

FILED

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KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

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

12 JOHN MOORE,

13 Plaintiff,

14 v.

15 ORCHARD SUPPLY HARDWARE
16 STORES CORPORATION; and DOES 1-
17 150, inclusive,

Defendants.

) Case No. CIV 1100911

) **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 vinyl
5 flooring sold in California.

6 2. By this Complaint, plaintiff seeks to remedy Defendant's continuing failure to
7 warn California citizens about their exposure to DEHP, present in or on certain vinyl flooring
8 that Defendant manufactures, imports, distributes, sells and/or offers for sale to consumers
9 throughout 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. Defendant ORCHARD SUPPLY HARDWARE STORES CORPORATION
21 ("ORCHARD") manufactures, imports, distributes, and/or sells vinyl flooring containing DEHP
22 including, but not limited to, *Vinyl Runner (#0 46696 35280 1)*.

23 6. All such vinyl flooring containing DEHP shall hereinafter be collectively referred
24 to as the "PRODUCTS."

25 7. ORCHARD's failure to warn consumers and/or other individuals in the State of
26 California not covered by California's Occupational Safety Health Act, Labor Code § 6300 *et*
27 *seq.* about their exposure to DEHP in conjunction with its distribution, importation,
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1 manufacture, and/or sale of the PRODUCTS is a violation of Proposition 65 and subjects
2 Defendant to enjoinder of such conduct as well as civil penalties for each such violation.

3 8. For ORCHARD's violation of Proposition 65, plaintiff seeks preliminary
4 injunctive and permanent injunctive relief to compel ORCHARD to provide purchasers or users
5 of the PRODUCTS with the required warning regarding the health hazards of DEHP. (*Cal.*
6 *Health & Safety Code § 25249.7(a).*)

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

9 **PARTIES**

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

14 11. ORCHARD is a person doing business within the meaning of California Health &
15 Safety Code § 25249.11.

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

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

21 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,
22 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they
23 engage in the process of research, testing, designing, assembling, fabricating, and/or
24 manufacturing, e.g., by engaging in private labeling one or more of the PRODUCTS for sale or
25 use in the State of California.

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

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

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

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

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

13 20. ORCHARD, MANUFACTURER DEFENDANTS, DISTRIBUTOR
14 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
15 referred to hereinafter as “DEFENDANTS.”

16 **VENUE AND JURISDICTION**

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

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

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

5 **FIRST CAUSE OF ACTION**

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

7 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
8 Paragraphs 1 through 23, inclusive.

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

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

16 27. On October 15, 2010, a sixty-day notice of violation ("Notice"), together with the
17 requisite Certificate of Merit, was provided to ORCHARD and various public enforcement
18 agencies stating that as a result of ORCHARD's sales of the PRODUCTS, purchasers and users
19 in the State of California were being exposed to DEHP resulting from the reasonably foreseeable
20 uses of the PRODUCTS, without the individual purchasers and users first having been provided
21 with a "clear and reasonable warning" regarding such toxic exposures.

22 28. DEFENDANTS have engaged in the manufacture, importation, distribution, and/or
23 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code §
24 25249.6 and DEFENDANTS' manufacture, importation, distribution, and/or offering of the
25 PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 has
26 continued to occur beyond ORCHARD's receipt of the Notice. Plaintiff further alleges and
27 believes that such violations will continue to occur in the future.

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

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

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

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

12 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
13 continues to cause consumer and workplace exposures to DEHP, as such exposure is defined by
14 27 California Code of Regulations ("CCR") § 25602(b).

15 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
16 the PRODUCTS would expose individuals to DEHP through dermal contact and ingestion.

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

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

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

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

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

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 alleged
13 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 to 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.

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21 Dated: February 17, 2011

22 Respectfully Submitted,

23 THE CHANLER GROUP

24
25 By: 

26 Clifford A. Chanler
27 Attorneys for Plaintiff
28 JOHN MOORE