19STCV29979

[PROPOSED] CONSENT JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Judge: Hon. Robert Draper

Dept.: 78

Compl. Filed: August 22, 2019

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Consumer Protection Group,
4 LLC (“CPG”), acting on behalf of itself and in the interest of the public, and Defendant A.D. Sutton
5 & Sons, Inc. (“Defendant”), with each referred to as a “Party” and collectively referred to as
6 “Parties.” Ross Stores, Inc. (“Ross”) is a thirty-party beneficiary of this Consent Judgment and will
7 be released by CPG as set forth in Section 4 below.

8 **1.2 Defendant and Products.**

9 Defendant is a New York corporation that is qualified to and does conduct business in
10 California, and employs ten (10) or more persons. CPG alleges that Defendant manufactured,
11 caused to be manufactured, sold, or distributed a hand-held cooler (referred to hereinafter as
12 “Covered Products”), which product is labeled “Fridge Pack cooler”. For purposes of this Consent
13 Judgment, Defendant is deemed a person in the course of doing business in California and subject to
14 the provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
15 Safety Code §§ 25249.6 et seq. (“Proposition 65”).

16 **1.3 Listed Chemical.**

17 Di (2-ethylhexyl) Phthalate (“DEHP”), also known as Diethyl Hexyl Phthalate and Bis
18 (2-ethylhexyl) Phthalate, collectively have been listed by the State of California as a chemical
19 known to cause cancer and birth defects or other reproductive harm.

20 **1.4 Notice of Violation.**

21 On November 26, 2018, CPG served Defendant, Ross, and various public enforcement
22 agencies with a document titled “60-Day Notice of Violation” (“AG 2018-02115”) that provided the
23 recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
24 individuals in California of exposures to DEHP contained in the Covered Products sold by
25 Defendant (“Notice”). No public enforcer has commenced or diligently prosecuted the allegations
26 set forth in the Notice.

1 **1.5 Complaint.**

2 On August 22, 2019 CPG filed a Complaint for civil penalties and injunctive relief
3 (“Complaint”) in the above-captioned action. In the First Cause of Action, the Complaint alleges,
4 among other things, that Defendant violated Proposition 65 by failing to give clear and reasonable
5 warnings of exposure to DEHP from the Covered Products.

6 **1.6 Consent to Jurisdiction.**

7 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
8 jurisdiction over the allegations contained in the Notice and Complaint, personal jurisdiction over
9 Defendant as to the acts alleged in the Notice and Complaint, that venue is proper in the County of
10 Los Angeles, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
11 settlement and resolution of the allegations contained in the Notice or Complaint and of all claims
12 which were or could have been raised by any person or entity based in whole or in part, directly or
13 indirectly, on the facts alleged therein or arising therefrom or related thereto.

14 **1.7 No Admission.**

15 This Consent Judgment resolves claims that are denied and disputed. The Parties enter into
16 this Consent Judgment pursuant to a full and final settlement of any and all claims between the
17 Parties for the purpose of avoiding prolonged litigation. Defendant denies all the material, factual
18 and legal allegations in Plaintiff’s Notice and Complaint and maintains that the Products have been,
19 and are, in compliance with all laws, and that Defendant has not violated Proposition 65. This
20 Consent Judgment, or compliance with it, shall not constitute or be construed as an admission of
21 liability by Defendant but, to the contrary, as a compromise of claims that are expressly contested
22 and denied. Nothing in this Consent Judgment shall be construed as an admission by the Parties of
23 any material allegation of the Notice or the Complaint, any fact, conclusion of law, issue of law or
24 violation of law, including without limitation, any admission concerning any alleged violation of
25 Proposition 65 or any other statutory, regulatory, common law, or equitable doctrine. Nothing in
26 this Consent Judgment, nor compliance with its terms, shall constitute or be construed as an
27 admission by the Parties, or give rise to any inference, of any fact, conclusion of law, issue of law,
28 or violation of law, or of fault, wrongdoing, or liability by Defendant, their officers, directors,

1 employees, or parent, subsidiary or affiliated corporations, or be offered or admitted as evidence in
2 any administrative or judicial proceeding or litigation in any court, agency, or forum. Furthermore,
3 nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or
4 defense the Parties may have in any other or future legal proceeding, except as expressly provided
5 in this Consent Judgment.

6 **1.8** The “Effective Date” is the date Plaintiff notifies Defendant in writing that this
7 Consent Judgment is approved and entered by the Court.

8 **2. INJUNCTIVE RELIEF**

9 **2.1** Within ninety (90) calendar days of the Effective Date, Defendant shall not directly
10 sell, offer for sale in California, or distribute for sale in California, any Covered Products unless
11 they contain no more than 0.1% DEHP by weight.

12 **2.2 Proposition 65 Warnings.** For any Covered Products in Defendant’s possession
13 and control as of the Effective Date that contains more than 0.1% DEHP by weight, Defendant shall
14 place a Proposition 65 compliant warning on the item as outlined in section 2.2.1.

15 **2.2.1** When a warning is required under Section 2.1, Defendant shall provide a
16 warning substantially similar to either the following warning.

17 Long-Form Warning:

18  **WARNING:** This product can expose you to di (2-ethylhexyl) phthalate, which
19 is known to the State of California to cause cancer and birth defects or other
20 reproductive harm. For more information go to www.P65Warnings.ca.gov.

21 or

22 Short-Form Warning:

23  **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

24 The warning shall be accompanied by a symbol consisting of a black exclamation point in a yellow
25 equilateral triangle with a black outline. Where the label, labeling, package, shelf tag or sign for the
26 Products is not printed using the color yellow, the symbol may be printed in black and white. The
27 symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of
28 the word “**WARNING.**” The warning shall be provided directly on each Product or its label,

1 labeling, package, shelf tag or sign with such conspicuousness as compared with other words,
2 statements or designs as to render it likely to be seen, read and understood by an ordinary individual
3 under customary conditions of purchase. However, if Defendant opts to use the Short-Form
4 Warning, said warning must be provided on each Product or its label or package.

5 **2.2.2 Compliance with Warning Regulations.** Defendant shall be deemed to be
6 in compliance with the warning requirements of this Consent Judgment by either adhering to
7 Sections 2.1 and 2.2 of this Consent Judgment or by complying with Proposition 65 warning
8 requirements adopted by the California Office of Environmental Health Hazard Assessment
9 (“OEHHA”) after the Effective Date that pertain to such products.

10 **2.3 Sell-through For Existing Inventory**

11 The injunctive requirements of Section 2 shall not apply to Products that Defendant manufactured,
12 distributed, supplied, sold and/or offered to sell prior to ninety (90) calendar days after the Effective
13 Date, which Products are subject to the releases provided in Section 4.1. After the Effective Date, if
14 Defendant directly sells the Covered Product that contains more than 0.1% DEHP by weight from
15 in existing inventory via an internet website to customers located in California, the warning
16 requirements of this section shall be satisfied in accordance with applicable regulations.

17 **3. SETTLEMENT PAYMENT**

18 **3.1 Payment and Due Date.**

19 Within twenty one (21) days after Defendant receives written notice of the Court’s approval
20 and entry of this consent judgment, Defendant shall pay a total of fifty-two thousand dollars and
21 zero cents (\$52,000) in full and complete settlement of all monetary claims by CPG related to the
22 Notice and Complaint as to Defendant, as follows:

23 **3.1.1 Civil Penalty:** Defendant agrees to pay seventy-eight hundred dollars
24 (\$7,800.00) as penalties pursuant to Health & Safety Code § 25249.12(c)(1) and (d):

25 (a) Defendant shall issue one check made payable to the State of
26 California’s Office of Environmental Health Hazard Assessment (“OEHHA”) in the amount of
27 fifty-eight hundred and fifty dollars (\$5,850.00) representing 75% of the total penalty and another
28

1 check made payable to CPG in the amount of nineteen hundred and fifty dollars (\$1,950.00)
2 representing 25% of the total penalty; and

3 **3.1.2 Additional Settlement Payment:** Defendant shall issue one check for fifty-
4 eight hundred and fifty dollars (\$5,850.00) to “Consumer Protection Group, Inc.” pursuant to Health
5 & Safety Code § 25249.7 (b) and California Code of Regulations, Title 11 § 3203 (d). CPG will
6 use this Additional Settlement Payment as follows, eighty five percent (85%) for fees of
7 investigation, purchasing and testing for Proposition 65 listed chemicals in various products, and for
8 expert fees for evaluating exposures through various mediums, including but not limited to
9 consumer product, occupational, and environmental exposures to Proposition 65 listed chemicals,
10 and the cost of hiring consulting and retaining experts who assist with the scientific analysis
11 necessary for those files in litigation and to offset the costs of future litigation enforcing Proposition
12 65 but excluding attorney fees; fifteen percent (15%) for administrative costs incurred during
13 investigation and litigation to reduce the public’s exposure to Proposition 65 listed chemicals by
14 notifying those persons and/or entities believed to be responsible for such exposures and attempting
15 to persuade those persons and/or entities to reformulate their products or the source of exposure to
16 completely eliminate or lower the level of Proposition 65 listed chemicals including but not limited
17 to costs of documentation and tracking of products investigated, storage of products, website
18 enhancement and maintenance, computer and software maintenance, investigative equipment,
19 CPG’s member’s time for work done on investigations, office supplies, mailing supplies and
20 postage.

21 **3.1.3 Reimbursement of Attorneys’ Fees and Costs:** Defendant shall pay thirty
22 eight thousand three hundred and fifty dollars (\$38,350) to Blackstone Law, APC as complete
23 reimbursement for any and all investigation fees and costs, attorneys’ fees, expert fees, report costs,
24 and any and all other costs and expenses incurred as a result of investigating, bringing this matter to
25 the Defendant’s attention, litigating, negotiating a settlement in the public interest, and seeking and
26 obtaining court approval of this Consent Judgment.

27 **3.2** All payments referenced in paragraphs 3.1.1, 3.1.2, and 3.1.3 above, shall be made as
28 stated above and delivered to: Jonathan M. Genish, Blackstone Law, APC, 8383 Wilshire Blvd.,

1 Suite 745, Beverly Hills, CA 90211. Upon receipt, Plaintiff's counsel will forward delivery of
2 Defendant's civil penalty payment to OEHHA.

3 **4. RELEASE OF DEFENDANT**

4 **4.1** This Consent Judgment is a full, final, and binding resolution between CPG, on
5 behalf of itself and in the public interest and (i) Defendant and its officers, directors, members,
6 attorneys, agents, insurers, employees, parents, shareholders, representatives, divisions,
7 subdivisions, subsidiaries, partners, affiliates, sister companies, and their predecessors, franchisees,
8 cooperative members, licensees, successors and assigns (collectively referred to as "Defendant
9 Releasees"); (ii) all entities to which Defendant Releasees directly or indirectly has distributed or
10 sold the Covered Products, including, but not limited to, distributors, suppliers, wholesalers,
11 customers, manufacturers, licensors, licensees, franchisees, cooperative members, and retailers,
12 including without limitation Ross, and their respective parents, affiliates and subsidiaries,
13 shareholders, directors, officers, agents, employees, attorneys, successors and assignees,
14 franchisees, cooperative members and licensees from any claims or allegations of violation arising
15 under Proposition 65 pertaining to the failure to warn about exposures to DEHP from the Covered
16 Products that Defendant has distributed, supplied, and/or sold prior to ninety (90) calendar days
17 after the Effective Date(including but not limited to the Ross Stores, Inc.); (iii) and the successors
18 and assigns of any of them (the released entities listed in
19 (i) through (iii) of this Section 4.1 are collectively referred to as "Released Parties") for all claims
20 for violations of Proposition 65 for alleged exposures to DEHP from Covered Products
21 manufactured, distributed, or sold by Defendant on or before the Effective Date. Defendant's
22 compliance with this Consent Judgment shall constitute compliance by any Released Parties with
23 Proposition 65 with respect to DEHP in the Covered Products manufactured, distributed, or sold
24 after the Effective Date. Nothing in this Section affects CPG's right to commence or prosecute an
25 action under Proposition 65 against any person other than the Released Parties.

26 **4.2** CPG on behalf of itself, its past and current agents, representatives, attorneys,
27 successors, affiliates, and/or assignees (collectively, the "CPG Releasers"), hereby waives all rights
28 to institute or participate in, directly or indirectly, any form of legal action and releases all claims,

1 including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
2 demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not
3 limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether
4 known or unknown, fixed or contingent (collectively "Claims"), against the Released Parties arising
5 from any violation of Proposition 65 or any other statutory or common law regarding alleged
6 exposures to, or the failure to warn about alleged exposures to, DEHP from the Covered Products.
7 It is possible that Claims not known to the Parties arising out of the facts alleged in the Notice or the
8 Complaint and relating to the Covered Products will develop or be discovered. CPG, on behalf of
9 itself and the CPG Releasers, acknowledges that this Consent Judgment is expressly intended to
10 cover and include all such Claims. CPG has full knowledge of the contents of California Civil
11 Code section 1542. CPG, on behalf of itself and the CPG Releasers, acknowledges that the Claims
12 released in this Section 4 may include unknown Claims, and nevertheless waives California Civil
13 Code § 1542 as to any such unknown Claims. California Civil Code section 1542 reads as follows:

14 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
15 THAT THE CREDITOR OR RELEASING PARTY DOES NOT
16 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
17 THE TIME OF EXECUTING THE RELEASE AND THAT, IF
18 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
19 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
20 OR RELEASED PARTY.

18 CPG understands and acknowledges that the significance and consequence of this waiver of
19 California Civil Code section 1542.

20 **5. ENFORCEMENT OF JUDGMENT**

21 **5.1** The terms of this Consent Judgment shall be enforced exclusively by the Parties
22 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
23 California, Los Angeles County, enforce the terms and conditions contained herein. A Party may
24 enforce any of the terms and conditions of this Consent Judgment only after that Party first provides
25 30 days' notice to the Party allegedly failing to comply with the terms and conditions of this
26 Consent Judgment, and attempts to resolve such Party's failure to comply in an open and good faith
27 manner.
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1 **5.2 Notice of Violation.** Prior to bringing any motion, order to show cause, or other
2 proceeding to enforce the terms of this Consent Judgment, CPG shall provide a Notice of Violation
3 (“NOV”) to the Defendant. The NOV shall include for each of the Covered Products: the date(s)
4 the alleged violation(s) was observed and the location at which the Covered Products were offered
5 for sale, and shall be accompanied by all test data obtained by CPG regarding the Covered Products,
6 including an identification of the component(s) of the Covered Products that were tested.

7 **5.2.1 Non-Contested NOV.** CPG shall take no further action of any kind
8 regarding the alleged violation if, within 60 days of receiving such NOV referred to in paragraph
9 5.2, the Defendant serves a Notice of Election (“NOE”) not to contest the NOV that meets one of
10 the following conditions:

11 (a) A statement that the Covered Product was manufactured and shipped
12 by the Defendant for sale in California before the Effective Date; or

13 (b) A statement that since receiving the NOV the Defendant has taken
14 corrective action by either: (i) taking all steps necessary to bring the sale of the product into
15 compliance under the terms of this Consent Judgment; or (ii) requesting that its customers or stores
16 in California, as applicable, remove the Covered Product identified in the NOV from sale in
17 California and destroy or return the Covered Product to the Defendant or vendor, as applicable; or
18 (iii) refute the information provided in the NOV.

19 **5.2.2 Contested NOV.** Defendant may serve a Notice of Election (“NOE”)
20 informing CPG of its election to contest the NOV referred to in paragraph 5.2 within 60 days of
21 receiving such NOV.

22 (a) In its election, the Defendant may request that the sample(s) of
23 Covered Product tested by CPG be subject to confirmatory testing at an EPA-accredited laboratory
24 at equally shared cost.

25 (b) If the confirmatory testing establishes that the Covered Products do
26 not contain DEHP in excess of the level allowed in Section 2.1, above, CPG shall take no further
27 action regarding the alleged violation. If the testing does not establish compliance with Section 2.1,
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1 above, the Defendant may withdraw its NOE to contest the violation and may serve a new NOE
2 pursuant to Section 5.2.1.

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

6 **5.3** In any court proceeding brought by either Party to enforce this Consent Judgment,
7 the prevailing Party shall be entitled to recover its reasonable attorney's fees and costs.

8 **6. ENTRY OF CONSENT JUDGMENT**

9 **6.1** CPG shall file a motion seeking approval of this Consent Judgment pursuant to
10 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CPG and
11 Defendant waives their respective rights to a hearing or trial on the allegations of the Complaint.

12 **6.2** If this Consent Judgment is not approved in full by the Court within one year of full
13 execution: (a) this Consent Judgment and any and all prior agreements between the Parties merged
14 herein shall terminate and become null and void, and the actions shall revert to the status that
15 existed prior to the execution date of this Consent Judgment; (b) no term of this Consent Judgment
16 or any draft thereof, or of the negotiation, documentation, or other part or aspect of the Parties'
17 settlement discussions, shall have any effect, nor shall any such matter be admissible in evidence for
18 any purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer
19 to determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

20 **7. MODIFICATION OF JUDGMENT**

21 **7.1** This Consent Judgment may be modified only upon written agreement of the Parties
22 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any Party
23 as provided by law and upon entry of a modified Consent Judgment by the Court.

24 **7.2** Any Party seeking to modify this Consent Judgment shall attempt in good faith to
25 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

26 **7.3** Within fifteen (15) business days of the Effective Date, CPG shall file a request for
27 dismissal without prejudice of Defendant with respect to all causes of action in the Complaint.
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1 **8. RETENTION OF JURISDICTION**

2 **8.1** This Court shall retain jurisdiction of this matter to implement and enforce the terms
3 of this Consent Judgment under Code of Civil Procedure § 664.6.

4 **9. SERVICE ON THE ATTORNEY GENERAL**

5 **9.1** CPG shall serve a copy of this Consent Judgment, signed by both Parties, on the
6 California Attorney General so that the Attorney General may review this Consent Judgment prior
7 to its submittal to the Court for approval. No sooner than forty-five (45) days after the Attorney
8 General has received the aforementioned copy of this Consent Judgment, and in the absence of any
9 written objection by the Attorney General to the terms of this Consent Judgment, the Parties may
10 then submit it to the Court for approval.

11 **10. ATTORNEY FEES**

12 **10.1** Except as specifically provided in Section 3.1.3, each Party shall bear its own costs
13 and attorney fees in connection with this action.

14 **11. ENTIRE AGREEMENT**

15 **11.1** This Consent Judgment contains the sole and entire agreement and understanding of
16 the Parties with respect to the entire subject matter hereof and any and all prior discussions,
17 negotiations, commitments and understandings related hereto. No representations, oral or
18 otherwise, express or implied, other than those contained herein have been made by any Party
19 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
20 to exist or to bind any of the Parties.

21 **12. GOVERNING LAW**

22 **12.1** The validity, construction and performance of this Consent Judgment shall be
23 governed by the laws of the State of California, without reference to any conflicts of law provisions
24 of California law.

25 **12.2** The terms of this Consent Judgment shall be governed by the laws of the State of
26 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
27 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
28 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or

1 rendered inapplicable by reason of law generally as to the Covered Products, then any Defendant
2 subject to this Consent Judgment may provide written notice to CPG of any asserted change in the
3 law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to
4 the extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be
5 interpreted to relieve a Defendant from any obligation to comply with any pertinent state or federal
6 law or regulation.

7 **12.3** 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 or
11 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
12 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
13 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
14 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this
15 regard, the Parties hereby waive California Civil Code § 1654.

16 **13. EXECUTION AND COUNTERPARTS**

17 **13.1** This Consent Judgment may be executed in counterparts and by means of facsimile
18 or portable document format (pdf), which taken together shall be deemed to constitute one
19 document and have the same force and effect as original signatures.

20 **14. NOTICES**

21 **14.1** Any notices under this Consent Judgment shall be by personal delivery or First-Class
22 Mail.

23 If to CPG:

24 Jonathan M. Genish
25 Blackstone Law, APC
26 8383 Wilshire Blvd., Suite 745
27 Beverly Hills, CA 90211
28 jgenish@blackstonepc.com

If to A.D. Sutton:
Malcolm C. Weiss
Hunton Andrews Kurth
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
mcweiss@huntonAK.com

15. AUTHORITY TO STIPULATE

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

AGREED TO:

Date:

By:

Consumer Protection Group, LLC

AGREED TO:

Date:

By:

Sept 25, 2019
A.D. Sutton

A. D. Sutton & Sons, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court

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If to A.D. Sutton:

Malcolm C. Weiss
Hunton Andrews Kurth
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
mcweiss@huntonAK.com

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AGREED TO:

AGREED TO:

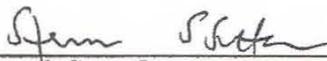
Date: 10-4-2019

Date: Oct 25, 2019

By:


Consumer Protection Group, LLC

By:


A. D. Sutton & Sons, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court