

1 Christopher M. Martin, State Bar No. 186021
2 HIRST & CHANLER LLP
3 566 W. Adams, Suite 450
4 Chicago, IL 60521
5 Telephone: (312) 376-1801
6 Facsimile: (312) 376-1804
7 Attorneys for Plaintiff
8 ANTHONY E. HELD, PH.D., P.E.

FILED

FEB 11 2008

CONNIE MAZZEI
CLERK OF THE SUPERIOR COURT
DEPUTY

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF MONTEREY
11 UNLIMITED CIVIL JURISDICTION

12 ANTHONY E. HELD, PH.D., P.E.

13 Plaintiff,

14 v.

15 RAND INTERNATIONAL LEISURE
16 PRODUCTS LTD.; WALGREEN CO.; and
17 DOES 1 through 150, inclusive,

18 Defendants.

Case No. _____

M89139

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Cal. Health & Safety Code §25249.6 et seq.)

BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff ANTHONY E.
3 HELD, PH.D., P.E., in the public interest of the citizens of the State of California, to enforce the
4 People's right to be informed of the presence of Di(2-ethylhexyl)phthalate (a toxic chemical)
5 found in inflatable vinyl toys/ children's items manufactured and sold by defendants in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to warn
7 California citizens about their exposure to Di(2-ethylhexyl) phthalate (DEHP) present in or on
8 certain inflatable vinyl toys/ children's items that defendants manufacture, distribute and/or offer
9 for sale to consumers throughout the State of California.

10 3. High levels of DEHP are commonly found in and on inflatable vinyl toys/
11 children's items that defendants manufacture, distribute and/or offer for sale to consumers
12 throughout the State of California.

13 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code §25249.6 *et seq.* (Proposition 65), "No person in the course of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to the
16 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
17 such individual. . . ." (*Cal. Health & Safety Code §25249.6.*)

18 5. On January 1, 1988, California identified and listed DEHP as a chemical known to
19 cause birth defects and other reproductive harm. DEHP became subject to the warning
20 requirement one year later and was therefore subject to the "clear and reasonable warning"
21 requirements of Proposition 65, beginning on January 1, 1989. (*CCR §12000(c); Cal. Health &*
22 *Safety Code §25249.8.*) DEHP shall hereinafter be referred to as the "LISTED CHEMICAL."

23 6. Defendants manufacture and sell inflatable vinyl toys/ children's items containing
24 DEHP including, but not limited to, *Spider-Man 16" Beach Ball, Item: 578948 (#0 38798 04816*
25 *4)*, which contain excessive levels of the LISTED CHEMICAL. All such inflatable vinyl toys/
26 children's items containing the LISTED CHEMICAL shall hereinafter be referred to as the
27 "PRODUCTS."
28

1 16. MANUFACTURER DEFENDANTS engage in the process of research, testing,
2 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
3 engage in the process of research, testing, designing, assembling, fabricating and/or
4 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

5 17. Defendants DOES 51-100 (DISTRIBUTOR DEFENDANTS) are each persons
6 doing business within the meaning of California Health & Safety Code §25249.11.

7 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
8 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
9 the State of California.

10 19. Defendants DOES 101-150 (RETAIL DEFENDANTS) are each persons doing
11 business within the meaning of California Health & Safety Code §25249.11.

12 20. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
13 of California.

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

19 22. RAND, WALGREEN, MANUFACTURER DEFENDANTS, DISTRIBUTOR
20 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred
21 to hereinafter as “DEFENDANTS.”

22 **VENUE AND JURISDICTION**

23 23. Venue is proper in the Monterey County Superior Court, pursuant to Code of Civil
24 Procedure §§394, 395, 395.5, because this Court is a court of competent jurisdiction, because one
25 or more instances of wrongful conduct occurred, and continues to occur, in the County of
26 Monterey and/or because DEFENDANTS conducted, and continue to conduct, business in this
27 County with respect to the PRODUCTS.
28

1 24. The California Superior Court has jurisdiction over this action pursuant to
2 California Constitution Article VI, §10, which grants the Superior Court “original jurisdiction in
3 all causes except those given by statute to other trial courts.” The statute under which this action
4 is brought does not specify any other basis of subject matter jurisdiction.

5 25. The California Superior Court has jurisdiction over DEFENDANTS based on
6 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
7 association that either are citizens of the State of California, have sufficient minimum contacts in
8 the State of California, or otherwise purposefully avail themselves of the California market.
9 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
10 courts consistent with traditional notions of fair play and substantial justice.

11
12 **FIRST CAUSE OF ACTION**

13 **(Violation of Proposition 65)**

14 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
15 Paragraphs 1 through 25, inclusive.

16 27. The citizens of the State of California have expressly stated in the Safe Drinking
17 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.5, *et seq.*
18 (Proposition 65) that they must be informed “about exposures to chemicals that cause cancer, birth
19 defects and other reproductive harm.” (*Cal. Health & Safety Code §25249.6.*)

20 28. Proposition 65 states, “No person in the course of doing business shall knowingly
21 and intentionally expose any individual to a chemical known to the state to cause cancer or
22 reproductive toxicity without first giving clear and reasonable warning to such individual....” (*Id.*)

23 29. On November 20, 2007, a sixty-day notice of violation, together with the requisite
24 certificate of merit, was provided to RAND, WALGREEN, and various public enforcement
25 agencies stating that as a result of DEFENDANTS’ sale of PRODUCTS, purchasers and users in
26 the State of California were being exposed to the LISTED CHEMICAL resulting from the
27 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
28

1 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

2 30. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
3 the PRODUCTS for sale or use in violation of California Health & Safety Code §25249.6 and
4 DEFENDANTS’ manufacture, distribution and/or offering of the PRODUCTS for sale or use in
5 violation of California Health & Safety Code §25249.6 has continued to occur beyond
6 DEFENDANTS’ receipt of plaintiff’s sixty-day notice of violation. Plaintiff further alleges and
7 believes that such violations will continue to occur into the future.

8 31. After receipt of the claims asserted in the sixty-day notice of violation, the
9 appropriate public enforcement agencies have failed to commence and diligently prosecute a cause
10 of action against DEFENDANTS under Proposition 65.

11 32. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
12 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
13 limits.

14 33. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
15 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED
16 CHEMICAL.

17 34. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
18 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion during
19 the reasonably foreseeable use of the PRODUCTS.

20 35. The normal and reasonably foreseeable use of the PRODUCTS has caused and
21 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
22 by 22 CCR §12601(b).

23 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
24 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
25 and/or ingestion.

26 37. DEFENDANTS, and each of them, intended that such exposures to the LISTED
27 CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their
28

1 deliberate, non-accidental participation in the manufacture, distribution and/or offer for sale or use
2 of PRODUCTS to individuals in the State of California.

3 38. DEFENDANTS failed to provide a “clear and reasonable warning” to those
4 consumers and/or other individuals in the State of California who were or who could become
5 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
6 reasonably foreseeable use of the PRODUCTS.

7 39. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
8 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
9 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold by
10 DEFENDANTS without “clear and reasonable warning,” have suffered, and continue to suffer,
11 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

12 40. As a consequence of the above-described acts, DEFENDANTS, and each of them,
13 are liable for a maximum civil penalty of \$2,500 per day for each violation pursuant to California
14 Health & Safety Code §25249.7(b).

15 41. As a consequence of the above-described acts, California Health & Safety Code
16 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against
17 DEFENDANTS.

18 42. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
19 set forth hereinafter.

20 **PRAYER FOR RELIEF**

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

22 1. That the Court, pursuant to California Health & Safety Code §25249.7(b), assess
23 civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each
24 violation alleged herein;

25 2. That the Court, pursuant to California Health & Safety Code §25249.7(a),
26 preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing,
27 distributing or offering the PRODUCTS for sale or use in California, without providing “clear and
28

1 reasonable warnings" as defined by 22 CCR §12601, as to the harms associated with exposures to
2 the LISTED CHEMICAL;

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

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

5

6 Dated: February 7, 2008

Respectfully Submitted,

7

HIRST & CHANLER LLP

8



9

10

Christopher M. Martin
Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28