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ENDORSED  
FILED  
San Francisco County Superior Court

NOV - 7 2011

CLERK OF THE COURT  
BY: RONNIE OTERO  
Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

IN GEAR FASHIONS, INC; FRISKY-  
NINETEEN, L.L.C; and DOES 1-150,  
inclusive,

Defendants.

Case No.: CGC-11-511834

**FIRST AMENDED 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”) and di-n-butyl phthalate  
5 (“DBP”), toxic phthalate chemicals found in footwear sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to  
7 warn California citizens about their exposure to DEHP and DBP present in or on certain  
8 footwear that defendants manufacture, distribute, and/or offer for sale to consumers throughout  
9 the state of California.

10 3. High levels of DEHP and DBP are commonly found in and on footwear that  
11 defendants manufacture, distribute, and/or offer for sale to consumers throughout the state of  
12 California.

13 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,  
14 California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course  
15 of doing business shall knowingly and intentionally expose any individual to a chemical known  
16 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable  
17 warning to such individual ...” (Cal. Health & Safety Code § 25249.6.)

18 5. On October 24, 2003, California identified and listed DEHP as a chemical known  
19 to cause birth defects and other reproductive harm. DEHP became subject to the “clear and  
20 reasonable warning” requirements of Proposition 65 one year later on October 24, 2004. (27  
21 Cal. Code Regs., § 27001 (c); Cal. Health & Safety Code, §§ 25249.8 & 25249.10(b).)

22 6. On December 2, 2005, California identified and listed DBP as a chemical known  
23 to cause birth defects and other reproductive harm. DBP became subject to the “clear and  
24 reasonable warning” requirements of Proposition 65 one year later on December 2, 2006. (Tit.  
25 27 Cal. Code Regs., § 27001 (c); Cal. Health & Safety Code, §§ 25249.8 & 25249.10(b).)

26 7. Defendants manufacture, distribute, and/or sell footwear containing excessive  
27 levels of DEHP and DBP including, but not limited to, the *Blue Aqua Flip Flops, L10F212C (#6*  
28

1 75220 36791 4). All such footwear containing DEHP and DBP shall hereinafter be referred to as  
2 the "PRODUCTS."

3 8. Defendants' failure to warn consumers and/or other individuals in the state of  
4 California about their exposure to DEHP and DBP in conjunction with defendants' sale of the  
5 PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such  
6 conduct as well as civil penalties for each such violation.

7 9. 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 DEHP and DBP. (Cal.  
10 Health & Safety Code § 25249.7(a).)

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

13 **PARTIES**

14 11. 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 products; he brings this action in the public interest pursuant to  
17 California Health & Safety Code § 25249.7(d).

18 12. Defendant, IN GEAR FASHIONS, INC. ("IN GEAR"), is a person in the course  
19 of doing business within the meaning of California Health & Safety Code §§ 25249.6 &  
20 25249.11.

21 13. Defendant IN GEAR manufactures, distributes, and/or offers the PRODUCTS for  
22 sale or use in the state of California, or implies by its conduct that it manufactures, distributes,  
23 and/or offers the PRODUCTS for sale or use in the state of California.

24 14. Defendant FRISKY-NINETEEN, L.L.C ("FRISKY-NINETEEN") is a person in  
25 the course of doing business within the meaning of California Health & Safety Code §§ 25249.6  
26 & 25249.11(c).

1           15. Defendant FRISKY-NINETEEN manufactures, distributes, and/or offers the  
2 PRODUCTS for sale or use in the state of California, or implies by its conduct that it  
3 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

4           16. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are persons in  
5 the course of doing business within the meaning of California Health & Safety Code §§ 25249.6  
6 & 25249.11.

7           17. MANUFACTURER DEFENDANTS engage in the process of research, testing,  
8 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they  
9 engage in the process of research, testing, designing, assembling, fabricating, and/or  
10 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

11           18. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are persons in the  
12 course of doing business within the meaning of California Health & Safety Code §§ 25249.6 &  
13 25249.11.

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

17           20. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are persons in the  
18 course of doing business within the meaning of California Health & Safety Code §§ 25249.6 &  
19 25249.11.

20           21. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the  
21 State of California.

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

1 23. IN GEAR, FRISKY-NINETEEN, MANUFACTURER DEFENDANTS,  
2 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,  
3 collectively be referred to herein as "DEFENDANTS."

4 **VENUE AND JURISDICTION**

5 24. Venue is proper in the San Francisco County Superior Court, pursuant to  
6 California Code of Civil Procedure §§ 394, 395, & 395.5, because this Court is a court of  
7 competent jurisdiction, because one or more instances of wrongful conduct occurred, and  
8 continue to occur in the County of San Francisco, and/or because DEFENDANTS conducted,  
9 and continue to conduct, business in this county with respect to the PRODUCTS.

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

14 26. The California Superior Court has jurisdiction over DEFENDANTS based on  
15 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or  
16 association that either is a citizen of the state of California, has sufficient minimum contacts in  
17 the state of California, or otherwise purposefully avails itself of the California market.  
18 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California  
19 courts consistent with traditional notions of fair play and substantial justice.

20 **FIRST CAUSE OF ACTION**

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

22 27. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
23 Paragraphs 1 through 26, inclusive.

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

27 29. Proposition 65 states "[n]o person in the course of doing business shall knowingly  
28 and intentionally expose any individual to a chemical known to the state to cause cancer or

1 reproductive toxicity without first giving clear and reasonable warning to such individual....”

2 (*Ibid.*)

3 30. On or about March 31, 2011, plaintiff served a sixty-day notice of violation,  
4 together with the requisite certificate of merit, on IN GEAR and various public enforcement  
5 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS, purchasers and  
6 users in the state of California were being exposed to DEHP and DBP resulting from the  
7 reasonably foreseeable use of the PRODUCTS, without the individual purchasers and users first  
8 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

9 31. On or about September 19, 2011, plaintiff served a sixty-day notice of violation,  
10 together with the requisite certificate of merit, on IN GEAR, FRISKY-NINETEEN, and various  
11 public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the  
12 PRODUCTS, purchasers and users in the State of California were being exposed to DEHP and  
13 DBP resulting from the reasonably foreseeable use of the PRODUCTS, without the individual  
14 purchasers and users first having been provided with a “clear and reasonable warning” regarding  
15 such toxic exposures.

16 32. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of  
17 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and  
18 DEFENDANTS’ violations have continued to occur beyond DEFENDANTS’ receipt of  
19 plaintiff’s sixty-day notices. Plaintiff further alleges and believes that such violations are  
20 ongoing and continuous in nature.

21 33. After receipt of the claims asserted in the sixty-day notices of violation, the  
22 appropriate public enforcement agencies have failed to commence and diligently prosecute a  
23 cause of action against DEFENDANTS under Proposition 65.

24 34. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
25 California by DEFENDANTS contain DEHP and DBP in amounts above the level at which a  
26 warning is required pursuant to Proposition 65.

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1           35.     DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
2 distributed, and/or offered for sale or use by DEFENDANTS in California contain DEHP and  
3 DBP.

4           36.     The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as  
5 to expose individuals to DEHP and DBP through dermal contact and/or ingestion during the  
6 reasonably foreseeable use of the PRODUCTS.

7           37.     The normal and reasonably foreseeable use of the PRODUCTS has caused and  
8 continues to cause consumer exposures to DEHP and DBP, as such exposure is defined by Tit.  
9 27 Cal. Code Regs. § 25602(b).

10          38.     DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
11 the PRODUCTS would expose individuals to DEHP and DBP through dermal contact and/or  
12 ingestion.

13          39.     DEFENDANTS intended that such exposures to DEHP and DBP from the  
14 reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental  
15 participation in the manufacture, distribution, and/or offering of the PRODUCTS for sale to  
16 individuals in the state of California.

17          40.     DEFENDANTS failed to provide a “clear and reasonable warning” to those  
18 consumers and/or other individuals in the state of California who were or who could become  
19 exposed to DEHP and DBP through dermal contact and/or ingestion during the reasonably  
20 foreseeable use of the PRODUCTS.

21          41.     Contrary to the express policy and statutory prohibition contained in Proposition  
22 65, as enacted directly by California voters, individuals exposed to DEHP and DBP through  
23 dermal contact and/or ingestion resulting from the reasonably foreseeable use of the  
24 PRODUCTS sold by DEFENDANTS without a “clear and reasonable warning” have suffered,  
25 and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate  
26 remedy at law.

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

4           43.     As a consequence of the above-described acts, California Health & Safety Code  
5 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
6 DEFENDANTS.

7   **PRAYER FOR RELIEF**

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

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

12           2.     That the Court, pursuant to California Health & Safety Code § 25249.7(a),  
13 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, and/or  
14 offering the PRODUCTS for sale or use in California without first providing a “clear and  
15 reasonable warning” as defined by Tit. 27 Cal. Code Regs. § 25601, as to the harms associated  
16 with exposure to DEHP and DBP;

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

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

19  
20 Dated: November 7, 2011

Respectfully Submitted,  
THE CHANLER GROUP

21  
22 By:   
23 Brian Johnson  
Attorneys for Plaintiff  
JOHN MOORE