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KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

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JOHN MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

E&B GIFTWARE LLC; and DOES 1-150,
inclusive,

Defendants.

Case No. C101005560

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Cal. Health & Safety Code § 25249.6 et seq.)

VIA FAX

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff JOHN MOORE in
3 the public interest of the citizens of the State of California, to enforce the People's right to be
4 informed of the presence of di(2-ethylhexyl)phthalate, a toxic chemical found in training and
5 sauna fitness suits sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to
7 warn California citizens about their exposure to di(2-ethylhexyl)phthalate, present in or on
8 certain training and sauna fitness suits that defendants manufacture, distribute, and/or offer for
9 sale to consumers throughout the State of California.

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in and on training
11 and sauna fitness suits that defendants manufacture, distribute, and/or offer for sale to consumers
12 throughout the State of California.

13 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code § 25249.6 *et seq.* ("Proposition 65"), "No person in the course
15 of doing business shall knowingly and intentionally expose any individual to a chemical known
16 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual. . . ." (*Cal. Health & Safety Code* § 25249.6.)

18 5. On October 24, 2003, California identified and listed di(2-ethylhexyl)phthalate as
19 a chemical known to cause birth defects and other reproductive harm. Di(2-ethylhexyl)phthalate
20 became subject to the warning requirement one year later and was therefore subject to the "clear
21 and reasonable warning" requirements of Proposition 65, beginning on October 24, 2004. (27
22 *CCR* § 27001(c); *Cal. Health & Safety Code* § 25249.8.)

23 6. Di(2-ethylhexyl)phthalate shall hereinafter be referred to as the "LISTED
24 CHEMICAL."

25 7. Defendants manufacture, distribute, and/or sell training and sauna fitness suits
26 containing excessive levels of the LISTED CHEMICAL including, but not limited to, the
27 *BodyFit Sauna Suit, Style# BF3612BK, SKU 25569018 (#6 54602 93612 2)*. All such training
28

1 and sauna fitness suits containing the LISTED CHEMICAL shall hereinafter be referred to as the
2 "PRODUCTS."

3 8. Defendants' failure to warn consumers and/or other individuals in the State of
4 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale
5 of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of
6 such conduct as well as civil penalties for each such violation.

7 9. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
8 and permanent injunctive relief to compel defendants to provide purchasers or users of the
9 PRODUCTS with the required warning regarding the health hazards of the LISTED
10 CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

11 10. Plaintiff also seeks civil penalties against defendants for its violations of
12 Proposition 65, as provided for by California Health & Safety Code § 25249.7(b).

13 **PARTIES**

14 11. Plaintiff JOHN MOORE, is a citizen of the State of California who is dedicated to
15 protecting the health of California citizens through the elimination or reduction of toxic
16 exposures from consumer products, and brings this action in the public interest pursuant to
17 California Health & Safety Code § 25249.7.

18 12. Defendant E&B GIFTWARE LLC ("E&B GIFTWARE") is a person doing
19 business within the meaning of California Health & Safety Code § 25249.11.

20 13. Defendant E&B GIFTWARE manufactures, distributes, and/or offers the
21 PRODUCTS for sale or use in the State of California or implies by its conduct that it
22 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

23 14. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each
24 persons doing business within the meaning of California Health & Safety Code § 25249.11.

25 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,
26 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
27 engage in the process of research, testing, designing, assembling, fabricating and/or
28 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

16. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code § 25249.11.

17. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in the State of California.

18. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code § 25249.11.

19. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the State of California.

20. At this time, the true names of Defendants DOES 1-150, inclusive, are unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences herein alleged. When ascertained, their true names shall be reflected in an amended complaint.

21. E&B GIFTWARE, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as “DEFENDANTS.”

VENUE AND JURISDICTION

22. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil Procedure §§ 394, 395, 395.5, because this Court is a court of competent jurisdiction, because one or more instances of wrongful conduct occurred, and continues to occur, in the County of Marin and/or because DEFENDANTS conducted, and continue to conduct, business in this County with respect to the PRODUCTS.

23. The California Superior Court has jurisdiction over this action pursuant to California Constitution Article VI, § 10, which grants the Superior Court “original jurisdiction in all causes except those given by statute to other trial courts.” The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.

24. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that either are citizens of the State of California, have sufficient minimum contacts in the State of California, or otherwise purposefully avail themselves of the California market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

FIRST CAUSE OF ACTION

(Violation of Proposition 65 - Against All Defendants)

25. Plaintiff realleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 24, inclusive.

26. The citizens of the State of California have expressly stated in the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.5, *et seq.* (Proposition 65) that they must be informed “about exposures to chemicals that cause cancer, birth defects and other reproductive harm.” (*Cal. Health & Safety Code* § 25249.6.)

27. On or about June 17, 2010, a sixty-day notice of violation, together with the requisite certificate of merit, was provided to E&B GIFTWARE and various public enforcement agencies stating that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in the State of California were being exposed to di(2-ethylhexyl)phthalate resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first having been provided with a "clear and reasonable warning" regarding such toxic exposures.

28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 has continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and believes that such violations will continue to occur into the future.

1 29. After receipt of the claims asserted in the sixty-day notice of violation, the
2 appropriate public enforcement agencies have failed to commence and diligently prosecute a
3 cause of action against DEFENDANTS under Proposition 65.

4 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
5 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
6 limits.

7 31. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
8 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
9 LISTED CHEMICAL.

10 32. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
11 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
12 during the reasonably foreseeable use of the PRODUCTS.

13 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
14 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
15 by 27 CCR § 25602(b).

16 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
17 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
18 and/or ingestion.

19 35. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
20 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
21 accidental participation in the manufacture, distribution, and/or offer for sale or use of
22 PRODUCTS to individuals in the State of California.

23 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those
24 consumers and/or other individuals in the State of California who were or who could become
25 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
26 reasonably foreseeable use of the PRODUCTS.

27 37. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
28 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal

1 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold
2 by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to
3 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

4 38. As a consequence of the above-described acts, DEFENDANTS are liable for a
5 maximum civil penalty of \$2,500 per day for each violation pursuant to California Health &
6 Safety Code § 25249.7(b).

7 39. As a consequence of the above-described acts, California Health & Safety Code
8 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
9 DEFENDANTS.

10 **PRAYER FOR RELIEF**

11 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

12 1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess
13 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation
14 alleged herein;

15 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
16 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
17 offering the PRODUCTS for sale or use in California, without providing "clear and reasonable
18 warnings" as defined by 27 CCR § 25601, as to the harms associated with exposures to each of
19 the LISTED CHEMICAL;

20 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

21 4. That the Court grant such other and further relief as may be just and proper.

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Dated: October 8, 2010

Respectfully Submitted,
THE CHANLER GROUP

By: 
Christopher M. Martin
Attorneys for Plaintiff
JOHN MOORE