

1 Brian C. Johnson, State bar No. 235965
2 Christopher Tuttle, State Bar No. 264545
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 MARK MOORBERG

FILED

JAN 19 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: C. Lucchesi, Deputy

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION

15 MARK MOORBERG,

16 Plaintiff,

17 v.

18 HOME ESSENTIALS & BEYOND, INC.; and
19 DOES 1-150, inclusive,

20 Defendants.

Case No. 011/ 1600202

**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 Mark Moorberg
3 (“Plaintiff”) 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 and on the vinyl/PVC magnifying
6 glass handles sold by defendants in California.

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

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

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

22 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
23 DEHP as a chemical known to cause birth defects (and reproductive harm). DEHP became
24 subject to the “clear and reasonable warning” requirements of the act one year later on October
25 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
26 25249.10(b).

1 6. Defendants manufacture, distribute, import, sell, and offer for sale without health
2 hazard warnings in California, vinyl/PVC magnifying glass handles that contain DEHP including,
3 but not limited to, *Acacia Magnifying Glass*, #69572, UPC #7 86460 69572 6. All such
4 vinyl/PVC magnifying glass handles containing DEHP are referred to collectively hereinafter as
5 “PRODUCTS.”

6 7. Defendants’ failure to warn consumers in the State of California of the health
7 hazards associated with exposures to DEHP in conjunction with defendants’ sales of the
8 PRODUCTS are violations of Proposition 65, and subject defendants, and each of them, to
9 enjoinder of such conduct as well as civil penalties for each violation. Health & Safety Code
10 § 25249.7(a) & (b)(1).

11 8. For defendants’ violations of Proposition 65, Plaintiff seeks preliminary and
12 permanent injunctive relief to compel defendants to provide consumers of the PRODUCTS with
13 the required warning regarding the health hazards associated with exposures to DEHP. Health
14 & Safety Code § 25249.7(a).

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

17 **PARTIES**

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

22 11. Defendant HOME ESSENTIALS & BEYOND, INC. (“HOME ESSENTIALS”)
23 is a person in the course of doing business within the meaning of Health and Safety Code
24 sections 25249.6 and 25249.11.

25 12. HOME ESSENTIALS manufactures, imports, distributes, sells, and/or offers the
26 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
27
28

1 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
2 State of California.

3 13. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
4 person in the course of doing business within the meaning of Health and Safety Code sections
5 25249.6 and 25249.11.

6 14. MANUFACTURER DEFENDANTS, and each of them, research, test, design,
7 assemble, fabricate, and manufacture, or each implies by its conduct that it researches, tests,
8 designs, assembles, fabricates, and manufactures one or more of the PRODUCTS offered for
9 sale or use in California.

10 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
11 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
12 and 25249.11.

13 16. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
14 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
15 retailers for sale or use in the State of California, or each implies by its conduct that it
16 distributes, exchanges, transfers, processes, and transports one or more of the PRODUCTS to
17 individuals, businesses, or retailers for sale or use in the State of California.

18 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
19 the course of doing business within the meaning of Health and Safety Code sections 25249.6
20 and 25249.11.

21 18. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to
22 individuals in the State of California.

23 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are
24 unknown to Plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
25 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
26 allege, that each of the fictitiously named defendants is responsible for the acts and occurrences
27 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
28

1 20. HOME ESSENTIALS, MANUFACTURER DEFENDANTS, DISTRIBUTOR
2 DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter, where appropriate, be
3 referred to collectively as the “DEFENDANTS.”

4 **VENUE AND JURISDICTION**

5 21. Venue is proper in the Superior Court for the County of Marin pursuant to Code
6 of Civil Procedure sections 393, 395, and 395.5, because this Court is a court of competent
7 jurisdiction, because Plaintiff seeks civil penalties against DEFENDANTS, because one or more
8 instances of wrongful conduct occurred, and continue to occur, in this county, and/or because
9 DEFENDANTS conducted, and continue to conduct, business in Marin with respect to the
10 PRODUCTS.

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

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

21 **FIRST CAUSE OF ACTION**

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

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

25 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
26 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be
27
28

1 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
2 harm.”

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

7 27. On June 26, 2015, Plaintiff served a sixty-day notice of violation, together with
8 the accompanying certificate of merit, on HOME ESSENTIALS, California Attorney General’s
9 Office, and the requisite public enforcement agencies alleging that, as a result of
10 DEFENDANTS’ sales of the PRODUCTS, consumers in the State of California are being
11 exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without
12 the consumers first receiving a “clear and reasonable warning” regarding the harms associated
13 with exposures to DEHP, as required by Proposition 65.

14 28. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
15 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS’
16 violations have continued beyond their receipt of Plaintiff’s sixty-day notice of violation. As
17 such, DEFENDANTS’ violations are ongoing and continuous in nature and, unless enjoined
18 will continue in the future.

19 29. After receiving Plaintiff’s sixty-day notice of violation, no public enforcement
20 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS
21 under Proposition 65 to enforce the alleged violations that are the subject of Plaintiff’s notice of
22 violation.

23 30. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
24 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
25 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
26 consumers in California are not exempt from the “clear and reasonable” warning requirements
27 of Proposition 65, yet DEFENDANTS provide no clear & reasonable warning.
28

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

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

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

8 34. DEFENDANTS know that the normal and reasonably foreseeable use of the
9 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

10 35. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
11 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
12 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
13 consumers in California.

14 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
15 consumers in California who have been, or who will be, exposed to DEHP through dermal
16 contact and/or ingestion resulting from their use of the PRODUCTS.

17 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
18 directly by California voters, consumers exposed to DEHP through dermal contact and/or
19 ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold without a “clear
20 and reasonable” health hazard warning, have suffered, and continue to suffer, irreparable harm
21 for which they have no plain, speedy, or adequate remedy at law.

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

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

28

1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiff prays for judgment against DEFENDANTS as follows:

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

6 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
7 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
8 offering the PRODUCTS for sale or use in California without first providing a “clear and
9 reasonable warning” in accordance with title 27 of the California Code of Regulations, section
10 25601 *et seq.*, regarding the harms associated with exposures to DEHP;

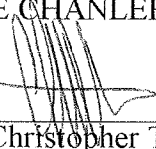
11 3. That the Court, Pursuant to Health and Safety Code section 25249.7(a), issue
12 preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS
13 currently in the chain of commerce in California without a “clear and reasonable warning” as
14 defined by California Code of Regulations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

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

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

17
18 Dated: January 15, 2016

19 Respectfully submitted,
20 THE CHANLER GROUP

21 By: 
22 Christopher Tuttle
23 Attorneys for Plaintiff
24 MARK MOORBERG
25
26
27
28