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Clifford A. Chanler, State Bar No. 135534
Troy C. Bailey, State Bar No. 277424
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
PETER ENGLANDER

ENDORSED
FILED
ALAMEDA COUNTY

AUG 16 2013

CLERK OF THE SUPERIOR COURT
By S. IYAMU Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

PETER ENGLANDER,
Plaintiff,

v.

ALPHAGARY CORPORATION; and DOES 1-
150, inclusive,
Defendants.

Case No. RG 13692128

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

(Health & Safety Code § 25249.5 *et seq.*)

NATURE OF THE ACTION

1
2 1. This Complaint is a representative action brought by plaintiff PETER ENGLANDER
3 in 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 black
5 PVC material used to make a variety of consumer products including vinyl grips placed on hand
6 tools sold in the State of California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to warn
8 California citizens about the risks of exposures to DEHP present in black PVC material used to
9 make a variety of consumer products including vinyl grips placed on hand tools, manufactured,
10 distributed, and offered for sale or use to consumers throughout the State of California.

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

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

20 5. Defendants manufacture, shape, broker, distribute, import, sell and offer for sale
21 without a warning in California, black PVC material containing DEHP used to make a variety of
22 consumer products including vinyl grips placed on hand tools such as the *V5 19 oz. A/S Vaughan*
23 *M/F Hammer (#0 51218 13030 0)* as identified in plaintiff’s May 3, 2013, 60-Day Notice of
24 Violation of Proposition 65 and May 21, 2013, Supplemental 60-Day Notice of Violation of
25 Proposition 65 (“PRODUCT”).

26 6. Although defendants expose consumers, workers, infants, children, and other
27 individuals in California to DEHP in the PRODUCT, defendants provide no warnings about the
28 reproductive hazards associated with exposures to this chemical. Defendants’ failure to warn

1 consumers, workers and other individuals in the State of California about the health hazards
2 associated with exposures to DEHP in conjunction with defendants' manufacture and sales of the
3 PRODUCT is a violation of Proposition 65, and subjects defendants to enjoinder of such conduct
4 as well as civil penalties for each violation. (Health & Safety Code § 25249.7(a) & (b)(1).)

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

9 8. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
10 penalties against defendants for their violations of Proposition 65.

11 PARTIES

12 9. Plaintiff PETER ENGLANDER is a citizen of the State of California who is
13 dedicated to protecting the health of California consumers and other individuals in California
14 through the elimination or reduction of toxic exposures from consumer products, and he brings this
15 action in the public interest pursuant to Health and Safety Code section 25249.7(d).

16 10. Defendant AlphaGary Corporation ("ALPHAGARY") is a person in the course of
17 doing business within the meaning of Health and Safety Code section 25249.11.

18 11. ALPHAGARY manufactures, shapes, brokers, distributes, sells and/or offers the
19 PRODUCT for sale or use in the State of California, or it implies by its conduct that it
20 manufactures, shapes, brokers, distributes, sells and/or offers the PRODUCT for sale or use in the
21 State of California.

22 12. Defendant DOES 1-150 are each persons in the course of doing business within the
23 meaning of Health and Safety Code Section 25249.11(b), that manufacture, distribute, sell and/or
24 offer the PRODUCT for sale in the State of California. At this time, the true names and capacities
25 of defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who, therefore, sues said
26 defendants by their fictitious names pursuant to Code of Civil Procedure section 474. Plaintiff is
27 informed and believes, and on that basis alleges, that each of the fictitiously named defendants is
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1 responsible for the acts and occurrences alleged herein. When ascertained, their true names and
2 capacities shall be reflected in an amended complaint.

3 13. ALPHAGARY and Defendants DOES 1-150 are collectively referred to hereinafter
4 as “DEFENDANTS.”

5 **VENUE AND JURISDICTION**

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

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

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

23 **FIRST CAUSE OF ACTION**

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

25 17. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
26 Paragraphs 1 through 16, inclusive.

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1 18. 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 informed
3 about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.”

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

8 20. On May 3, 2013, plaintiff served a 60-Day Notice of Violation (“Notice”), together
9 with the requisite certificate of merit on ALPHAGARY and certain public enforcement agencies
10 stating that, as a result of DEFENDANTS’ sales of hand tool grips including, but not limited to, the
11 *V5 19 oz. A/S Vaughan M/F Hammer (#0 51218 13030 0)* containing DEHP, purchasers and users
12 in the State of California are being exposed to this Proposition 65-listed chemical from reasonably
13 foreseeable uses of the hand tool grips, without the individual purchasers and users first having
14 been provided with the “clear and reasonable warning” regarding required by Proposition 65.

15 21. On May 21, 2013, plaintiff served a Supplemental 60-Day Notice of Violation
16 (“Supplemental Notice”), together with the requisite certificate of merit on ALPHAGARY and
17 certain public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
18 PRODUCT, purchasers and users in the State of California are being exposed to this Proposition
19 65-listed chemical from reasonably foreseeable uses of the PRODUCT, without the individual
20 purchasers and users first having been provided with the “clear and reasonable warning” regarding
21 required by Proposition 65.

22 22. The Notice and Supplemental Notice shall hereinafter collectively be referred to as
23 the “NOTICES.”

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

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

4 25. The PRODUCT manufactured, imported, shaped, brokered, distributed, sold and
5 offered for sale or use in California by DEFENDANTS cause exposures to DEHP that are not
6 exempt from the "clear and reasonable" warning requirements of Proposition 65.

7 26. DEFENDANTS knew or should have known that the PRODUCT they manufacture,
8 shape, broker, distribute, sell and offer for sale or use in the State of California contains DEHP.

9 27. DEHP is present in or on the PRODUCT in such a way as to expose individuals
10 through dermal contact and/or ingestion during reasonably foreseeable uses of the PRODUCT,
11 including through workplace exposures to the PRODUCT.

12 28. The normal and reasonably foreseeable uses of the PRODUCT have caused, and
13 continue to cause, consumer exposures and workplace exposures to DEHP, as such exposures are
14 defined by Title 27 of the California Code of Regulations, section 25602(b).

15 29. DEFENDANTS have knowledge that the normal and reasonably foreseeable uses of
16 the PRODUCT expose individuals to DEHP through dermal contact and/or ingestion.

17 30. DEFENDANTS intended that such exposures to DEHP from the reasonably
18 foreseeable uses of the PRODUCT would occur by DEFENDANTS' deliberate, non-accidental
19 participation in the manufacture, shaping, brokering, distribution, sale and offering of the
20 PRODUCT for sale or use to individuals in the State of California.

21 31. DEFENDANTS failed to provide a "clear and reasonable warning" to those
22 consumers and other individuals in the State of California who were or who would become exposed
23 to DEHP through dermal contact and/or ingestion during the reasonably foreseeable uses of the
24 PRODUCT, including through workplace exposures to the PRODUCT.

25 32. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
26 directly by California voters, individuals exposed to DEHP through dermal contact and/or ingestion
27 resulting from the reasonably foreseeable uses of the PRODUCT, including through workplace
28 exposures to the PRODUCT, sold by DEFENDANTS without a "clear and reasonable warning"

1 have suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or
2 adequate remedy at law.

3 33. 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 for
5 each violation.

6 34. 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, and each of them, as
11 follows:

- 12 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess civil
13 penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;
- 14 2. That the Court, pursuant to Health and Safety Code section 25249.7(a), preliminarily
15 and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the
16 PRODUCT for sale or use in the State of California without first providing a “clear and reasonable
17 warning” as defined by Title 27 of the California Code of Regulations, section 25601 *et seq.*, as to
18 the harms associated with exposures DEHP;
- 19 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and
20 4. That the Court grant such other and further relief as may be just and proper.

21 Dated: August 16, 2013

THE CHANLER GROUP

22
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24 By: _____
25 Clifford A. Chanler
26 Attorneys for Plaintiff
27 PETER ENGLANDER
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