

ENDORSED
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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By Lynetta M. Irvin, Deputy

Brian C. Johnson, State Bar No. 235965
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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

NEW ENTERPRISE STONE & LIME CO.,
INC.; and WORK AREA PROTECTION
CORPORATION,

Defendants.

) Case No. **RG 15781127**

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

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

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff JOHN MOORE in
3 the public interest of the citizens of the State of California to enforce the People’s right to be
4 informed of the health hazards caused by exposures to di(2-ethylhexyl)phthalate (“DEHP”), a
5 toxic chemical found in vinyl/PVC cones sold by defendants in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
7 warn individuals not covered by California’s Occupational Safety Health Act, Labor Code
8 section 6300 et seq., who purchase, use or handle defendants’ products, about the risks of
9 exposure to DEHP present in and on the vinyl/PVC cones manufactured, distributed, and
10 offered for sale or use throughout the State of California. Individuals not covered by
11 California’s Occupational Safety Health Act, Labor Code section 6300 et seq., who purchase,
12 use or handle defendants’ products, are referred to hereinafter as “consumers.”

13 3. Detectable levels of DEHP are found in and on the vinyl/PVC cones that
14 defendants manufacture, distribute, and offer for sale to consumers throughout the State of
15 California.

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

21 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
22 DEHP as a chemical known to cause birth defects (and reproductive harm). DEHP became
23 subject to the “clear and reasonable warning” requirements of the act one year later on October
24 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
25 25249.10(b).

26 6. Defendants manufacture, distribute, import, sell, and offer for sale without health
27 hazard warnings in California, vinyl/PVC cones containing DEHP including, but not limited to,
28

1 the Cone, #12PVCS, UPC #8 94043 00001 7. All such vinyl/PVC cones containing DEHP are
2 referred to collectively hereinafter as "PRODUCTS."

3 7. Defendants' failure to warn consumers in the State of California of the health
4 hazards associated with exposures to DEHP in conjunction with defendants' sales of the
5 PRODUCTS are violations of Proposition 65, and subject defendants, and each of them, to
6 enjoinder of such conduct as well as civil penalties for each violation. Health & Safety Code
7 § 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 consumers of the PRODUCTS with
10 the required warning regarding the health hazards associated with exposures to DEHP. Health
11 & 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 JOHN MOORE is a citizen of the State of California who is dedicated to
16 protecting the health of California citizens through the elimination or reduction of toxic
17 exposures from consumer products; and he brings this action in the public interest pursuant to
18 Health and Safety Code section 25249.7(d).

19 11. Defendant NEW ENTERPRISE STONE & LIME CO., INC. ("NEW
20 ENTERPRISE") is a person in the course of doing business within the meaning of Health and
21 Safety Code sections 25249.6 and 25249.11.

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

1 **FIRST CAUSE OF ACTION**

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

3 19. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 18, inclusive.

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

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

13 22. On February 27, 2015, plaintiff served a sixty-day notice of violation, together
14 with the accompanying certificate of merit, on NEW ENTERPRISE, WAPC, the California
15 Attorney General’s Office, and the requisite public enforcement agencies alleging that, as a
16 result of DEFENDANTS’ sales of the PRODUCTS, consumers in the State of California are
17 being exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS,
18 without the consumers first receiving a “clear and reasonable warning” regarding the harms
19 associated with exposures to DEHP, as required by Proposition 65.

20 23. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
21 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS’
22 violations have continued beyond their receipt of plaintiff’s sixty-day notice of violation. As
23 such, DEFENDANTS’ violations are ongoing and continuous in nature and, unless enjoined
24 will continue in the future.

25 24. After receiving plaintiff’s sixty-day notice of violation, no public enforcement
26 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS
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1 under Proposition 65 to enforce the alleged violations that are the subject of plaintiff's notice of
2 violation.

3 25. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
4 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
5 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
6 consumers in California are not exempt from the "clear and reasonable" warning requirements
7 of Proposition 65, yet DEFENDANTS provide no warning.

8 26. DEFENDANTS knew or should have known that the PRODUCTS they
9 manufacture, import, distribute, sell, and offer for sale in California contain DEHP.

10 27. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
11 through dermal contact and/or ingestion during reasonably foreseeable use.

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

15 29. DEFENDANTS know that the normal and reasonably foreseeable use of the
16 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

17 30. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
18 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
19 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
20 consumers in California.

21 31. DEFENDANTS failed to provide a "clear and reasonable warning" to those
22 consumers in California who have been, or who will be, exposed to DEHP through dermal
23 contact and/or ingestion resulting from their use of the PRODUCTS.

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

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

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

8 **PRAYER FOR RELIEF**

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

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

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

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

22 4. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

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

24 Dated: August 7, 2015

25 Respectfully submitted,
THE CHANLER GROUP

26 By: 
27 Brian C. Johnson
Attorneys for Plaintiff
28 JOHN MOORE