

ENDORSED
FILED
ALAMEDA COUNTY

AUG 10 2012

CLERK OF SUPERIOR COURT
By Donnan Pharr
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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION

14 **RG12643164**

15 JOHN MOORE,

16 Plaintiff,

17 v.

18 ETNA PRODUCTS CO., INC.; and DOES 1-
19 150, inclusive,

20 Defendants.

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

NATURE OF THE ACTION

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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 ottomans sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
7 warn California citizens about the risk of exposure to DEHP present in or on ottomans
8 manufactured, distributed, and/or offered for sale or use to consumers throughout the state of
9 California.

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

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

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

22 6. Defendants manufacture, distribute, and/or sell ottomans that contain excessive
23 levels of DEHP, including, but not limited to, the *Storage Ottoman with Snack Tray, Style*
24 *#4187-AL, Item #26784A (#0 84358 04187 8)*. All such ottomans containing DEHP are
25 collectively referred to hereinafter as “PRODUCTS.”

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

3 8. 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 9. Plaintiff also seeks civil penalties against defendants for their violations of
8 Proposition 65, as provided by California Health & Safety Code § 25249.7(b).

9 **PARTIES**

10 10. 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 products, and brings this action in the public interest pursuant to
13 California Health & Safety Code § 25249.7(d).

14 11. Defendant ETNA PRODUCTS CO., INC. ("ETNA") is a person in the course of
15 doing business within the meaning of California Health & Safety Code § 25249.11.

16 12. Defendant ETNA manufactures, distributes, and/or offers the PRODUCTS for sale
17 or use in the State of California, or implies by its conduct that it manufactures, distributes, and/or
18 offers the PRODUCTS for sale or use in the State of California.

19 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each
20 persons in the course of doing business within the meaning of California Health & Safety Code
21 § 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.
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1 in all causes except those given by statute to other trial courts.” The statute under which this
2 action is brought does not specify any other basis of subject matter jurisdiction.

3 23. 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 is a citizen of the state of California, has sufficient minimum contacts in the
6 state of California, or otherwise purposefully avails itself of the California market.
7 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
8 California 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 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 23, inclusive.

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

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

21 27. On or about January 19, 2012, plaintiff’s sixty-day notice of violation, together
22 with the requisite certificate of merit, was provided to ETNA and various public enforcement
23 agencies stating that, as a result of the DEFENDANTS’ sales of ottomans, purchasers and users
24 in the state of California were being exposed to the LISTED CHEMICAL resulting from the
25 reasonably foreseeable use of the PRODUCTS, without the individual purchasers and users first
26 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

1 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
2 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
3 such violations have continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day
4 notice of violation. Plaintiff further alleges that DEFENDANTS' violations are ongoing in
5 nature and will continue to occur in the future.

6 29. After receiving the claims asserted in the sixty-day notice of violation, the
7 appropriate public enforcement agencies have failed to commence and diligently prosecute a
8 cause of action against DEFENDANTS under Proposition 65.

9 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
10 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the
11 allowable state limits, such that they require a "clear and reasonable" Proposition 65 warning
12 prior to being sold or offered for sale.

13 31. DEFENDANTS knew or should have known that the PRODUCTS they
14 manufactured, distributed, and/or offered for sale or use in California contain the LISTED
15 CHEMICAL.

16 32. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
17 expose individuals through dermal contact and/or ingestion during reasonably foreseeable use.

18 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
19 continues to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
20 defined by Tit. 27 CCR § 25602(b).

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

24 35. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
25 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
26 accidental participation in the manufacture, distribution, and/or offering of the PRODUCTS for
27 sale or use to individuals in the state of California.

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1 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
2 consumers and/or other individuals in the state of California who were or who could become
3 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
4 reasonably foreseeable use of the PRODUCTS.

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

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

13 39. As a consequence of the above-described acts, California Health & Safety Code
14 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
15 DEFENDANTS.

16 **PRAYER FOR RELIEF**

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

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

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


26 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and
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4. That the Court grant such other and further relief as may be just and proper.

Dated: August 9, 2012

Respectfully Submitted,
THE CHANLER GROUP

By: 
Brian C. Johnson
Attorneys for Plaintiff
JOHN MOORE