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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
15

17 ANTHONY E. HELD, Ph.D., P.E.,

18 Plaintiff,

19 v.

20 ENOR CORPORATION; WAL-MART
STORES, INC.; and DOES 1 through 150,
21 inclusive,

22 Defendants.

Case No. **RG08379187**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

**ENDORSED
FILED
ALAMEDA COUNTY**

MAR 28 2008

CLERK OF THE SUPERIOR COURT
By C. PITTS Deputy

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, found
5 in certain children's sporting items sold 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 present in or on certain
8 sporting items for children that defendants manufacture, distribute and/or offer for sale to
9 consumers throughout the State of California.

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in or on the children's
11 sporting items that defendants manufacture, distribute and/or offer for sale to consumers throughout
12 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 di(2-ethylhexyl)phthalate as a
19 chemical known to cause birth defects and other reproductive harm. Di(2-ethylhexyl)phthalate
20 became subject to the warning requirement one year later and was therefore subject to the "clear
21 and reasonable warning" requirements of Proposition 65, beginning on January 1, 1989. (*22 CCR*
22 *§ 12000(c)*; *Cal. Health & Safety Code* § 25249.8.) Di(2-ethylhexyl)phthalate shall hereinafter be
23 referred to as the "LISTED CHEMICAL."

24 6. Defendants manufacture, distribute and/or offer for sale sporting items for children
25 containing Di(2-ethylhexyl)phthalate including, but not limited to, *EZ Mitt*, #25217 (#0 92211
26 25217 0). All such sporting items for children containing the LISTED CHEMICAL shall
27 hereinafter be referred to as the "PRODUCTS."
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1 7. Defendants' failure to warn consumers and/or other individuals in the State of
2 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale of
3 the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such
4 conduct as well as civil penalties for each such violation.

5 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
6 and permanent injunctive relief to compel defendants to provide purchasers or users of the
7 PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL.
8 (*Cal. Health & Safety Code § 25249.7(a).*)

9 9. Plaintiff also seeks civil penalties against defendants for their violations of
10 Proposition 65, as provided for by California Health & Safety Code § 25249.7(b).

11 **PARTIES**

12 10. Plaintiff ANTHONY E. HELD, Ph.D., P.E., is a citizen of the City and County of
13 Sacramento in the State of California who is dedicated to protecting the health of California citizens
14 through the elimination or reduction of toxic exposures from consumer products, and brings this
15 action in the public interest pursuant to California Health & Safety Code § 25249.7.

16 11. Defendant ENOR CORPORATION is a person in the course of doing business
17 within the meaning of California Health & Safety Code § 25249.11.

18 12. ENOR CORPORATION manufactures, distributes and/or offers the PRODUCTS
19 for sale or use in the State of California or implies by its conduct that it manufactures, distributes
20 and/or offers the PRODUCTS for sale or use in the State of California.

21 13. Defendant WAL-MART STORES, INC. is a person in the course of doing business
22 within the meaning of California Health & Safety Code § 25249.11.

23 14. WAL-MART STORES, INC. manufactures, distributes and/or offers the
24 PRODUCTS for sale or use in the State of California or implies by its conduct that it manufactures,
25 distributes and/or offers the PRODUCTS for sale or use in the State of California.

26 15. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
27 in the course of doing business within the meaning of California Health & Safety Code § 25249.11.

28 16. MANUFACTURER DEFENDANTS engage in the process of research, testing,

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

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

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

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

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

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

18 22. ENOR CORPORATION, WAL-MART STORES, INC., MANUFACTURER
19 DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where
20 appropriate, collectively be referred to hereinafter as “DEFENDANTS.”

21 **VENUE AND JURISDICTION**

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

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

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

10 **FIRST CAUSE OF ACTION**

11 **(Violation of Proposition 65)**

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

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

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

22 29. On January 11, 2008, a sixty-day notice of violation, together with the requisite
23 certificate of merit, was provided to ENOR CORPORATION, WAL-MART STORES, INC., and
24 various public enforcement agencies, stating that as a result of DEFENDANTS’ sale of
25 PRODUCTS, purchasers and users in the State of California were being exposed to the LISTED
26 CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS, without the
27 individual purchasers and users first having been provided with a “clear and reasonable warning”
28 regarding such toxic exposures.

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

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

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

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

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

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

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

24 37. DEFENDANTS, and each of them, intended that such exposures to the LISTED
25 CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their
26 deliberate, non-accidental participation in the manufacture, distribution and/or offer for sale or use
27 of PRODUCTS to individuals in the State of California.

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

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

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

13 41. As a consequence of the above-described acts, California Health & Safety Code
14 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
15 DEFENDANTS.

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

18 **PRAYER FOR RELIEF**

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

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

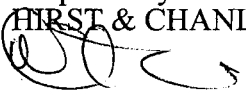
23 2. That the Court, pursuant to California Health & Safety Code §25249.7(a),
24 preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing,
25 distributing and/or offering the PRODUCTS for sale or use in California, without providing “clear
26 and reasonable warnings” as defined by 22 CCR §12601, as to the harm associated with exposures
27 to the LISTED CHEMICAL;

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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: March 28, 2008

Respectfully Submitted,
~~FIRST & CHANLER LLP~~


David Lavine
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.