

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Josh Voorhees, State Bar No. 241436
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
JOHN MOORE

ENDORSED
FILED
ALAMEDA COUNTY
SEP 15 2014
CLERK OF THE SUPERIOR COURT
By S. KAMU Deputy

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

JOHN MOORE,

Plaintiff,

v.

ACHIM IMPORTING COMPANY INC.;
AMAZON.COM, INC.; WAYFAIR LLC; and
DOES 1-150, inclusive,

Defendants.

Case No. RG14730480
**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 floor tiles sold in California.

6 2. By this First Amended Complaint, plaintiff seeks to remedy defendants’
7 continuing failure to warn California citizens about reproductive harms associated with their
8 exposure to DEHP present in and on the vinyl/PVC floor tiles that defendants manufacture,
9 import, distribute, and/or offer for sale to consumers throughout the State of California.

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

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

20 5. Defendants manufacture, import, distribute, sell and/or offer to sell vinyl/PVC
21 floor tiles that contain DEHP in levels that require a warning under Proposition 65, including,
22 but not limited to: (1) *Nexus Tile Collection Self-Adhesive Vinyl Floor Tiles, Style*
23 *FTVWD201DG, SKU Number FTVWD20120 (UPC #0 54006 33236 8)*; (2) *Nexus Tile*
24 *Collection Self-Adhesive Vinyl Floor Tiles, SKU Number FTVGM32720 (UPC # 0 54006 33269*
25 *6)*; and (3) *Nexus Tile Collection Self-Adhesive Vinyl Floor Tiles, SKU Number FTVWD20220,*
26 *UPC #0 54006 33237 5*). All such vinyl/PVC floor tiles containing DEHP are referred to
27 collectively hereinafter as “PRODUCTS.”
28

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

4 16. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each
5 persons in the course of doing business within the meaning of Health and Safety Code section
6 25249.11.

7 17. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
8 and/or manufacture, or imply by their conduct that they research, test, design, assemble,
9 fabricate, and/or manufacture one or more of the PRODUCTS offered for sale or use in the
10 State of California.

11 18. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
12 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

13 19. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
14 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
15 in the State of California.

16 20. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
17 the course of doing business within the meaning of Health and Safety Code section 25249.11.

18 21. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
19 State of California.

20 22. At this time, the true names of defendants DOES 1 through 150, inclusive, are
21 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
22 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
23 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
24 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

25 23. ACHIM, AMAZON, WAYFAIR, MANUFACTURER DEFENDANTS,
26 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,
27 collectively be referred to as “DEFENDANTS.”
28

1 **VENUE AND JURISDICTION**

2 24. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
3 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
4 because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda
5 County, and/or because DEFENDANTS conducted, and continue to conduct, business in this
6 county with respect to the PRODUCTS.

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

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

17 **FIRST CAUSE OF ACTION**

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

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

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

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

1 30. On July 5, 2013, plaintiff served a Sixty-Day Notice Of Violation of Proposition
2 65 (“Notice”), together with the requisite certificate of merit, on ACHIM and the requisite
3 public prosecutors stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
4 containing the LISTED CHEMICAL, purchasers and users in the State of California were being
5 exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable uses of the
6 PRODUCTS, without the individual purchasers and users first having been provided with a
7 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.

8 31. On June 20, 2014, plaintiff served a Supplemental Sixty-Day Notice Of Violation
9 of Proposition 65 (“Supplemental Notice”), together with the requisite certificate of merit, on
10 ACHIM, AMAZON, WAYFAIR, and the requisite public prosecutors stating that as a result of
11 DEFENDANTS’ sales of the PRODUCTS containing the LISTED CHEMICAL, purchasers
12 and users in the State of California were being exposed to the LISTED CHEMICAL resulting
13 from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
14 users first having been provided with a “clear and reasonable warning” regarding such toxic
15 exposures, as required by Proposition 65. The Notice and Supplemental Notice are referred to
16 hereinafter as the “Notices.”

17 32. DEFENDANTS have engaged in the manufacture, import, distribution, sale,
18 and/or offering of the PRODUCTS for sale or use in violation of Health & Safety Code
19 § 25249.6, and such violations have continued to occur beyond DEFENDANTS’ receipt of
20 plaintiff’s Notices. DEFENDANTS’ violations are thus ongoing and continuous in nature.
21 Plaintiff further alleges and believes that such violations will continue to occur into the future.

22 33. After receiving plaintiff’s Notices, the appropriate public prosecutors have failed
23 to commence and diligently prosecute a cause of action against DEFENDANTS under
24 Proposition 65 regarding the allegations in plaintiff’s Notices.

25 34. The PRODUCTS manufactured, imported, distributed, sold, and/or offered for
26 sale or use in California by DEFENDANTS contain detectable amounts of the LISTED
27 CHEMICAL, such that DEFENDANTS must provide a “clear and reasonable” warning under
28 Proposition 65 to consumers and/or users of the PRODUCTS in California.

1 35. DEFENDANTS knew or should have known that the PRODUCTS they
2 manufacture, import, distribute, sell, and/or offer for sale or use in California contain the
3 LISTED CHEMICAL.

4 36. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
5 expose individuals to DEHP through dermal contact and/or ingestion during reasonably
6 foreseeable use.

7 37. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
8 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
9 defined by 27 CCR § 25602(b).

10 38. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
11 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact
12 and/or ingestion.

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

17 40. DEFENDANTS failed to provide a “clear and reasonable warning” to those
18 consumers and other individuals in the State of California who were or who would become
19 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion while using the
20 PRODUCTS in reasonably foreseeable ways.

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

26 42. Pursuant to Health & Safety Code § 25249.7(b), as a consequence of the above-
27 described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day for
28 each violation.

1 43. As a consequence of the above-described acts, Health & Safety Code
2 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
3 DEFENDANTS.

4 **PRAYER FOR RELIEF**

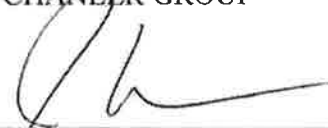
5 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

15 Respectfully submitted.

16 Dated: September 12, 2014

17 THE CHANLER GROUP

18
19 By: 
20 Josh Voorhees
21 Attorneys for Plaintiff
22 JOHN MOORE
23
24
25
26
27
28