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**FILED**

**SEP - 7 2011**

**KIM TURNER**  
Court Executive Officer  
**MARIN COUNTY SUPERIOR COURT**  
By: C. Lucchesi, Deputy

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF MARIN**  
**UNLIMITED CIVIL JURISDICTION**

11 JOHN MOORE,

12 Plaintiff,

13 v.

14 WIESNER PRODUCTS, INC.; and DOES 1-  
15 150, inclusive,

16 Defendants.

Case No. CIV 1104474

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

*(Cal. Health & Safety Code § 25249.6 et seq.)*

BY FAX

**NATURE OF THE ACTION**

1. This Complaint is a representative action brought by plaintiff JOHN MOORE, in the public interest of the citizens of the State of California, to enforce the People's right to be informed of the presence of Di-n-butyl phthalate ("DBP"), a toxic chemical found in footwear sold in California.

2. By this Complaint, plaintiff seeks to remedy defendant's continuing failure to warn California citizens about their exposure to DBP, present in or on certain footwear that defendant manufactures, imports, distributes, sells, and/or offers for sale to consumers throughout the State of California.

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

4. On December 2, 2005, California identified and listed DBP as a chemical known to cause birth defects and other reproductive harm. DBP became subject to the warning requirement one year later and was, therefore, subject to the "clear and reasonable warning" requirements of Proposition 65, beginning on December 2, 2006. (27 CCR § 27001 (c); *Cal. Health & Safety Code* §§ 25249.8 & 25249.10(b).)

5. Defendant WIESNER PRODUCTS, INC. ("WIESNER PRODUCTS" or "Defendant") manufactures, imports, distributes, sells, and/or offers for sale footwear containing DBP including, but not limited to, *Batman Flip Flops, #155 410 022420 8 109*.

6. All such footwear containing DBP shall hereinafter be collectively referred to as the "Products."

7. Defendant's failure to warn consumers and/or other individuals in the State of California not covered by California's Occupational Safety Health Act, Labor Code § 6300 *et seq.* about their exposure to DBP in conjunction with Defendant's distribution, importation,

1 manufacture, sale, and/or offering for sale of the Products is a violation of Proposition 65 and  
2 subjects Defendant to enjoinder of such conduct as well as civil penalties for each such  
3 violation.

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

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

#### 10 **PARTIES**

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

15 11. WIESNER PRODUCTS is a person doing business within the meaning of  
16 California Health & Safety Code § 25249.11.

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

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

22 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,  
23 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they  
24 engage in the process of research, testing, designing, assembling, fabricating, and/or  
25 manufacturing, one or more of the Products for sale or 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.

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

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

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

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

20. WIESNER PRODUCTS, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as “DEFENDANTS”.

## VENUE AND JURISDICTION

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

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

23. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or

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 March 17, 2011, a 60-Day Notice of Violation, together with the requisite  
17 Certificate of Merit ("Notice"), was provided to WIESNER PRODUCTS and various public  
18 enforcement agencies stating that as a result of DEFENDANTS' manufacture, importation,  
19 distribution, sale, and/or offering for sale of the Products, purchasers and users in the State of  
20 California were being exposed to DBP resulting from the reasonably foreseeable uses of the  
21 Products, without the individual purchasers and users first having been provided with a "clear  
22 and reasonable warning" regarding such toxic exposures.

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

3 29. 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 30. The Products manufactured, imported, distributed, sold, and/or offered for sale or  
7 use in California by DEFENDANTS contained DBP above the allowable state limits.

8 31. DEFENDANTS knew or should have known that the Products manufactured,  
9 imported, distributed, sold, and/or offered for sale or use by DEFENDANTS in California  
10 contained DBP.

11 32. DBP was present in or on the Products in such a way as to expose individuals to  
12 DBP through dermal contact and ingestion during the reasonably foreseeable use of the Products.

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

16 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
17 the Products would expose individuals to DBP through dermal contact and ingestion.

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

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

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

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

7 39. 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, selling, 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 DBP;

- 1           3.       That the Court grant Plaintiff his reasonable attorneys' fees and costs of suit; and  
2           4.       That the Court grant such other and further relief as may be just and proper.  
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4   Dated: August 29, 2011

Respectfully Submitted,

THE CHANLER GROUP

By: 

Troy C. Bailey  
Attorneys for Plaintiff  
JOHN MOORE