

1 Christopher C. Moscone, State Bar No. 170250
2 Rachel J. Sater, State Bar No. 147976
3 Steven L. Iriki, State Bar No. 142533
4 MOSCONE EMBLIDGE SATER & OTIS LLP
5 220 Montgomery Street, Suite 2100
6 San Francisco, CA 94104
7 Telephone: (415) 362-3599
8 Facsimile: (415) 362-2006

9 Clifford A. Chanler, State Bar No. 135534
10 THE CHANLER GROUP
11 2560 Ninth Street
12 Parker Plaza, Suite 214
13 Berkeley, CA 94710
14 Telephone: (510) 848-8880
15 Facsimile: (510) 848-8118

16 Attorneys for Plaintiff
17 MARK MOORBERG

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

20 MARK MOORBERG,

21 Plaintiff,

22 v.

23 BENSUSSEN DEUTSCH &
24 ASSOCIATES, INC.; and DOES 1 -100,
25 inclusive,

26 Defendants.

27 Case No. CGC - 14 - 541130

28 **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 stylus toppers 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 stylus toppers 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 stylus
6 toppers 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 stylus toppers; (ii) through dermal exposure when DEHP from
10 vinyl/PVC stylus toppers 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 BENSUSSEN DEUTSCH & ASSOCIATES, INC. (“BENSUSSEN”)
24 manufactures, distributes, imports, sells and/or offers for sale in California vinyl/PVC stylus
25 toppers containing DEHP without a warning including, but not limited to, Nintendo #DS Mario
26 Kart 7 Stylus Kit, #00346, LOT11020C0201, UPC #6 17885 96335 3.

27 8. All products containing the LISTED CHEMICALS as listed in paragraph 7
28 above, shall hereinafter be referred to as the “PRODUCTS.”

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

10 16. BENSUSSEN and Defendants DOES 1 -100 are collectively referred to herein as
11 "DEFENDANTS."

12 **VENUE AND JURISDICTION**

13 17. Venue is proper in San Francisco Superior Court, pursuant to Code of Civil
14 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
15 because PLAINTIFF seeks civil penalties against DEFENDANTS, because one or more
16 instances of wrongful conduct occurred, and continue to occur, in the City and County of San
17 Francisco, and/or because DEFENDANTS conducted, and continue to conduct, business in this
18 county with respect to the PRODUCTS.

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

23 19. The California Superior Court has jurisdiction over DEFENDANTS based on
24 PLAINTIFF'S information and good faith belief that each of the DEFENDANTS is a person,
25 firm, corporation, or association that is a citizen of the State of California, has sufficient
26 minimum contacts in the State of California, and/or otherwise purposefully avails itself of the
27 California market. DEFENDANTS' purposeful availment of California as a marketplace for
28 the PRODUCTS renders the exercise of personal jurisdiction by California courts over

1 DEFENDANTS consistent with traditional notions of fair play and substantial justice.

2 **FIRST CAUSE OF ACTION**

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

4 20. PLAINTIFF re-alleges and incorporates by reference, as if fully set forth herein,
5 Paragraphs 1 through 19, inclusive.

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

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

14 23. On May 21, 2014, PLAINTIFF’S sixty-day notice of violation, together with the
15 requisite certificate of merit, was provided to BENSUSSEN and certain public enforcement
16 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing
17 DEHP, purchasers and users in the State of California were being exposed to DEHP resulting
18 from their reasonably foreseeable use of the PRODUCTS, without the individual purchasers
19 and users first having been provided with a “clear and reasonable warning” regarding such
20 toxic exposures, as required by Proposition 65.

21 24. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
22 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
23 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
24 PLAINTIFF’S sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing
25 and continuous in nature, and will continue to occur in the future.

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

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

4 27. 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 28. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as
8 to expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
9 inhalation during reasonably foreseeable use of the PRODUCTS including through workplace
10 exposure to the PRODUCTS.

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

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

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

21 32. 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
23 exposed to the LISTED CHEMICAL through dermal contact, ingestion, and/or inhalation
24 during the reasonably foreseeable uses of the PRODUCTS including through workplace
25 exposure to the PRODUCTS.

26 33. Contrary to the express policy and statutory prohibition of Proposition 65
27 enacted directly by California voters, individuals exposed to the LISTED CHEMICAL through
28 dermal contact, ingestion, and/or inhalation resulting from the reasonably foreseeable uses of

1 the PRODUCTS including through workplace exposure to the PRODUCTS sold by
2 DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to
3 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

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

10 **PRAYER FOR RELIEF**

11 Wherefore, plaintiffs pray for judgment against DEFENDANTS, and each of them, as
12 follows:

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

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

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

24 //
25 //
26 //
27 //
28 //

1 4. That the Court grant PLAINTIFF his reasonable attorneys' fees and costs of suit;
2 and

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

5 Dated: August 13, 2014

Respectfully Submitted,

6 MOSCONE EMBLIDGE SATER & OTIS LLP

7
8 By: 
9 Steven L. Iriki
Attorneys for Plaintiff MARK MOORBERG