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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

CGC - 14 - 541129

20 MARK MOORBERG,

21 Plaintiff,

22 v.

23 1-800-FLOWERS.COM, INC.;
24 DESIGNPAC GIFTS, LLC; and DOES 1 -
25 100, inclusive,

26 Defendants.

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

NATURE OF THE ACTION

1. This Complaint is a representative action brought by plaintiff MARK MOORBERG ("PLAINTIFF") in the public interest of the citizens of the State of California to enforce the People's right to be informed of the presence of Di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical found in vinyl/PVC basket handles sold in California. DEHP is a toxic chemical used to treat vinyl/PVC, which is used in a variety of products.

ENDORSED
FILED
San Francisco County Superior Court
AUG 14 2014
CLERK OF THE COURT
ELIAS BUTT
Deputy Clerk

1 2. By this Complaint, PLAINTIFF seeks to remedy Defendants continuing failures
2 to warn California citizens about the risk of exposure to DEHP present in and on vinyl/PVC
3 basket handles manufactured, distributed, and offered for sale or use to consumers throughout
4 the State of California.

5 3. Detectable levels of DEHP are commonly found in and on vinyl/PVC basket
6 handles that Defendants manufacture, distribute, and offer for sale to consumers throughout the
7 State of California. Individuals in California, including infants and children, are exposed to
8 DEHP in the products through various routes of exposure: (i) through inhalation when DEHP
9 are released from vinyl/PVC basket handles; (ii) through dermal exposure when DEHP from
10 vinyl/PVC basket handles accumulate in ambient particles that are subsequently touched by
11 such individuals; and (iii) through ingestion when such particles are brought into contact with
12 the mouth.

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
15 of doing business shall knowingly and intentionally expose any individual to a chemical known
16 to 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 cancer. DEHP became subject to the “clear and
20 reasonable warning” requirements of the Act one year later on October 24, 2004. Cal. Code
21 Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

22 6. DEHP is hereinafter referred to as the “LISTED CHEMICAL.”

23 7. Defendant 1-800-FLOWERS.COM, INC. (“1-800-FLOWERS”) manufactures,
24 distributes, imports, sells and/or offers for sale in California vinyl/PVC basket handles
25 containing DEHP without a warning including, but not limited to, DesignPac Decadent
26 Sampler Hamper Small, *Style F132523-BC, UPC #7 31427 42523 6.*

27 8. Defendant DESIGNPAC GIFTS, LLC (“DESIGNPAC”) manufactures,
28 distributes, imports, sells and/or offers for sale in California vinyl/PVC basket handles

1 containing DEHP without a warning including, but not limited to, DesignPac Decadent Sampler
2 Hamper Small, *Style F132523-BC, UPC #7 31427 42523 6.*

3 9. All products containing the LISTED CHEMICALS as listed in paragraph 7
4 through 8 above, shall hereinafter be referred to as the "PRODUCTS."

5 10. Although Defendants expose infants, children, and other people to the LISTED
6 CHEMICALS in the PRODUCTS, Defendants provides no warnings about the carcinogenic
7 hazards associated with exposures to the LISTED CHEMICALS. DEFENDANTS' failures to
8 warn consumers and other individuals and workers (specifically those not subject to
9 California's Occupational Health Act, Labor Code section 6300 et seq. or exempted under the
10 out-of-state manufacturer rule) in the State of California about their exposures to the LISTED
11 CHEMICALS in conjunction with DEFENDANTS' sales of the PRODUCTS, is a violation of
12 Proposition 65, and subjects DEFENDANTS to enjoinder of such conduct as well as civil
13 penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

14 11. As a result of DEFENDANTS' violations of Proposition 65, PLAINTIFF seeks
15 preliminary and permanent injunctive relief to compel Defendants to provide purchasers or
16 users of the PRODUCTS with the required warning regarding the health hazards of the
17 LISTED CHEMICAL in the PRODUCTS. Health & Safety Code § 25249.7(a).

18 12. Pursuant to Health and Safety Code section 25249.7(b), PLAINTIFF also seeks
19 civil penalties against DEFENDANTS for their violations of Proposition 65.

20
21 **PARTIES**

22 13. Plaintiff MARK MOORBERG ("PLAINTIFF"), is a citizen of the State of
23 California who is dedicated to protecting the health of California citizens through the
24 elimination or reduction of toxic exposures from consumer products; and he brings this action
25 in the public interest pursuant to Health and Safety Code section 25249.7(d).

26 14. Defendant 1-800-FLOWERS.COM, INC. ("1-800-FLOWERS") is a person in
27 the course of doing business within the meaning of Health and Safety Code sections 25249.6
28 and 25249.11.

1 15. 1-800-FLOWERS manufactures, imports, distributes, sells, and/or offers the
2 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
3 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
4 State of California.

5 16. Defendant DESIGNPAC GIFTS, LLC (“DESIGNPAC”) is a person in the
6 course of doing business within the meaning of Health and Safety Code sections 25249.6 and
7 25249.11.

8 17. DESIGNPAC manufactures, imports, distributes, sells, and/or offers the
9 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
10 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
11 State of California.

12 18. Defendants DOES 1 -100 are each persons in the course of doing business within
13 the meaning of Health and Safety Code section 25249.11(b), which manufacture, distribute,
14 sell, and/or offer the PRODUCTS for sale in the State of California. At this time, the true
15 names and capacities of defendants DOES 1 through 100, inclusive, are unknown to
16 PLAINTIFF, who, therefore, sues said defendants by their fictitious names pursuant to Code of
17 Civil Procedure section 474. PLAINTIFF is informed and believes, and on that basis alleges,
18 that each of the fictitiously named defendants is responsible for the acts and occurrences
19 alleged herein. When ascertained, their true names and capacities shall be reflected in an
20 amended complaint.

21 19. 1-800-FLOWERS, DESIGNPAC and Defendants DOES 1 -100 are collectively
22 referred to herein as “DEFENDANTS.”

23 VENUE AND JURISDICTION

24 20. Venue is proper in San Francisco Superior Court, pursuant to Code of Civil
25 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
26 because PLAINTIFF seeks civil penalties against DEFENDANTS, because one or more
27 instances of wrongful conduct occurred, and continue to occur, in the City and County of San
28

1 Francisco, and/or because DEFENDANTS conducted, and continue to conduct, business in this
2 county with respect to the PRODUCTS.

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

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

14 **FIRST CAUSE OF ACTION**

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

16 23. PLAINTIFF re-alleges and incorporates by reference, as if fully set forth herein,
17 Paragraphs 1 through 22, inclusive.

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

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

26 26. On May 21, 2014, PLAINTIFF’S sixty-day notice of violation, together with the
27 requisite certificate of merit, was provided to 1-800-FLOWERS and DESIGNPAC and certain
28 public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the

1 PRODUCTS containing DEHP, purchasers and users in the State of California were being
2 exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without
3 the individual purchasers and users first having been provided with a “clear and reasonable
4 warning” regarding such toxic exposures, as required by Proposition 65.

5 27. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
6 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
7 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
8 PLAINTIFF’S sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing
9 and continuous in nature, and will continue to occur in the future.

10 28. After receiving PLAINTIFF’S sixty-day notice of violation, the appropriate
11 public enforcement agencies have failed to commence and diligently prosecute a cause of
12 action against DEFENDANTS under Proposition 65.

13 29. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
14 or use in California by DEFENDANTS contain the LISTED CHEMICAL such that they
15 require a “clear and reasonable” warning under Proposition 65.

16 30. DEFENDANTS knew or should have known that the PRODUCTS they
17 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED
18 CHEMICAL.

19 31. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as
20 to expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
21 inhalation during reasonably foreseeable use of the PRODUCTS including through workplace
22 exposure to the PRODUCTS.

23 32. The normal and reasonably foreseeable uses of the PRODUCTS have caused,
24 and continue to cause, consumer exposures to the LISTED CHEMICAL; as such exposures are
25 defined by the California Code of Regulations Title 27, section 25602(b).

26 33. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
27 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact,
28 ingestion, and/or inhalation.

1 offering the PRODUCTS for sale or use in California without first providing a “clear and
2 reasonable warning” as defined by the California Code of Regulations title 27, section 25601 *et*
3 *seq.*, as to the harms associated with exposures the LISTED CHEMICAL;

4 3. That the Court, pursuant to Health and Safety Code section 25249.7(a), issue
5 preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS
6 currently in the chain of commerce in California without a “clear and reasonable warning” as
7 defined by California Code of Regulations title 27, section 25601 *et seq.*,

8 4. That the Court grant PLAINTIFF his reasonable attorneys’ fees and costs of suit;
9 and

10 5. That the Court grant such other and further relief as may be just and proper.

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12 Dated: August 13, 2014

Respectfully Submitted,

MOSCONE EMBLIDGE SATER & OTIS LLP

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15 By: 

16 Steven L. Iriki

17 Attorneys for Plaintiff MARK MOORBERG
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