

ENDORSED
FILED
ALAMEDA COUNTY

MAR - 8 2011

CLERK OF SUPERIOR COURT
By _____ Deputy

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION

11
12 JOHN MOORE,

13 Plaintiff,

14 v.

15 BENSUSSEN DEUTSCH & ASSOCIATES,
16 INC.; and DOES 1-150, inclusive,

17 Defendants.

Case No. 107

11564500

**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 cases
5 for mobile electronic devices sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to
7 warn California citizens about their exposure to DEHP, present in or on cases for mobile
8 electronic devices that defendants manufacture, import, distribute, and/or offer for sale to
9 consumers 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 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. DEHP shall be referred to hereinafter as the "LISTED CHEMICAL."

21 6. Defendants manufacture, import, distribute, and/or sell cases for mobile electronic
22 devices containing excessive levels of the LISTED CHEMICAL including, but not limited to,
23 *Game Boy Advance SP Game Folio (#6 17885 93564 0).*

24 7. All such cases for mobile electronic devices containing the LISTED CHEMICAL,
25 as listed in paragraph 6 above, shall hereinafter be collectively referred to as the
26 "PRODUCT[S]."

27 8. Defendants' failures to warn consumers and/or other individuals in the State of
28 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale

1 of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of
2 such conduct as well as civil penalties for each such violation.

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

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

9 **PARTIES**

10 11. Plaintiff 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 12. BENSUSSEN DEUTSCH & ASSOCIATES, INC. ("BENSUSSEN") is a person
15 doing business within the meaning of California Health & Safety Code § 25249.11.

16 13. BENSUSSEN manufactures, imports, distributes, and/or offers the PRODUCTS
17 for 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 14. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
20 doing business within the meaning of California Health & Safety Code § 25249.11.

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

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

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

1 the State of California.

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

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

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

11 21. BENSUSSEN, MANUFACTURER DEFENDANTS, DISTRIBUTOR
12 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
13 referred to hereinafter as “DEFENDANTS.”

14 **VENUE AND JURISDICTION**

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

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

24 24. The California Superior Court has jurisdiction over DEFENDANTS based on
25 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
26 association that also is a citizen of the State of California, has sufficient minimum contacts in the
27 State of California, and/or otherwise purposefully avails itself of the California market.

1 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
2 courts consistent with traditional notions of fair play and substantial justice.

3 **FIRST CAUSE OF ACTION**

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

5 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
6 Paragraphs 1 through 24, inclusive.

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

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

14 28. On or about December 21, 2010, a sixty-day notice of violation, together with the
15 requisite certificate of merit, was provided to BENSUSSEN and various public enforcement
16 agencies stating that as a result of BENSUSSEN'S sales of the PRODUCTS, purchasers and
17 users in the State of California were being exposed to the LISTED CHEMICAL resulting from
18 the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users
19 first having been provided with a "clear and reasonable warning" regarding such toxic exposures
20 ("60-Day Notice").

21 29. DEFENDANTS have engaged in the manufacture, importation, distribution, and/or
22 offering of the PRODUCTS for sale or use, in violation of California Health & Safety Code §
23 25249.6, and DEFENDANTS' manufacture, importation, distribution, and/or offering of the
24 PRODUCTS for sale or use, in violation of California Health & Safety Code § 25249.6, has
25 continued to occur beyond DEFENDANTS receipt of plaintiff's 60-Day Notice. Plaintiff further
26 alleges and believes that such violations will continue to occur into the future.

1 30. After receipt of the claims asserted in the 60-Day 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 31. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or
5 use in California by DEFENDANTS contained the LISTED CHEMICAL above the allowable
6 state limits.

7 32. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
8 imported, distributed, and/or offered for sale or use by DEFENDANTS in California contained
9 the LISTED CHEMICAL.

10 33. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
11 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
12 during the reasonably foreseeable use of the PRODUCTS.

13 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
14 continues to cause consumer and workplace exposures to the LISTED CHEMICAL, as such
15 exposure is defined by 27 California Code of Regulations (“CCR”) § 25602(b).

16 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
17 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
18 and/or ingestion.

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

23 37. DEFENDANTS failed to provide a “clear and reasonable warning” to those
24 consumers and/or other individuals in the State of California who were or who could become
25 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
26 reasonably foreseeable use of the PRODUCTS.

27 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
28 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal

1 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold
2 by DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to
3 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

10 **PRAYER FOR RELIEF**

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

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

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

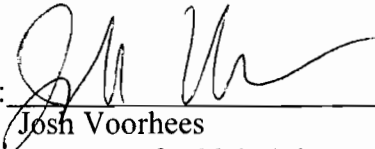
20 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

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

22
23 Dated: March 4, 2011

Respectfully Submitted,

THE CHANLER GROUP

25
26 By: 
27 Josh Voorhees
28 Attorneys for Plaintiff
JOHN MOORE