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ENDORSED  
FILED  
ALAMEDA COUNTY

MAR 28 2008  
CLERK OF THE SUPERIOR COURT  
By C. PITTS Deputy

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

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16  
17 ANTHONY E. HELD, Ph.D., P.E.,  
18 Plaintiff,  
19 v.  
20 KELLYTOY (USA), INC.; NATIONAL  
21 STORES, INC.; FACTORY 2-U; and DOES 1  
through 150, inclusive,  
22 Defendants.

Case No. **RG08379184**  
**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**  
*(Cal. Health & Safety Code § 25249.6 et seq.)*

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, *The Amazing Spider-Man Bat*  
26 *and Ball Set*, #73112 (#7 34689 73112 1). All such sporting items for children containing the  
27 LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."  
28



1           16.     FACTORY 2-U offers the PRODUCTS for sale or use in the State of California or  
2 implies by its conduct that it offers the PRODUCTS for sale or use in the State of California.

3           17.     Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons  
4 in the course of doing business within the meaning of California Health & Safety Code § 25249.11.

5           18.     MANUFACTURER DEFENDANTS engage in the process of research, testing,  
6 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage  
7 in the process of research, testing, designing, assembling, fabricating and/or manufacturing, one or  
8 more of the PRODUCTS for sale or use in the State of California.

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

11          20.     DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or  
12 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in the  
13 State of California.

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

16          22.     RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State  
17 of California.

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

23          24.     KELLYTOY (USA), INC., NATIONAL STORES, INC., FACTORY 2-U,  
24 MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL  
25 DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as  
26 “DEFENDANTS.”

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1 **VENUE AND JURISDICTION**

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

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

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

17 **FIRST CAUSE OF ACTION**

18 **(Violation of Proposition 65)**

19 28. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
20 Paragraphs 1 through 27, inclusive.

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

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

1           31.     On January 11, 2008, a sixty-day notice of violation, together with the requisite  
2 certificate of merit, was provided to KELLYTOY (USA), INC., NATIONAL STORES, INC.,  
3 FACTORY 2-U, and various public enforcement agencies, stating that as a result of  
4 DEFENDANTS' sale of PRODUCTS, purchasers and users in the State of California were being  
5 exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable uses of the  
6 PRODUCTS, without the individual purchasers and users first having been provided with a "clear  
7 and reasonable warning" regarding such toxic exposures.

8           32.     DEFENDANTS have engaged in the manufacture, distribution and/or offering of the  
9 PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6, and  
10 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale or use in  
11 violation of California Health & Safety Code § 25249.6 has continued to occur beyond  
12 DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and  
13 believes that such violations will continue to occur into the future.

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

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

19           35.     DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
20 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED  
21 CHEMICAL.

22           36.     The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as to  
23 expose individuals to the LISTED CHEMICAL through dermal contact and ingestion during the  
24 reasonably foreseeable use of the PRODUCTS.

25           37.     The normal and reasonably foreseeable use of the PRODUCTS has caused and  
26 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined by  
27 22 CCR §12601(b).

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