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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF MARIN

13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17 DO IT BEST CORP.; and DOES 1-150,
18 inclusive,

19 Defendants.

Case No. CIV 1005992

**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 vinyl floor tiles sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to
7 warn California citizens and others about their exposure to DEHP present in or on certain vinyl
8 floor tiles that defendants manufacture, distribute, and/or offer for sale to consumers throughout
9 the State of California.

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

15 4. On October 23, 2003, California identified and listed DEHP as a chemical known
16 to cause birth defects and other reproductive harm. DEHP became subject to the warning
17 requirement one year later and was therefore subject to the “clear and reasonable warning”
18 requirements of Proposition 65, beginning on October 23, 2004. (*27 CCR § 27001 (c); Cal.*
19 *Health & Safety Code § 25249.8.*)

20 5. Defendants manufacture, import, distribute, and/or sell vinyl floor tiles containing
21 DEHP including, but not limited to, the *Vinyl Floor Tile, Blue Tradition Tile, SKU # 287326 (#0*
22 *09326 26167 6)*. All such vinyl floor tiles containing DEHP shall hereinafter be referred to as
23 the “PRODUCTS.”

24 6. Defendants’ failures to warn consumers and/or other individuals in the State of
25 California about their exposure to DEHP in conjunction with defendants’ sale of the
26 PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such
27 conduct as well as civil penalties for each such violation.
28

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

5 8. Plaintiff also seeks civil penalties against defendants for their violations of
6 Proposition 65, as provided for by California Health & Safety Code § 25249.7(b).

7 **PARTIES**

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

12 10. Defendant DO IT BEST CORP. ("DO IT BEST") is a person doing business
13 within the meaning of California Health & Safety Code § 25249.11.

14 11. Defendant DO IT BEST manufactures, imports, distributes, and/or offers the
15 PRODUCTS for sale or use in the State of California or implies by its conduct that it
16 manufactures, imports, distributes, and/or offers the PRODUCTS for sale or use in the State of
17 California.

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

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

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

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

1 16. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons
2 doing business within the meaning of California Health & Safety Code § 25249.11.

3 17. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
4 State of California.

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

10 19. DO IT BEST, MANUFACTURER DEFENDANTS, DISTRIBUTOR
11 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
12 referred to hereinafter as “DEFENDANTS.”

13 **VENUE AND JURISDICTION**

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

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

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

1 **FIRST CAUSE OF ACTION**

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

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

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

8 25. Proposition 65 states, “No person in the course of doing business shall knowingly
9 and intentionally expose any individual to a chemical known to the state to cause cancer or
10 reproductive toxicity without first giving clear and reasonable warning to such individual....”
11 (*Id.*)

12 26. On September 1, 2010, a sixty-day notice of violation, together with the requisite
13 Certificate of Merit, was provided to DO IT BEST and various public enforcement agencies
14 stating that as a result of the DO IT BEST’S sales of the PRODUCTS, purchasers and users in
15 the State of California were being exposed to DEHP resulting from the reasonably foreseeable
16 uses of the PRODUCTS, without the individual purchasers and users first having been provided
17 with a “clear and reasonable warning” regarding such toxic exposures.

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

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

27 29. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or
28 use in California by DEFENDANTS contained DEHP above the allowable state limits.

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

4 31. DEHP was present in or on the PRODUCTS in such a way as to expose
5 individuals to DEHP through dermal contact, ingestion and/or inhalation, during the reasonably
6 foreseeable use of the PRODUCTS.

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

10 33. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
11 the PRODUCTS would expose individuals to DEHP through dermal contact, ingestion and/or
12 inhalation.

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

17 35. 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 DEHP through dermal contact, ingestion and/or inhalation during the reasonably
20 foreseeable use of the PRODUCTS.

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

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28

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

4 38. As a consequence of the above-described acts, California Health & Safety Code
5 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
6 DEFENDANTS.

7 39. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
8 hereinafter.

9 **PRAYER FOR RELIEF**

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

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

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

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

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

20
21 Respectfully Submitted,

22 Dated: November 2, 2010

THE CHANLER GROUP

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24 By: 

25 Clifford A. Chanler
Attorneys for Plaintiff
26 JOHN MOORE
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