

1 Josh Voorhees, State Bar No. 241436
2 Christopher Tuttle, State Bar No. 264545
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118
9 ctuttle@chanler.com

10 Attorneys for Plaintiff
11 JOHN MOORE

FILED

DEC - 4 2017

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

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF MARIN

14 UNLIMITED CIVIL JURISDICTION

15 JOHN MOORE,

16 Plaintiff,

17 v.

18 EXXEL OUTDOORS, LLC; and DOES 1 –
19 150, inclusive,

20 Defendants.

Case No.

Civ **1704438**

**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 safety vests 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 safety vests manufactured, distributed, and offered for
10 sale or use throughout the State of California. Individuals not covered by California's
11 Occupational Safety Health Act, Labor Code section 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 safety vests that Defendants
14 manufacture, distribute, and offer for sale to consumers throughout the State of California.

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

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

25 6. Defendants manufacture, distribute, import, sell, and offer for sale without health
26 hazard warnings in California, safety vests that contain DEHP including, but not limited to, the
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1 *Wenzel Safety Vest, #600309, UPC #0 47297 39149* 7. All such safety vests containing DEHP
2 are 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
10 with the required warning regarding the health hazards associated with exposures to DEHP.
11 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 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 EXXEL OUTDOORS, LLC ("EXXEL") is a person in the course of
20 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

21 12. EXXEL 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 13. 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 sections
26 25249.6 and 25249.11.

27 14. 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 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person
5 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
6 and 25249.11.

7 16. 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 17. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in
13 the course of doing business within the meaning of Health and Safety Code sections 25249.6
14 and 25249.11.

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

17 19. 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 section 474. Plaintiff is informed and believes, and on that basis
20 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
21 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

22 20. EXXEL, MANUFACTURER DEFENDANTS, DISTRIBUTOR
23 DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter, where appropriate, be
24 referred to collectively as the "DEFENDANTS."

25 **VENUE AND JURISDICTION**

26 21. Venue is proper in the Superior Court for the County of Marin pursuant to Code
27 of Civil Procedure sections 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 22. 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 23. The California Superior Court has jurisdiction over DEFENDANTS based on
10 plaintiff's information and good faith belief that DEFENDANTS are each 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 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
18 Paragraphs 1 through 23, inclusive.

19 25. 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 26. 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 27. On September 12, 2017, Plaintiff served a sixty-day notice of violation, together
2 with the accompanying certificate of merit, on EXXEL, the California Attorney General's
3 Office, and the requisite public enforcement agencies alleging that, as a result of
4 DEFENDANTS' sales of the PRODUCTS, consumers in the State of California are being
5 exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without
6 the consumers first receiving a "clear and reasonable warning" regarding the harms associated
7 with exposures to DEHP, as required by Proposition 65.

8 28. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
9 for sale or use in violation of Health and Safety Code section 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 in nature and, unless enjoined
12 will continue in the future.

13 29. 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 30. 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.

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

24 32. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
25 through dermal contact and/or ingestion during reasonably foreseeable use.
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33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and continues to cause, consumer exposures to DEHP, as defined by title 27 of the California Code of Regulations, section 25602(b).

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

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

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

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

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

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

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against DEFENDANTS as follows:

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

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

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

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

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

15 Dated: December 4, 2017

Respectfully submitted,
THE CHANLER GROUP

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17 By: 

Christopher Tuttle
Attorneys for Plaintiff
JOHN MOORE