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ENDORSED
FILED
ALAMEDA COUNTY

MAY 23 2013

CLERK OF THE SUPERIOR COURT

By ~~Donnan Pharr~~

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 B. H. INC.; TIME WARNER INC.; WARNER
19 BROS. ENTERTAINMENT INC.; WARNER
20 BROS. VIP TOUR STORE; and DOES 1-150,
21 inclusive,

22 Defendants.

Case No. RG13662418

**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/PVC luggage tags 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 the vinyl/PVC luggage tags manufactured, distributed, and offered for sale or use to
9 consumers throughout the State of California.

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

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

18 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
19 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became
20 subject to the “clear and reasonable warning” requirements of the act one year later on October
21 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
22 25249.10(b). DEHP is referred to hereinafter as the “LISTED CHEMICAL.”

23 6. Defendants manufacture, distribute, import, sell, and/or offer for sale vinyl/PVC
24 luggage tags containing the LISTED CHEMICAL without a warning, including, but not limited
25 to, the *Tag, Warner Bros. Studios, #32-83-014-167 (#0 82954 32004 5)*. All such vinyl/PVC
26 luggage tags containing the LISTED CHEMICAL are referred to collectively hereinafter as
27 “PRODUCTS.”
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1 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
2 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because
3 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the
4 PRODUCTS.

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

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

15 **FIRST CAUSE OF ACTION**

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

17 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
18 Paragraphs 1 through 23, inclusive.

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

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

1 27. On September 21, 2012, plaintiff's sixty-day notice of violation, together with the
2 requisite certificate of merit, was provided to B. H. and certain public enforcement agencies
3 stating that, as a result of DEFENDANTS' sales of the PRODUCTS containing the LISTED
4 CHEMICAL, purchasers and users in the State of California were being exposed to the LISTED
5 CHEMICAL resulting from their reasonably foreseeable use of the PRODUCTS, without the
6 individual purchasers and users first having been provided with a "clear and reasonable
7 warning" regarding such toxic exposures, as required by Proposition 65.

8 28. On February 22, 2013, plaintiff's supplemental sixty-day notice of violation,
9 together with the requisite certificate of merit, was provided to B. H., TIME WARNER,
10 WARNER BROS., WARNER BROS. STORE, and certain public enforcement agencies stating
11 that, as a result of DEFENDANTS' sales of the PRODUCTS containing the LISTED
12 CHEMICAL, purchasers and users in the State of California were being exposed to the LISTED
13 CHEMICAL resulting from their reasonably foreseeable use of the PRODUCTS, without the
14 individual purchasers and users first having been provided with a "clear and reasonable
15 warning" regarding such toxic exposures, as required by Proposition 65. The September 21,
16 2012 sixty-day notice of violation and the February 22, 2013 sixty-day notice shall, where
17 appropriate, collectively be referred to as "sixty-day notices of violation."

18 29. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
19 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
20 25249.6, and DEFENDANTS' violations have continued to occur beyond their receipt of
21 plaintiff's sixty-day notices of violation. As such, DEFENDANTS' violations are ongoing and
22 continuous in nature, and will continue to occur in the future.

23 30. After receiving plaintiff's sixty-day notices of violation, the appropriate public
24 enforcement agencies have failed to commence and diligently prosecute a cause of action
25 against DEFENDANTS under Proposition 65.
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1 31. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
2 or use in California by DEFENDANTS contain the LISTED CHEMICAL such that they require
3 a “clear and reasonable” warning under Proposition 65.

4 32. DEFENDANTS knew or should have known that the PRODUCTS they
5 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED
6 CHEMICAL.

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

10 34. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
11 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
12 defined by the California Code of Regulations title 27, section 25602(b).

13 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
14 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact
15 and/or ingestion.

16 36. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
17 the reasonably foreseeable uses of the PRODUCTS would occur by their deliberate, non-
18 accidental participation in the manufacture, importation, distribution, sale, and offering of the
19 PRODUCTS for sale or use to individuals in the State of California.

20 37. DEFENDANTS failed to provide a “clear and reasonable warning” to those
21 consumers and other individuals in the State of California who were or who would become
22 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
23 reasonably foreseeable uses of the PRODUCTS.

24 38. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
25 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
26 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold
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1 by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to
2 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

6 40. As a consequence of the above-described acts, Health and Safety Code
7 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
8 DEFENDANTS.

9 **PRAYER FOR RELIEF**

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

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

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

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

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

20 Dated: May 22, 2013

Respectfully Submitted,
THE CHANLER GROUP

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23 By: _____

John C. Mayo
Attorneys for Plaintiff
JOHN MOORE