

BY FAX

1 Clifford A. Chanler, State Bar No. 135534  
2 Christopher M. Martin, State Bar No. 186021  
3 Josh Voorhees, State Bar No. 241436  
4 THE CHANLER GROUP  
5 2560 Ninth Street  
6 Parker Plaza, Suite 214  
7 Berkeley, CA 94710  
8 Telephone: (510) 848-8880  
9 Facsimile: (510) 848-8118

10 Attorneys for Plaintiff  
11 JOHN MOORE

FILED

SEP - 7 2011

KIM TURNER  
Court Executive Officer  
MARIN COUNTY SUPERIOR COURT  
By: C. Lucchesi, Deputy

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF MARIN

14 UNLIMITED CIVIL JURISDICTION

15 JOHN MOORE,

16 Plaintiff,

17 v.

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

20 Defendants.

Case No. CIV 1005560

**FIRST AMENDED COMPLAINT FOR  
CIVIL PENALTIES AND INJUNCTIVE  
RELIEF**

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

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 ("DEHP"), a toxic chemical found in  
5 training and sauna fitness suits sold in California and of the presence of lead in the handle grips  
6 of exercise equipment sold in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to  
8 warn California citizens about their exposure to DEHP, present in or on certain training and  
9 sauna fitness suits that defendant manufactures, distributes, and/or offers for sale to consumers  
10 throughout the State of California, and about their exposure to lead, present in or on the handle  
11 grips of certain exercise equipment that defendant manufactures, distributes, and/or offers for  
12 sale to consumers throughout the State of California.

13 3. High levels of DEHP are commonly found in and on training and sauna fitness  
14 suits that defendant manufactures, distributes, and/or offers for sale to consumers throughout the  
15 State of California.

16 4. High levels of lead are commonly found in and on the handle grips of exercise  
17 equipment that defendant manufactures, distributes, and/or offers for sale to consumers  
18 throughout the State of California.

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

24 6. On February 27, 1987, California identified and listed lead as a chemical known  
25 to cause birth defects and other reproductive harm. Lead became subject to the warning  
26 requirement one year later and was therefore subject to the "clear and reasonable warning"  
27 requirements of Proposition 65, beginning on February 27, 1988. (27 CCR § 27001(c); *Cal.*  
28 *Health & Safety Code* §§ 25249.8 & 25249.10(b).)

7. On October 24, 2003, California identified and listed di(2-ethylhexyl)phthalate as a chemical known to cause birth defects and other reproductive harm. Di(2-ethylhexyl)phthalate became subject to the warning requirement one year later and was therefore subject to the “clear and reasonable warning” requirements of Proposition 65, beginning on October 24, 2004. (27 CCR § 27001(c); *Cal. Health & Safety Code* §§ 25249.8 & 25249.10(b).)

8. Lead and DEHP shall hereinafter be referred to as the “LISTED CHEMICALS.”

9. Defendant manufactures, distributes, and/or sells training and sauna fitness suits containing DEHP including, but not limited to, the *BodyFit Sauna Suit, Style# BF3612BK, SKU 25569018 (#6 54602 93612 2)*.

10. Defendant manufactures, distributes, and/or sells exercise equipment with handle grips containing lead including, but not limited to, *Everlast Duo Wheel, EX2413SL17EVN* (654602 22413 7).

11. All such training and sauna fitness suits and exercise equipment with handle grips containing the LISTED CHEMICALS identified in paragraphs 9 and 10 above shall hereinafter be collectively referred to as the “PRODUCTS.”

12. Defendant's failure to warn consumers and/or other individuals in the State of California about their exposure to the LISTED CHEMICALS in conjunction with defendant's sale of the PRODUCTS is a violation of Proposition 65 and subjects defendant to enjoinder of such conduct as well as civil penalties for each such violation.

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

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

**PARTIES**

15. Plaintiff JOHN MOORE, is a citizen of the State of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic

1 exposures from consumer products, and brings this action in the public interest pursuant to  
2 California Health & Safety Code § 25249.7.

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

5 17. Defendant E&B GIFTWARE manufactures, distributes, and/or offers the  
6 PRODUCTS for sale or use in the State of California or implies by its conduct that it  
7 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

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

10 19. MANUFACTURER DEFENDANTS engage in the process of research, testing,  
11 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they  
12 engage in the process of research, testing, designing, assembling, fabricating and/or  
13 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

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

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

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

21 23. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the  
22 State of California.

23 24. At this time, the true names of Defendants DOES 1-150, inclusive, are unknown  
24 to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code of Civil  
25 Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that each of the  
26 fictitiously named defendants is responsible for the acts and occurrences herein alleged. When  
27 ascertained, their true names shall be reflected in an amended complaint.  
28

1           25.     E&B GIFTWARE, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
2 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be  
3 referred to hereinafter as "DEFENDANTS."

4                               **VENUE AND JURISDICTION**

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

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

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

20                               **FIRST CAUSE OF ACTION**

21                               **(Violation of Proposition 65 - Against All Defendants)**

22          29.     Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
23 Paragraphs 1 through 28, inclusive.

24          30.     The citizens of the State of California have expressly stated in Proposition 65 that  
25 they must be informed "about exposures to chemicals that cause cancer, birth defects and other  
26 reproductive harm." (*Cal. Health & Safety Code § 25249.6.*)

27          31.     Proposition 65 states, "No person in the course of doing business shall knowingly  
28 and intentionally expose any individual to a chemical known to the state to cause cancer or

1 reproductive toxicity without first giving clear and reasonable warning to such individual....”

2 (*Id.*)

3         32.     On or about June 17, 2010, a sixty-day notice of violation, together with the  
4 requisite certificate of merit, was provided to E&B GIFTWARE and various public enforcement  
5 agencies stating that as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and  
6 users in the State of California were being exposed to DEHP resulting from the reasonably  
7 foreseeable uses of training and sauna fitness suits, without the individual purchasers and users  
8 first having been provided with a “clear and reasonable warning” regarding such toxic exposures.

9         33.     On or about May 11, 2011, a supplemental sixty-day notice of violation, together  
10 with the requisite certificate of merit, was provided to E&B GIFTWARE and various public  
11 enforcement agencies stating that as a result of the DEFENDANTS’ sales of the PRODUCTS,  
12 purchasers and users in the State of California were being exposed to DEHP resulting from the  
13 reasonably foreseeable uses of training and sauna fitness suits and lead resulting from the  
14 reasonably foreseeable uses of exercise equipment with handle grips, without the individual  
15 purchasers and users first having been provided with a “clear and reasonable warning” regarding  
16 such toxic exposures.

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

23         35.     After receipt of the claims asserted in each of the sixty-day notices of violation,  
24 the appropriate public enforcement agencies have failed to commence and diligently prosecute a  
25 cause of action against DEFENDANTS under Proposition 65.

26         36.     The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
27 California by DEFENDANTS contained the LISTED CHEMICALS above the allowable state  
28 limits.

1           37.     DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
2 distributed, and/or offered for sale or use by DEFENDANTS in California contained the  
3 LISTED CHEMICALS.

4           38.     The LISTED CHEMICALS were present in or on the PRODUCTS in such a way  
5 as to expose individuals to the LISTED CHEMICALS through dermal contact and/or ingestion  
6 during the reasonably foreseeable use of the PRODUCTS.

7           39.     The normal and reasonably foreseeable use of the PRODUCTS has caused and  
8 continues to cause consumer exposures to the LISTED CHEMICALS, as such exposure is  
9 defined by 27 CCR § 25602(b).

10          40.     DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
11 the PRODUCTS would expose individuals to the LISTED CHEMICALS through dermal contact  
12 and/or ingestion.

13          41.     DEFENDANTS intended that such exposures to the LISTED CHEMICALS from  
14 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-  
15 accidental participation in the manufacture, distribution, and/or offer for sale or use of  
16 PRODUCTS to individuals in the State of California.

17          42.     DEFENDANTS failed to provide a "clear and reasonable warning" to those  
18 consumers and/or other individuals in the State of California who were or who could become  
19 exposed to the LISTED CHEMICALS through dermal contact and/or ingestion during the  
20 reasonably foreseeable use of the PRODUCTS.

21          43.     Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
22 directly by California voters, individuals exposed to the LISTED CHEMICALS through dermal  
23 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold  
24 by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to  
25 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

1           45.     As a consequence of the above-described acts, California Health & Safety Code  
2 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
3 DEFENDANTS.

4                                   **PRAYER FOR RELIEF**

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

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

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

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

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

16                                   Respectfully Submitted,

17 Dated: September 6, 2011

THE CHANLER GROUP

18  
19 By: 

Christopher M. Martin  
Attorneys for Plaintiff  
JOHN MOORE