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ENDORSED
FILED
ALAMEDA COUNTY

OCT 20 2014

CLERK OF THE SUPERIOR COURT
By Maria Carrera

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA

13 UNLIMITED CIVIL JURISDICTION

14 MARK MOORBERG,

15 Plaintiff,

16 v.

17 EAST BAY RESTAURANT SUPPLY, INC.;
18 and DOES 1-150, inclusive,

19 Defendant.

20) Case No. RG 14-745064

21) **COMPLAINT FOR CIVIL PENALTIES**
22) **AND INJUNCTIVE RELIEF**

23) (Health & Safety Code § 25249.5 *et seq.*)
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1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff MARK
3 MOORBERG in the public interest of the citizens of the State of California to enforce the
4 People's right to be informed of the health hazards caused by exposures to di(2-
5 ethylhexyl)phthalate ("DEHP"), a toxic chemical found in Pedometers with vinyl/PVC ID
6 Holders sold by defendants in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to
8 warn California citizens and other individuals about the risks of exposure to DEHP present in
9 and on Pedometers with vinyl/PVC ID Holders manufactured, distributed, and offered for sale
10 or use to consumers and other individuals throughout the State of California.

11 3. Detectable levels of DEHP are found in and on Pedometers with vinyl/PVC ID
12 Holders that defendants manufacture, distribute, and offer for sale to consumers and other
13 individuals throughout the State of California.

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

19 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
20 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became
21 subject to the "clear and reasonable warning" requirements of the act one year later on October
22 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
23 25249.10(b).

24 6. Defendants manufacture, distribute, import, sell, and offer for sale without health
25 hazard warnings in California, Pedometers with vinyl/PVC ID Holders containing DEHP,
26 including, but not limited to, the *Jamba Juice Pedometer with Retractable ID Holder*,
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1 #83765428406, UPC #8 37654 28406 3. All such Pedometers with vinyl/PVC ID Holders
2 containing DEHP are referred to collectively hereinafter as "PRODUCTS."

3 7. Defendants' failure to warn consumers and other individuals in the State of
4 California of the health hazards associated with exposures to DEHP in conjunction with
5 defendants' sales of the PRODUCTS are violations of Proposition 65, and subject defendants,
6 and each of them, to enjoinder of such conduct as well as civil penalties for each violation.
7 Health & Safety Code § 25249.7(a) & (b)(1).

8 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
9 permanent injunctive relief to compel defendants to provide purchasers or users of the
10 PRODUCTS with the required warning regarding the health hazards associated with exposures
11 to DEHP. Health & Safety Code § 25249.7(a).

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

14 PARTIES

15 10. Plaintiff MARK MOORBERG is a citizen of the State of California who is
16 dedicated to protecting the health of California citizens through the elimination or reduction of
17 toxic exposures from consumer products; and he brings this action in the public interest
18 pursuant to Health and Safety Code section 25249.7(d).

19 11. Defendant EAST BAY RESTAURANT SUPPLY, INC ("EBRS") is a person in
20 the course of doing business within the meaning of Health and Safety Code sections 25249.6
21 and 25249.11.

22 12. EBRS manufactures, imports, distributes, sells, and/or offers the PRODUCTS for
23 sale or use in the State of California, or imply by its conduct that it manufactures, imports,
24 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

25 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each
26 persons in the course of doing business within the meaning of Health and Safety Code sections
27 25249.6 and 25249.11.

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1 wrongful conduct occurred, and continue to occur, in this county, and/or because
2 DEFENDANTS conducted, and continue to conduct, business in Alameda County with respect
3 to the PRODUCTS.

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

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

14 **FIRST CAUSE OF ACTION**

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

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

18 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
19 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 26. 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 27. On July 30, 2014, plaintiff served a supplemental sixty-day notice of violation,
27 together with the requisite certificate of merit, on EBRS and certain public enforcement
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1 agencies alleging that, as a result of DEFENDANTS' sales of the PRODUCTS containing
2 DEHP, purchasers and users in the State of California were being exposed to DEHP resulting
3 from their reasonably foreseeable use of the PRODUCTS, without the individual purchasers and
4 users first having been provided with a "clear and reasonable warning" regarding the harms
5 associated with such exposures, as required by Proposition 65.

6 28. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
7 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS'
8 violations have continued beyond their receipt of plaintiff's supplemental sixty-day notice of
9 violation. DEFENDANTS' violations are ongoing and continuous in nature, and, as such, will
10 continue in the future.

11 29. After receiving plaintiff's sixty-day notice of violation, none of the appropriate
12 public enforcement agencies have commenced and diligently prosecuted a cause of action
13 against DEFENDANTS under Proposition 65 to enforce the alleged violations that are the
14 subject of plaintiff's notice of violation.

15 30. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
16 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
17 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
18 consumers and other individuals in California are not exempt from the "clear and reasonable"
19 warning requirements of Proposition 65, yet DEFENDANTS provide no warning.

20 31. DEFENDANTS knew or should have known that the PRODUCTS they
21 manufactured, imported, distributed, sold, and offered for sale or use in California contained
22 DEHP.

23 32. DEHP is present in or on the PRODUCTS in such a way as to expose individuals
24 to DEHP through dermal contact and/or ingestion during reasonably foreseeable use.

25 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
26 continues to cause, consumer exposures to DEHP, as defined by title 27 of the California Code
27 of Regulations, section 25602(b).

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1 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
2 the PRODUCTS exposed individuals to DEHP through dermal contact and/or ingestion.

3 35. DEFENDANTS intended that exposures to DEHP from the reasonably
4 foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation
5 in the manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or
6 use to consumers and other individuals in California.

7 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those
8 consumers and other individuals in California who were or who would become exposed to
9 DEHP through dermal contact and/or ingestion resulting from their use of the PRODUCTS.

10 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
11 directly by California voters, individuals exposed to DEHP through dermal contact and/or
12 ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold without a "clear
13 and reasonable" health hazard warning, have suffered, and continue to suffer, irreparable harm
14 for which they have no plain, speedy, or adequate remedy at law.

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

18 39. As a consequence of the above-described acts, Health and Safety Code
19 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
20 DEFENDANTS.

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PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation;
2. That the Court, pursuant to Health and Safety Code section 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California without first providing a "clear and reasonable warning" in accordance with title 27 of the California Code of Regulations, section 25601 *et seq.*, regarding the harms associated with exposures DEHP;
3. That the Court, Pursuant to Health and Safety Code section 25249.7(a), issue preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS currently in the chain of commerce in California without a "clear and reasonable warning" as defined by California Code of Regulations title 27, section 25601 *et seq.*;
4. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
5. That the Court grant such other and further relief as may be just and proper.

Dated: October 17, 2014

Respectfully Submitted,
THE CHANLER GROUP

By: 

Troy C. Bailey
Attorneys for Plaintiff
MARK MOORBERG