

BY FAX

1 Clifford A. Chanler, State Bar No. 135534
2 THE CHANLER GROUP
3 2550 Ninth Street
4 Parker Plaza, Suite 205
5 Berkeley, CA 94710-2565
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118
8 Email: clifford@chanler.com

9 Attorneys for Plaintiff
10 JOHN MOORE

FILED

MAY 30 2019

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

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF MARIN

13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17 MUTUAL INDUSTRIES NORTH, INC.;
18 HARRIS MUTUAL, LLC and DOES 1-150,
19 inclusive,

20 Defendants.

Case No. CIV1804303

**FIRST-AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

1 **NATURE OF THE ACTION**

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

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

13 3. Detectable levels of DEHP are found in and on vinyl flagging tape that defendants
14 manufacture, distribute, and offer for sale to consumers and other individuals throughout the State
15 of 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 the
19 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
20 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 subject
23 to the “clear and reasonable warning” requirements of the act one year later on October 24, 2004.
24 Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 and 25249.10(b).

25 6. Defendants manufacture, distribute, import, sell, and offer for sale without health
26 hazard warnings in California, vinyl flagging tape including, but not limited to, the *Harris*
27 *Industries 1 3/16” X 300’ Orange 2 mil Vinyl Flagging Tape, Manufacturer #: VST-04*. All such
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1 vinyl flagging tape containing DEHP that is manufactured, distributed, sold, or offered for sale by
2 defendants in the State of California is 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, and
6 each of them, to enjoinder of such conduct as well as civil penalties for each violation. Health &
7 Safety Code § 25249.7(a) and (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 exposures
17 from consumer products, and he brings this action in the public interest pursuant to Health and
18 Safety Code section 25249.7(d).

19 11. Defendant MUTUAL INDUSTRIES NORTH, INC. (MUTUAL INDUSTRIES) is
20 a person in the course of doing business within the meaning of Health and Safety Code
21 sections 25249.6 and 25249.11.

22 12. MUTUAL INDUSTRIES 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 State
25 of California.

26 13. Defendant HARRIS MUTUAL, LLC (HARRIS) is a person in the course of doing
27 business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

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1 14. HARRIS manufactures, imports, distributes, sells, and/or offers the PRODUCTS
2 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
3 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

4 15. Defendants DOES 1-50 (MANUFACTURER DEFENDANTS) are each a person in
5 the course of doing business within the meaning of Health and Safety Code sections 25249.6 and
6 25249.11.

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

11 17. Defendants DOES 51-100 (DISTRIBUTOR DEFENDANTS) are each a person in
12 the course of doing business within the meaning of Health and Safety Code sections 25249.6 and
13 25249.11.

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

19 19. Defendants DOES 101-150 (RETAILER DEFENDANTS) are each a person in the
20 course of doing business within the meaning of Health and Safety Code sections 25249.6 and
21 25249.11.

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

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

1 22. MUTUAL INDUSTRIES, HARRIS, MANUFACTURER DEFENDANTS,
2 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter, where
3 appropriate, be referred to collectively as the “DEFENDANTS.”

4 **VENUE AND JURISDICTION**

5 23. Venue is proper in the Superior Court for the County of Marin pursuant to Code of
6 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 24. 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 25. 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 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
24 Paragraphs 1 through 25, inclusive.

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

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

5 29. On August 29, 2018, plaintiff served a 60-Day Notice of Violation, (the 2018
6 Notice), together with the requisite certificate of merit, on MUTUAL INDUSTRIES, the
7 California Attorney General’s Office, and the requisite public enforcement agencies alleging that,
8 as a result of MUTUAL INDUSTRIES’ sales of the PRODUCTS, consumers in the State of
9 California are being exposed to DEHP resulting from their reasonably foreseeable use of the
10 PRODUCTS, without the consumers first receiving a “clear and reasonable warning” regarding the
11 harms associated with exposures to DEHP, as required by Proposition 65.

12 30. On March 11, 2019, plaintiff served a 60-Day Notice of Violation, (the 2019
13 Notice), together with the requisite certificate of merit, on HARRIS, the California Attorney
14 General’s Office, and the requisite public enforcement agencies alleging that, as a result of
15 HARRIS’ sales of the PRODUCTS, consumers in the State of California are being exposed to
16 DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without the consumers
17 first receiving a “clear and reasonable warning” regarding the harms associated with exposures to
18 DEHP, as required by Proposition 65.

19 31. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS for
20 sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS’ violations
21 have continued beyond their receipt of plaintiff’s 2018 Notice and 2019 Notice. As such,
22 DEFENDANTS’ violations are ongoing and continuous in nature and, unless enjoined will
23 continue in the future.

24 32. After receiving plaintiff’s 2018 Notice and 2019 Notice, no public enforcement
25 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS under
26 Proposition 65 to enforce the alleged violations that are the subject of plaintiff’s 2018 Notice and
27 2019 Notice.

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

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

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

10 36. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
11 continues to cause, consumer product exposures to DEHP, as defined by title 27 of the California
12 Code of Regulations, section 25600.1(e).

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

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

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

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

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

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

7 **PRAYER FOR RELIEF**

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

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

12 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
13 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
14 offering the PRODUCTS for sale or use in California without first providing a “clear and
15 reasonable warning” in accordance with title 27 of the California Code of Regulations,
16 section 25600 *et seq.*, regarding the harms associated with exposures to DEHP;


17 3. That the Court, pursuant to Health and Safety Code section 25249.7(a), issue
18 preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS
19 currently in the chain of commerce in California without a “clear and reasonable warning” as
20 defined by California Code of Regulations title 27, section 25600 *et seq.*;

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

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

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24 Dated: May 29, 2019

Respectfully submitted,
THE CHANLER GROUP

25
26 By: 
27 Clifford A. Chanler
Attorneys for plaintiff
28 JOHN MOORE