

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY SMITH
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 PRECILA BALABBO,

12 Plaintiff,

13 v.

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

16 Defendants.

Case No.: CGC-22-597740

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: July 24, 2023

Hearing Time: 9:30 AM

Complaint Filed: January 20, 2022

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Precila Balabbo
3 acting on behalf of the public interest (hereinafter “Plaintiff” or “Balabbo”), and A.D. Sutton &
4 Sons, Inc. (“A.D. Sutton” or “Defendant”) with Balabbo and Defendant collectively referred to as
5 the “Parties” and each of them as a “Party.” Balabbo is an individual residing in California who
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing
7 or eliminating hazardous substances contained in consumer products. A.D. Sutton is alleged to be
8 a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code
9 §§ 25249.5 et seq. (“Proposition 65”)

10 **1.2 Allegations.** Balabbo alleges that Defendant has exposed California consumers to
11 di(2-ethylhexyl) phthalate (“DEHP”) from its manufacture, import, distribution and/or sale in
12 California of various totes and backpacks, without providing a clear and reasonable warning
13 pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State
14 of California to cause cancer and birth defects or other reproductive harm.

15 **1.3 Notices of Violation/Complaints.** On or about September 13, 2021, Balabbo served
16 A.D. Sutton, Charming Charlie Brands Co., Charming Charlie, LLC (“Charming Charlie”) and
17 various public enforcement agencies with documents entitled “60-Day Notice of Violation”
18 pursuant to Health & Safety Code §25249.7(d), alleging that A.D. Sutton and Charming Charlie
19 violated Proposition 65 by failing to warn California consumers that the use of Madison & Dakota
20 and various other brand totes manufactured, imported, distributed and/or sold by A.D. Sutton and/or
21 Charming Charlie exposed California consumers to DEHP without a Proposition 65 warning (the
22 “Tote Notice”). Thereafter, on or around June 23, 2022, Balabbo served A.D. Sutton and various
23 public enforcement agencies with a second set of documents entitled “60-Day Notice of Violation”
24 pursuant to Health & Safety Code §25249.7(d), alleging that A.D. Sutton violated Proposition 65
25 by failing to warn California consumers that the use of various brand backpacks manufactured,
26 imported, distributed, sold and/or shipped by A.D. Sutton exposed California consumers to DEHP
27 without a Proposition 65 warning (the “Backpack Notice”). The September 2021 Notice of
28

1 Violation and the June 2022 Notice of Violation are collectively referred to herein as the “Notices.”
2 To the best of the Parties’ knowledge, no public enforcer has brought nor is diligently prosecuting
3 the claims alleged in the Notices. On January 20, 2022, Balabbo filed a complaint based on the
4 allegations set forth in the Tote Notice (the “Complaint”). Concurrent with the court’s approval of
5 this Consent judgment the Complaint shall be deemed amended to incorporate the allegations set
6 forth in the Backpack Notice.

7 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
8 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper
9 in the County of San Francisco, and that this Court has jurisdiction to approve, enter, and oversee
10 the enforcement of this Consent Judgment as a full and final binding resolution in the public interest
11 of all claims which were or could have been raised in the Complaint based on the facts alleged
12 therein and in the Notices.

13 1.5 Defendant enters into this Consent Judgment solely to avoid prolonged and costly
14 litigation. Defendant denies the material factual and legal allegations contained in the Notices and
15 Complaint, and maintains that all products that it has manufactured, imported, sold, shipped and/or
16 distributed in California, including the types of products covered by the Notices and Complaint,
17 have been and are in compliance with all laws, and are completely safe for their intended use.
18 Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,
19 finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment
20 constitute or be construed as an admission by Defendant of any fact, finding, conclusion, issue of
21 law or violation of law, such being specifically denied by Defendant. Notwithstanding the
22 allegations in the Notices and Complaint, Defendant maintains that it has not knowingly
23 manufactured, or caused to be manufactured, any products (including but not limited to the Covered
24 Products defined below) for sale in California in violation of Proposition 65. However, this § 1.5
25 shall not diminish or otherwise affect the Parties’ obligations, responsibilities, and duties under this
26 Consent Judgment.

1 **2. DEFINITIONS**

2 2.1 **Covered Products.** The term “Covered Products” means all name brand and private
3 label totes, backpacks and similar carrying cases manufactured, distributed, imported, shipped,
4 offered for sale, and/or sold in California by A.D. Sutton with accessible components containing
5 DEHP or other listed phthalates, including but not limited to Madison & Dakota brand totes and
6 backpacks.

7 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
8 entered as a Judgment of the Court.

9 **3. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

10 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
11 thereafter, Covered Products that A.D. Sutton manufactures, imports, distributes, sells, or offers for
12 sale in California shall either be: (1) Reformulated Products pursuant to § 3.2, below; or (2) labeled
13 with a clear and reasonable warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent
14 Judgment, a “Reformulated Product” is a Covered Product that is in compliance with the
15 reformulation standard set forth in § 3.2 below. The warning requirements set forth in §§ 3.3 and
16 3.4 shall not apply to any Reformulated Product.

17 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
18 that contain concentrations less than or equal to 0.1% (1,000 parts per million (“ppm”)) each of
19 DEHP, dibutyl phthalate (“DBP”), diisononyl phthalate (“DINP”), diisodecyl phthalate (“DIDP”),
20 di-n-hexyl phthalate (“DnHP”), and butyl benzyl phthalate (“BBP”), in any accessible components
21 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
22 and 8270C, or other methodologies utilized by federal or state government agencies for the purpose
23 of determining the phthalate content in a solid substance.

24 3.3 **Clear and Reasonable Warnings.** As of the Effective Date, and continuing
25 thereafter, a clear and reasonable warning as set forth in this §§ 3.3 and 3.4 must be provided for
26 all Covered Products that Defendant manufactures, imports, distributes, sells, or offers for sale in
27 California that are not Reformulated Products. There shall be no obligation for Defendant to
28

1 provide a warning for any Covered Products that are not Reformulated Products that are
2 manufactured or otherwise enter the stream of commerce prior to the Effective Date. Where
3 required, the warning shall consist of either the **Warning** or **Alternative Warning** described in §§
4 3.3(a) or (b), respectively:

5 (a) **Warning.** The “**Warning**” shall consist of one of the following statements:

6  [California Prop. 65] **WARNING:** This product can expose you to chemicals
7 including di(2-ethylhexyl) phthalate (DEHP), which are known to the State of
8 California to cause cancer and birth defects or other reproductive harm. For more
information go to www.P65Warnings.ca.gov.

9 (b) **Alternative Warning:** A.D. Sutton may, but is not required to, use the alternative
10 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

11  [California Prop. 65] **WARNING:** Cancer and Reproductive Harm -
12 www.P65Warnings.ca.gov.

13 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
14 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
15 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
16 triangle with a black outline, except that if the sign or label for the Covered Product does not use
17 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
18 than the height of the word “**WARNING:**”. Language in brackets above is optional. The warning
19 shall be affixed to or printed on the Covered Product’s packaging, its container, hand tag,
20 instruction booklet, or labeling, or on a placard, shelf tag, sign or electronic device or automatic
21 process, displayed with such conspicuousness, as compared with other words, statements, or
22 designs, as to render it likely to be read and understood by an ordinary individual under customary
23 conditions of purchase or use. A warning may be contained in the same section of the packaging or
24 labeling that states other safety warnings, if any, concerning the use of the Covered Product, and
25 shall be at least the same size as those other safety warnings.

26 If A.D. Sutton controls the content for the web page listing of a Covered Product, in addition
27 to affixing the **Warning** or **Alternative Warning** to the packaging or labeling, A.D. Sutton shall
28 post the **Warning** or **Alternative Warning** on A.D. Sutton controlled websites offering Covered

1 Products for sale in California. The requirements of this Section shall be satisfied if the **Warning**
2 or **Alternative Warning**, or a clearly marked hyperlink using the word “WARNING,” appears on
3 the Covered Product display page, or by otherwise prominently displaying the warning to the
4 purchaser prior to completing the purchase. If A.D. Sutton does not control the content for a web
5 page listing of a Covered Product and A.D. Sutton has knowledge the Covered Product is being
6 offered for sale in California by a third party internet retailer, consistent with Title 27, California
7 Code of Regulations, Section 25600.2, A.D. Sutton shall request the third-party internet seller to
8 provide the **Warning** or **Alternative Warning** on the Covered Product display page, or by otherwise
9 prominently displaying the warning to the purchaser prior to completing the purchase.

10 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment for Covered Products that are not Reformulated Products
12 by either adhering to §§ 3.3 and 3.4 of this Consent Judgment, or by complying with any warning
13 requirements adopted by the State of California’s Office of Environmental Health Hazard
14 Assessment (“OEHHA”) applicable to the Covered Products and exposures at issue after the
15 Effective Date.

16 4. **MONETARY TERMS**

17 4.1 **Civil Penalty.** In complete resolution of any claim for monetary relief of any kind
18 related to the Notices, the Action, and this Consent Judgment (except Plaintiff’s attorney’s fees as
19 set forth in § 4.2 below), A.D. Sutton shall pay a total of \$3,000.00 as a Civil Penalty pursuant to
20 Health and Safety Code section 25249.7(b), with 75% of the Civil Penalty remitted to OEHHA and
21 the remaining 25% of the Civil Penalty remitted to Balabbo, as provided by California Health &
22 Safety Code § 25249.12.

23 4.1.1 Within ten (10) days of the Effective Date, A.D. Sutton shall send two
24 separate checks for the Civil Penalty payment to: (a) “OEHHA” in the amount of \$2,250; and (b)
25 “Brodsky & Smith, LLC in Trust for Balabbo” in the amount of \$750. Payment owed to Balabbo
26 pursuant to this Section shall be delivered to the following payment address:

27 Evan J. Smith, Esquire
28 Brodsky & Smith, LLC

Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

A copy of the check payable to OEHHA shall be mailed or emailed to Brodsky & Smith, LLC at the address set forth above as proof of payment to OEHHA.

4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, A.D. Sutton shall send a check for a total of \$32,000 made payable to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement and resolution of any claim for Balabbo's attorneys' fees and costs and/or other expenses of any kind incurred in connection with the Notices, the Complaint, and this Consent Judgment, as a result of activities including but not limited to investigating, testing, consulting with experts, bringing this matter to A.D. Sutton's attention, litigating, negotiating, and obtaining judicial approval of this Consent Judgment in the public interest pursuant to Code of Civil Procedure § 1021.5, and any other statute or common law of similar effect.

5. PUBLIC AND PRIVATE RELEASES OF ALL CLAIMS

5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo acting on her own behalf, and on behalf of the public interest, and A.D. Sutton, and its parents, shareholders, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they

1 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
2 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees,
3 retailers (including but not limited to Charming Charlie and Macy's West Stores, Inc., and each of
4 their affiliates), franchisees, and cooperative members, and each of their parents, shareholders,
5 members, directors, officers, managers, employees, representatives, agents, attorneys, divisions,
6 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
7 successors and assigns (collectively "Releasees"), of all claims for actual or alleged violations of
8 Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notices and
9 the Complaint, with respect to any Covered Products manufactured, imported, distributed, shipped,
10 offered for sale, or sold by A.D. Sutton prior to the Effective Date. It is the Parties' intent that this
11 Consent Judgment shall have preclusive effect such that no other person or entity, whether
12 purporting to act in his, her, or its interests, or in the public interest, shall be permitted to pursue
13 and/or take any action with respect to any violation of Proposition 65 based on exposure to DEHP
14 that was alleged in the Notices and/or the Complaint, or that could have been brought pursuant to
15 the Notices and/or Complaint against A.D. Sutton, the Defendant Releasees, and/or the Releasees
16 for Covered Products manufactured, imported, distributed, shipped, offered for sale, or sold through
17 the Effective Date of this Consent Judgment ("Proposition 65 Claims"). A.D. Sutton's compliance
18 with the terms of this Consent Judgment constitutes compliance by A.D. Sutton with Proposition
19 65 regarding actual or alleged exposure to DEHP in the Covered Products.

20 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
21 agents, representatives, attorneys, and successors and/or assignees, and not in her representative
22 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
23 legal action and releases A.D. Sutton, Defendant Releasees, and Releasees, from any and all manner
24 of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
25 promises, liabilities, damages, penalties, charges, losses, costs, expenses, and attorneys' fees, of
26 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
27 future, with respect to any actual or alleged violations of Proposition 65 related to or arising from
28

1 Covered Products manufactured, imported, distributed, shipped, offered for sale, or sold by A.D.
2 Sutton, Defendant Releasees or Releasees. With respect to the foregoing waivers and releases in
3 this paragraph, Balabbo hereby specifically waives any and all rights and benefits she now has, or
4 in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code,
5 which provides as follows:

6 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
7 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
8 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
9 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
DEBTOR OR RELEASED PARTY.

10 Balabbo, on behalf of herself, her past and current agents, representatives, attorneys, and
11 successors and/or assignees, expressly waives and relinquishes any and all rights and benefits that
12 she or they may have under, or that may be conferred upon them by, the provisions of California
13 Civil Code § 1542 as well as under any other state or federal statute or common law principle of
14 similar effect, to the fullest extent they may lawfully waive such rights or benefits pertaining to
15 the released matters.

16 5.3 A.D. Sutton waives any and all claims against Balabbo, her attorneys and other
17 representatives, for any and all actions taken or statements made (or those that could have been
18 taken or made) by Balabbo and her attorneys and other representatives, whether in the course of
19 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
20 and/or with respect to Covered Products.

21 5.4 Compliance with the injunctive relief provisions of § 3 of this Consent Judgment
22 constitutes compliance with Proposition 65 with respect to actual or alleged exposure to DEHP,
23 DINP, DBP, BBP, DINP and/or DnHP from use of Covered Products.

24 **6. INTEGRATION**

25 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
26 any and all prior negotiations and understandings related hereto shall be deemed to have been
27

merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

7. GOVERNING LAW

7.1 The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. If Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, Covered Products are so affected.

8. NOTICES

8.1 Unless specified herein, all correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (1) first-class, registered or certified mail, return receipt requested; or (2) overnight courier on any Party by the other Party at the following addresses:

For Defendant:

For A.D. Sutton:

Steven Sutton, Chief Executive Officer
A.D. Sutton & Sons, Inc.
20 West 33rd Street, Suite 1100
New York, NY 10001

With Copy to:

J. Robert Maxwell, Esq.
ROGERS JOSEPH O'DONNELL
A Professional Law Corporation
311 California Street, 10th Fl.
San Francisco, CA 94104

And

For Balabbo:

Evan Smith
Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

Any Party, from time to time, may specify in writing to the other Party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile or pdf,
4 each of which shall be deemed an original, and all of which, when taken together, shall constitute
5 one and the same document.

6 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
7 **APPROVAL**

8 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
9 Safety Code § 25249.7(f) and to promptly prepare and file a Motion for Approval of this Consent
10 Judgment. Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
13 Parties agree to meet and confer in good faith on how to proceed and if such agreement is not
14 reached within 30 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer in good faith as to whether to modify the terms of
17 this Consent Judgment. If the Parties do not jointly agree on a course of action to take, the case
18 shall proceed on its normal course on the trial court's calendar.

19 **11. SEVERABILITY**

20 11.1 If, subsequent to the Court's approval and entry of this Consent Judgment as a
21 judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the
22 validity of the remaining provisions shall not be adversely affected.

23 **12. JOINT PREPARATION**

24 12.1 The Parties have jointly participated in the preparation of this Consent Judgment
25 and this Consent Judgment is the result of the joint efforts of the Parties. Accordingly, any
26 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
27 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
28

1 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
2 be resolved against the drafting Party shall not be employed in the interpretation of this Consent
3 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

4 **13 MODIFICATION**

5 13.1 This Consent Judgment may be modified only by further stipulation of the Parties
6 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

7 **14 ENFORCEMENT**

8 14.1 The only persons who may enforce this Consent Judgment are the Parties hereto.
9 No Party shall bring a motion to enforce the terms of this Consent Judgment without first providing
10 notice to the other party and meeting and conferring in good faith about the alleged violation for a
11 period of at least thirty (30) days. A Party who unsuccessfully brings or contests an action arising
12 out of this Consent Judgment shall be required to pay the prevailing Party's reasonable attorney's
13 fees and costs. Nothing in this § 14.1 shall preclude a Party from seeking an award of sanctions
14 pursuant to law.

15 **15 RETENTION OF JURISDICTION**

16 15.1 This Court shall retain jurisdiction of this matter to implement or modify the
17 Consent Judgment.

18 **16 AUTHORIZATION**

19 16.1 The undersigned warrant that they are authorized to execute this Consent Judgment
20 on behalf of their respective Parties and have read, understood, and agree to all of the terms and
21 conditions of this Consent Judgment, and certify that each is fully authorized by the Party he or she
22 represents to execute the Consent Judgment on behalf of the Party represented and legally bind that
23 Party. Except as explicitly provided herein each Party is to bear its own attorney's fees and costs.

24
25 [REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

AGREED TO:

Date: 6/5/23

Date: 2/20/23

By: *Precila Balabbo*
PRECILA BALABBO

By: *Steven S. Sutton*
A.D. SUTTON & SONS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court