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ENDORSED  
FILED  
ALAMEDA COUNTY

MAY 03 2013

CLERK OF THE SUPERIOR COURT  
By Kmel Dhillon Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF ALAMEDA  
13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17  
18 LOWE'S COMPANIES, INC.; LOWE'S  
19 HIW, INC.; and DOES 1-150, inclusive,

20 Defendants.

Case No. RG13664554

**FIRST AMENDED COMPLAINT FOR  
CIVIL PENALTIES AND INJUNCTIVE  
RELIEF**

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

1 NATURE OF THE ACTION

2 1. This First Amended Complaint is a representative action brought by plaintiff  
3 JOHN MOORE in the public interest of the citizens of the State of California to enforce the  
4 People’s right to be informed of the presence of di(2-ethylhexyl)phthalate (“DEHP”), a toxic  
5 chemical found in vinyl rainwear sold in California.

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

10 3. Detectable levels of DEHP are commonly found in and on the vinyl rainwear that  
11 defendants manufacture, distribute, and offer for sale to consumers throughout California.

12 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at  
13 Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”), “[n]o person in the course of  
14 doing business shall knowingly and intentionally expose any individual to a chemical known to  
15 the state to cause cancer or reproductive toxicity without first giving clear and reasonable  
16 warning to such individual . . . .” Health & Safety Code § 25249.6.

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

22 6. Defendants manufacture, distribute, import, sell, and offer for sale without  
23 warning, vinyl rainwear containing the LISTED CHEMICAL, including, but not limited to, the  
24 *Rain Poncho Light Duty, Item #0044282, Model #LS-RC001 (UPC No. 6 62909 44282 6)*. All  
25 such vinyl rainwear containing the LISTED CHEMICAL is referred to collectively hereinafter  
26 as the “PRODUCTS.”



1 therefore, sues said defendants by their fictitious names pursuant to Code of Civil Procedure  
2 section 474. Plaintiff is informed and believes, and on that basis alleges, that each of the  
3 fictitiously named defendants is responsible for the acts and occurrences alleged herein. When  
4 ascertained, their true names and capacities shall be reflected in an amended complaint.

5 14. LOWE’S, LOWE’S HIW, and Defendants DOES 1-150 are collectively referred  
6 to hereafter as “DEFENDANTS.”

7 **VENUE AND JURISDICTION**

8 15. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil  
9 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,  
10 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of  
11 wrongful conduct occurred, and continue to occur, in Alameda County, and because  
12 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the  
13 PRODUCTS.

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

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

24 **FIRST CAUSE OF ACTION**

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

26 18. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
27 Paragraphs 1 through 17, inclusive.

1           19. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic  
2 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be  
3 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive  
4 harm.”

5           20. Proposition 65 states, “[n]o person in the course of doing business shall  
6 knowingly and intentionally expose any individual to a chemical known to the state to cause  
7 cancer or reproductive toxicity without first giving clear and reasonable warning to such  
8 individual . . . .” Health & Safety Code § 25249.6.

9           21. On November 9, 2012, plaintiff served LOWE’S and the requisite public  
10 enforcement agencies with a sixty-day notice of violation of Proposition 65, and the requisite  
11 certificate of merit, alleging that as a result of DEFENDANTS’ sales of the PRODUCTS  
12 containing the LISTED CHEMICAL, purchasers and users in California were being exposed to  
13 the LISTED CHEMICAL resulting from their reasonably foreseeable use of the PRODUCTS,  
14 without those individual purchasers and users first having been provided with a “clear and  
15 reasonable warning” regarding such the health hazards of such exposures, as required by  
16 Proposition 65.

17           22. On February 5, 2013, plaintiff served LOWE’S HIW and the same public  
18 enforcement agencies with a sixty-day notice of violation of Proposition 65, together with the  
19 requisite certificate of merit, alleging that LOWE’S HIW also violated Proposition 65 when it  
20 failed to provide consumers and users in California with a “clear and reasonable warning”  
21 regarding the health hazards associated with exposures to the LISTED CHEMICAL from the  
22 PRODUCTS. The November 9, 2012, sixty-day notice of violation and the February 5, 2013,  
23 sixty-day notice of violations are collectively referred to hereafter as the “NOTICES”

24           23. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,  
25 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section  
26 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of the  
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1 NOTICES. As such, DEFENDANTS’ violations are ongoing and continuous in nature, and will  
2 continue to occur in the future.

3 24. After receiving the NOTICES, the appropriate public enforcement agencies have  
4 failed to commence and diligently prosecute a cause of action against DEFENDANTS under  
5 Proposition 65.

6 25. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale  
7 or use in California by DEFENDANTS contain the LISTED CHEMICAL in amounts that  
8 require a “clear and reasonable” warning under Proposition 65.

9 26. DEFENDANTS knew or should have known that the PRODUCTS they  
10 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED  
11 CHEMICAL.

12 27. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to  
13 expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion from  
14 reasonably foreseeable use.

15 28. The normal and reasonably foreseeable use of the PRODUCTS have caused, and  
16 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are  
17 defined by the California Code of Regulations title 27, section 25602(b).

18 29. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
19 the PRODUCTS exposes individuals to the LISTED CHEMICAL through dermal contact  
20 and/or ingestion.

21 30. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from  
22 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-  
23 accidental participation in the manufacture, import, distribution, sale, and offering of the  
24 PRODUCTS for sale or use to individuals in the State of California.

25 31. DEFENDANTS failed to provide a “clear and reasonable warning” to those  
26 consumers and other individuals in California who were, or who would become, exposed to the  
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1 LISTED CHEMICAL through dermal contact and/or ingestion from their reasonably  
2 foreseeable uses of the PRODUCTS.

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

8 33. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the  
9 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day  
10 for each violation.

11 34. As a consequence of the above-described acts, Health and Safety Code  
12 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
13 DEFENDANTS.

14 **PRAYER FOR RELIEF**

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

16 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess  
17 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

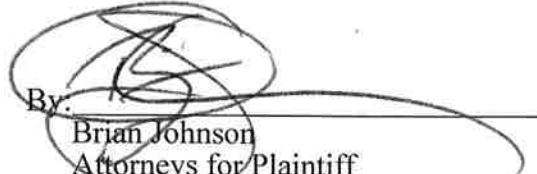
18 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),  
19 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or  
20 offering the PRODUCTS for sale or use in California without first providing a “clear and  
21 reasonable warning” as defined by the California Code of Regulations title 27, section 25601 *et*  
22 *seq.*, as to the harms associated with exposures to the LISTED CHEMICAL;

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

24 4. That the Court grant such other and further relief as may be just and proper.  
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1 Dated: May 3<sup>rd</sup>, 2013

2 Respectfully Submitted,  
3 THE CHANLER GROUP

4   
5 By: Brian Johnson  
6 Attorneys for Plaintiff  
7 JOHN MOORE

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