

ENDORSED
FILED
ALAMEDA COUNTY

FEB 15 2011

CLERK OF THE SUPERIOR COURT
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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION

15 JOHN MOORE,

16 Plaintiff,

17 v.

18 SMART & FINAL, INC.; and DOES 1-150,
19 inclusive,

20 Defendants.

Case No.

109 81561250

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

23 *(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”) and di(2-ethylhexyl)phthalate
5 (“DEHP”), toxic chemicals found in aprons 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 and DEHP, present in or on aprons that
8 defendants manufacture, import, distribute, and/or offer for sale to consumers throughout the
9 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 24, 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 24, 2004. (*27 CCR § 25601; Cal. Health*
19 *& Safety Code § 25249.8.*)

20 5. On December 2, 2005, California identified and listed DBP as a chemical known
21 to cause birth defects and other reproductive harm. DBP became subject to the warning
22 requirement one year later and was, therefore, subject to the “clear and reasonable warning”
23 requirements of Proposition 65, beginning on December 2, 2006. (*Id.*)

24 6. DBP and DEHP shall be referred to hereinafter as the “LISTED CHEMICALS.”

25 7. Defendants manufacture, import, distribute, and/or sell aprons containing
26 excessive levels of the LISTED CHEMICALS including, but not limited to, *Smart & Final*
27 *Chef’s Review Brown Vinyl Bib Apron (#0 41512 62203 8).*

1 8. All such aprons containing the LISTED CHEMICALS, as listed in paragraph 7
2 above, shall hereinafter be collectively referred to as the "PRODUCT[S]."

3 9. Defendants' failures to warn consumers and/or other individuals in the State of
4 California about their exposure to the LISTED CHEMICALS in conjunction with defendants'
5 sale 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 10. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
8 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 CHEMICALS. (*Cal. Health & Safety Code § 25249.7(a).*)

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

13 **PARTIES**

14 12. 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 and commercial products, and brings this action in the public interest
17 pursuant to California Health & Safety Code § 25249.7.

18 13. SMART & FINAL, INC. ("SMART & FINAL") is a person doing business within
19 the meaning of California Health & Safety Code § 25249.11.

20 14. SMART & FINAL manufactures, imports, 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, imports, distributes, and/or offers the PRODUCTS for sale or use in the State of
23 California.

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

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

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

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

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

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

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

17 22. SMART & FINAL, MANUFACTURER DEFENDANTS, DISTRIBUTOR
18 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
19 referred to hereinafter as “DEFENDANTS.”

20 **VENUE AND JURISDICTION**

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

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

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

9 **FIRST CAUSE OF ACTION**

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

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

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

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

20 29. On or about November 23, 2010, a sixty-day notice of violation, together with the
21 requisite certificate of merit, was provided to SMART & FINAL and various public enforcement
22 agencies stating that as a result of SMART & FINAL’S sales of the PRODUCTS, purchasers and
23 users in the State of California were being exposed to the LISTED CHEMICALS resulting from
24 the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users
25 first having been provided with a “clear and reasonable warning” regarding such toxic exposures
26 (“60-Day Notice”).

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

1 25249.6, and DEFENDANTS' manufacture, importation, distribution, and/or offering of the
2 PRODUCTS for sale or use, in violation of California Health & Safety Code § 25249.6, has
3 continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice. Plaintiff
4 further alleges and believes that such violations will continue to occur into the future.

5 31. After receipt of the claims asserted in the 60-Day Notice, the appropriate public
6 enforcement agencies have failed to commence and diligently prosecute a cause of action against
7 DEFENDANTS under Proposition 65.

8 32. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or
9 use in California by DEFENDANTS contained the LISTED CHEMICALS above the allowable
10 state limits.

11 33. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
12 imported, distributed, and/or offered for sale or use by DEFENDANTS in California contained
13 the LISTED CHEMICALS.

14 34. The LISTED CHEMICALS were present in or on the PRODUCTS in such a way
15 as to expose individuals to the LISTED CHEMICALS through dermal contact and/or ingestion
16 during the reasonably foreseeable use of the PRODUCTS.

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

20 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
21 the PRODUCTS would expose individuals to the LISTED CHEMICALS through dermal contact
22 and/or ingestion.

23 37. DEFENDANTS intended that such exposures to the LISTED CHEMICALS from
24 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
25 accidental participation in the manufacture, importation, distribution and/or offer for sale or use
26 of PRODUCTS to individuals in the State of California.

27 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
28 consumers and/or other individuals in the State of California who were or who could become

1 exposed to the LISTED CHEMICALS through dermal contact and/or ingestion during the
2 reasonably foreseeable use of the PRODUCTS.

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

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

11 41. As a consequence of the above-described acts, California Health & Safety Code
12 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
13 DEFENDANTS.

14 **PRAYER FOR RELIEF**

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

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

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

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

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

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3 Dated: February 0, 2011

Respectfully Submitted,

THE CHANLER GROUP

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6 By: 

7 Josh Voorhees
Attorneys for Plaintiff
JOHN MOORE

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