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ENDORSED
FILED
ALAMEDA COUNTY

SEP 13 2011

CLERK OF THE SUPERIOR COURT
By MARCO J. DOWNIE
Deputy

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF ALAMEDA

14 UNLIMITED CIVIL JURISDICTION

15 JOHN MOORE,

16 Plaintiff,

17 v.

18 INNOVAGE LLC; MERCHSOURCE, LLC;
19 and DOES 1-150, inclusive,

20 Defendants.

Case No. RG 11594937

**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
5 cases for portable electronic devices 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 present in or on cases for portable
8 electronic devices that defendants manufacture, distribute, and/or offer for sale to consumers
9 throughout the state of California.

10 3. High levels of DEHP are commonly found in and on the cases for portable
11 electronic devices that defendants manufacture, distribute, and/or offer for sale to consumers
12 throughout the state of 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
15 course of doing business shall knowingly and intentionally expose any individual to a chemical
16 known to the state to cause cancer or reproductive toxicity without first giving clear and
17 reasonable 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. (Tit.
21 27 Cal. Code Regs. (“CCR”) § 27001(c); Cal. Health & Safety Code §§ 25249.8 &
22 25249.10(b).) DEHP shall be referred to hereinafter as the “LISTED CHEMICAL.”

23 6. Defendants manufacture, distribute, and/or offer for sale cases for portable
24 electronic devices containing excessive levels of the LISTED CHEMICAL including, but not
25 limited to, *The Sharper Image 2.4” Portable Photo Album, #1624893 (19162) (#6 94202 10415*
26 *6)*. All such cases for portable electronic devices containing the LISTED CHEMICAL shall
27 hereinafter be referred to as the “PRODUCTS.”
28

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

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

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

11 **- PARTIES**

12 10. Plaintiff, JOHN MOORE is a citizen of the state of California who is dedicated to
13 protecting the health of California citizens through the elimination or reduction of toxic
14 exposures from consumer products; he brings this action in the public interest pursuant to
15 California Health & Safety Code § 25249.7(d).

16 11. Defendant INNOVAGE LLC ("INNOVAGE") is a person in the course of doing
17 business within the meaning of California Health & Safety Code § 25249.11(c).

18 12. Defendant INNOVAGE manufactures, distributes, and/or offers the PRODUCTS
19 for sale or use in the state of California, or implies by its conduct that it manufactures,
20 distributes, and/or offers the PRODUCTS for sale or use in the state of California.

21 13. Defendant MERCHSOURCE, LLC ("MERCHSOURCE") is a person in the
22 course of doing business within the meaning of California Health & Safety Code § 25249.11(c).

23 14. Defendant MERCHSOURCE manufactures, distributes, and/or offers the
24 PRODUCTS for sale or use in the state of California, or implies by its conduct that it
25 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
26 California.

1 15. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each
2 persons in the course of doing business within the meaning of California Health & Safety Code
3 § 25249.11(c).

4 16. MANUFACTURER DEFENDANTS engage in the process of research, testing,
5 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they
6 engage in the process of research, testing, designing, assembling, fabricating, and/or
7 manufacturing, one or more of the PRODUCTS offered for sale or use in the state of California.

8 17. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
9 in the course of doing business within the meaning of California Health & Safety Code §
10 25249.11(c).

11 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
12 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
13 in the state of California.

14 19. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons in
15 the course of doing business within the meaning of California Health & Safety Code §
16 25249.11(c).

17 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
18 state of California.

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

24 22. INNOVAGE, MERCHSOURCE, MANUFACTURER DEFENDANTS,
25 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,
26 collectively be referred to as “DEFENDANTS.”
27
28

1 **VENUE AND JURISDICTION**

2 23. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
3 Procedure §§ 394, 395, & 395.5, because this Court is a court of competent jurisdiction, and
4 because one or more instances of wrongful conduct occurred, and continue to occur, in the
5 County of Alameda, and/or because DEFENDANTS conducted, and continue to conduct,
6 business in this county with respect to the PRODUCTS.

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

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

17 **FIRST CAUSE OF ACTION**

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

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

21 27. The citizens of the state of California have expressly stated in the Safe Drinking
22 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 *et seq.*
23 that they must be informed “about exposures to chemicals that cause cancer, birth defects and
24 other reproductive harm.” (Cal. Health & Safety Code, § 25249.6.)

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

1 29. On or about March 31, 2011, a sixty-day notice of violation, together with the
2 requisite certificate of merit, was provided to INNOVAGE, MERCHSOURCE and various
3 public enforcement agencies stating that, as a result of the DEFENDANTS' sales of the
4 PRODUCTS, purchasers and users in the state of California were being exposed to DEHP
5 resulting from the reasonably foreseeable use of the PRODUCTS, without the individual
6 purchasers and users first having been provided with a "clear and reasonable warning"
7 regarding such toxic exposures.

8 30. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
9 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6, and
10 DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale or use
11 in violation of California Health & Safety Code § 25249.6 has continued to occur beyond
12 DEFENDANTS' receipt of Plaintiff's sixty-day notice of violation. Plaintiff further alleges and
13 believes that such violations will continue to occur into the future.

14 31. After receipt of the claims asserted in the sixty-day notice of violation, the
15 appropriate public enforcement agencies have failed to commence and diligently prosecute a
16 cause of action against DEFENDANTS under Proposition 65.

17 32. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
18 California by DEFENDANTS contained the LISTED CHEMICAL in an amount above the
19 allowable state limits.

20 33. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
21 distributed, and/or offered for sale or use in California contained the LISTED CHEMICAL.

22 34. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
23 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
24 during the reasonably foreseeable use of the PRODUCTS.

25 35. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
26 continues to cause, consumer exposures to the LISTED CHEMICAL, as such exposure is
27 defined by Title 27 CCR § 25602(b).

28

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

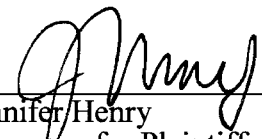
6 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

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

8
9 Dated: September 9, 2011

Respectfully Submitted,
THE CHANLER GROUP

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12 By: _____


Jennifer Henry
Attorneys for Plaintiff
JOHN MOORE