

1 Clifford A. Chanler, State Bar No. 135534  
2 Josh Voorhees, State Bar No. 241436  
3 THE CHANLER GROUP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
10 JOHN MOORE

**FILED**

**MAR 25 2011**

**KIM TURNER**  
Court Executive Officer  
**MARIN COUNTY SUPERIOR COURT**  
By: J. Chen, Deputy

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 CAPELLI OF NEW YORK INC.; GMA )  
18 ACCESSORIES INC.; and )  
19 DOES 1-150, inclusive, )

20 Defendants. )

21 Case No. CIV 1101575

22 **COMPLAINT FOR CIVIL PENALTIES**  
23 **AND INJUNCTIVE RELIEF**

24 *(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-n-butyl phthalate (“DBP”), a toxic chemical found in footwear  
5 sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to  
7 warn California citizens about their exposure to DBP, present in, or on, footwear that defendants  
8 manufacture, import, distribute, and/or offer for sale to consumers throughout the State of  
9 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 December 2, 2005, California identified and listed DBP as a chemical known  
16 to cause birth defects and other reproductive harm. DBP 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 December 2, 2006. (*27 CCR § 25601; Cal. Health*  
19 *& Safety Code § 25249.8.*)

20 5. Defendants manufacture, import, distribute, and/or sell footwear containing DBP  
21 including, but not limited to, *Canyon River Blues Flip Flops, Bronze, #S1026G-HT (#7 41985*  
22 *25349 3).*

23 6. All such footwear containing DBP shall hereinafter be collectively referred to as  
24 the “PRODUCT[S].”

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

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

5 9. 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 10. 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 and commercial products, and brings this action in the public interest  
11 pursuant to California Health & Safety Code § 25249.7.

12 11. CAPELLI OF NEW YORK INC. ("CAPELLI") is a person doing business within  
13 the meaning of California Health & Safety Code § 25249.11.

14 12. CAPELLI manufactures, imports, distributes, and/or offers the PRODUCTS for  
15 sale or use in the State of California or implies by its conduct that it manufactures, imports,  
16 distributes, and/or offers the PRODUCTS for sale or use in the State of California.

17 13. GMA ACCESSORIES INC. ("GMA") is a person doing business within the  
18 meaning of California Health & Safety Code § 25249.11.

19 14. GMA manufactures, imports, distributes, and/or offers the PRODUCTS for sale or  
20 use in the State of California or implies by its conduct that it manufactures, imports, distributes,  
21 and/or offers the PRODUCTS for sale or use in the State of California.

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

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

1 17. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons  
2 doing business within the meaning of California Health & Safety Code § 25249.11.

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

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

8 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the  
9 State of California and, in some circumstances, may also be manufacturers and/or distributors.

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

15 22. CAPELLI, GMA, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
16 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be  
17 referred to hereinafter as “DEFENDANTS.” “

18 **VENUE AND JURISDICTION**

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

24 24. The California Superior Court has jurisdiction over this action pursuant to  
25 California Constitution Article VI, § 10, which grants the Superior Court “original jurisdiction in  
26 all causes except those given by statute to other trial courts.” The statute under which this action  
27 is brought does not specify any other basis of subject matter jurisdiction.  
28

1 25. The California Superior Court has jurisdiction over DEFENDANTS based on  
2 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or  
3 association that also is a citizen of the State of California, has sufficient minimum contacts in the  
4 State of California, and/or otherwise purposefully avails itself of the California market.  
5 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California  
6 courts consistent with traditional notions of fair play and substantial justice.

7 **FIRST CAUSE OF ACTION** “

8 **“(Violation of Proposition 65 - Against All Defendants)**

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

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

14 28. Proposition 65 states, “[n]o person in the course of doing business shall knowingly  
15 and intentionally expose any individual to a chemical known to the state to cause cancer or  
16 reproductive toxicity without first giving clear and reasonable warning to such individual....”  
17 (*Id.*) “

18 29. On or about October 15, 2010, a 60-Day Notice of Violation, together with the  
19 requisite Certificate of Merit (“Notice”), was provided to Defendants and various public  
20 enforcement agencies stating that as a result of Defendants’ sale, manufacture and/or distribution  
21 of the PRODUCTS, purchasers and users in the State of California were being exposed to DBP  
22 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual  
23 purchasers and users first having been provided with a “clear and reasonable warning” regarding  
24 such toxic exposures.

25 30. DEFENDANTS have engaged in the manufacture, importation, distribution, and/or  
26 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code  
27 § 25249.6, and DEFENDANTS’ manufacture, importation, distribution, and/or offering of the  
28 PRODUCTS for sale or use, in violation of California Health & Safety Code § 25249.6, has

1 continued beyond DEFENDANTS' receipt of the Notice. Plaintiff further alleges and believes  
2 that such violations will continue to occur into the future.

3 31. After receipt of the claims asserted in the Notice, the appropriate public  
4 enforcement agencies have failed to commence and diligently prosecute a cause of action against  
5 DEFENDANTS under Proposition 65.

6 32. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or  
7 use in California by DEFENDANTS contained DBP in an amount above the allowable state  
8 limits.

9 33. DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
10 imported, distributed, and/or offered for sale or use by DEFENDANTS in California contained  
11 DBP in an amount above allowable state limits.

12 34. DBP was present in or on the PRODUCTS in such a way as to expose individuals  
13 to DBP through dermal contact and/or ingestion during the reasonably foreseeable use of the  
14 PRODUCTS.

15 35. The normal and reasonably foreseeable use of the PRODUCTS has caused, and  
16 continues to cause, consumer and workplace exposures to DBP, as such exposure is defined by  
17 27 California Code of Regulations ("CCR") § 25602(b).

18 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
19 the PRODUCTS would expose individuals to DBP through dermal contact and/or ingestion.

20 37. DEFENDANTS intended that such exposures to DBP from the reasonably  
21 foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation  
22 in the manufacture, importation, distribution and/or offering of the PRODUCTS for sale or use to  
23 individuals in the State of California.

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

28

1 39. Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
2 directly by California voters, individuals exposed to DBP through dermal contact and/or  
3 ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by  
4 DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to suffer,  
5 irreparable harm for which they have no plain, speedy or adequate remedy at law.

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

9 41. As a consequence of the above-described acts, California Health & Safety Code  
10 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
11 DEFENDANTS.

### 12 **PRAYER FOR RELIEF**

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

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

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

22  
23  
24  
25  
26  
27  
28

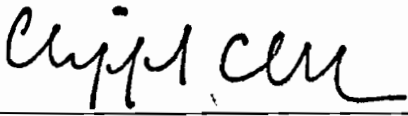
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: March 23, 2011

Respectfully Submitted,

THE CHANLER GROUP

By:   
Clifford A Chanler  
Attorneys for Plaintiff  
JOHN MOORE