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Brian Johnson, State Bar No. 235965
Kimberly Gates, State Bar No. 282369
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118
E-mail: brian@chanler.com
E-mail: kimberly@chanler.com

Attorneys for Plaintiff
JOHN MOORE

FILED

MAR - 2 2016

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

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

JOHN MOORE,

Plaintiff,

v.

XYLEM, INC.; and DOES 1-150, inclusive,

Defendants.

Case No. CIV 1600763 -
**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 and on the vinyl/PVC tubing 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 6300 *et seq.*, who purchase, use, or handle defendants’ products, about the risks of exposures to
9 DEHP present in and on the vinyl/PVC tubing that defendants manufacture, distribute, and
10 offer for sale or use throughout the State of California. Individuals not covered by California’s
11 Occupational Safety Health Act, Labor Code § 6300 *et seq.*, who purchase, use or handle
12 defendants’ products, are referred to hereinafter as “consumers.”

13 3. Detectable levels of DEHP are found in and on the vinyl/PVC tubing 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 § 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 listed DEHP as a
22 chemical known to cause birth defects or reproductive harm. DEHP became subject to the
23 “clear and reasonable warning” requirements of the act one year later on October 24, 2004. Cal.
24 Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

25 6. Defendants manufacture, distribute, import, sell, and/or offer for sale, in
26 California, without health hazard warnings, vinyl/PVC tubing containing DEHP, including, but
27 not limited to, the tubing sold in conjunction with the *Jabsco Self-Priming Electric Drill Pump*
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1 Kit, #17215-0000, UPC #6 71880 01257 7. All such vinyl/PVC tubing 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 § 25249.7(b), plaintiff also seeks civil
13 penalties against defendants for their violations of Proposition 65.

14 PARTIES

15 1. 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 § 25249.7(d).

19 2. Defendant XYLEM, INC. ("XYLEM") is a person in the course of doing business
20 within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

21 3. XYLEM manufactures, imports, distributes, sells, and/or offers the PRODUCTS
22 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
23 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

24 4. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each a
25 person in the course of doing business within the meaning of Health and Safety Code § 25249.6
26 and § 25249.11.

27 5. MANUFACTURER DEFENDANTS, and each of them, research, test, design,
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1 assemble, fabricate, and manufacture, or each implies by its conduct that it researches, tests,
2 designs, assembles, fabricates, and manufactures one or more of the PRODUCTS offered for
3 sale or use in California.

4 6. Defendants DOES 51-100 (the "DISTRIBUTOR DEFENDANTS") are each a
5 person in the course of doing business within the meaning of Health and Safety Code § 25249.6
6 and § 25249.11.

7 7. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
8 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
9 retailers for sale or use in the State of California, or each implies by its conduct that it
10 distributes, exchanges, transfers, processes, and transports one or more of the PRODUCTS to
11 individuals, businesses, or retailers for sale or use in the State of California.

12 8. Defendants DOES 101-150 (the "RETAILER DEFENDANTS") are each a
13 person in the course of doing business within the meaning of Health and Safety Code § 25249.6
14 and § 25249.11.

15 9. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to
16 individuals in the State of California.

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

22 11. XYLEM, MANUFACTURER DEFENDANTS, DISTRIBUTOR
23 DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter be referred to collectively
24 as the "DEFENDANTS."

25 **VENUE AND JURISDICTION**

26 12. Venue is proper in the Superior Court for the County of Marin, pursuant to Code
27 of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of competent
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1 jurisdiction, because plaintiff seeks civil penalties against DEFENDANTS, because one or more
2 instances of wrongful conduct occurred, and continue to occur, in this county, and/or because
3 DEFENDANTS conducted, and continue to conduct, business in Marin with respect to the
4 PRODUCTS.

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

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

15 **FIRST CAUSE OF ACTION**

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

17 15. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
18 Paragraphs 1 through 14, inclusive.

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

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

1 18. On October 21, 2015, plaintiff served a sixty-day notice of violation, together
2 with the accompanying certificate of merit, on XYLEM, the California Attorney General, and
3 all other requisite public enforcers alleging that, as a result of DEFENDANTS' sales of the
4 PRODUCTS, consumers in the State of California are being exposed to DEHP resulting from
5 their reasonably foreseeable use of the PRODUCTS, without the consumers first receiving a
6 "clear and reasonable warning" regarding the harms associated with exposures to DEHP, as
7 required by Proposition 65.

8 19. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
9 for sale or use in violation of Health and Safety Code § 25249.6, and DEFENDANTS'
10 violations have continued beyond their receipt of plaintiff's sixty-day notice of violation. As
11 such, DEFENDANTS' violations are ongoing and continuous and, unless enjoined, will
12 continue in the future.

13 20. After receiving plaintiff's sixty-day notice of violation, no public enforcement
14 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS
15 under Proposition 65 to enforce the alleged violations that are the subject of plaintiff's notice of
16 violation.

17 21. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
18 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
19 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
20 consumers in California are not exempt from the "clear and reasonable" warning requirements
21 of Proposition 65, yet DEFENDANTS provide no warning. DEFENDANTS' violations of
22 Proposition 65, resulting from their failure to provide warnings to consumers exposed to DEHP
23 from the PRODUCTS, have continued since as far back as October 21, 2012.

24 22. DEFENDANTS know or should know that the PRODUCTS they manufacture,
25 import, distribute, sell, and offer for sale in California contain DEHP.

26 23. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
27 through dermal contact and/or ingestion during reasonably foreseeable use.
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1 24. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
2 continues to cause, consumer exposures to DEHP, as defined by Title 27 of the California Code
3 of Regulations, § 25602(b).

4 25. DEFENDANTS know that the normal and reasonably foreseeable use of the
5 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

6 26. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
7 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
8 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
9 consumers in California.

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

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

18 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-
19 described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty of
20 \$2,500 per day for each violation.

21 30. As a consequence of the above-described acts, Health and Safety Code
22 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
23 DEFENDANTS.

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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 § 25249.7(b), assess civil
4 penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each
5 violation;

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

11 3. That the Court, Pursuant to Health and Safety Code § 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, § 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 Dated: March 2, 2016

18 Respectfully submitted,
19 THE CHANLER GROUP

20 By: Kimberly Gates
21 Kimberly Gates
22 Attorneys for Plaintiff
23 JOHN MOORE
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