

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Christopher M. Martin, State Bar No. 186021
HIRST & CHANLER LLP
566 W. Adams, Suite 450
Chicago, IL 60521
Telephone: (312) 376-1801
Facsimile: (312) 376-1804

Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.

ENDORSED
FILED
ALAMEDA COUNTY

JUL - 7 2008

CLERK OF THE SUPERIOR COURT

By C. PITTS Deputy

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

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

Plaintiff,

v.

ALMAR SALES CO., INC.; NATIONAL
STORES, INC.; FACTORY 2-U; and DOES 1
through 150, inclusive,

Defendants.

Case No. **RG08396862**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

VIA FAX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NATURE OF THE ACTION

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

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

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

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

5. On October 24, 2003, California identified and listed DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became subject to the warning requirement one year later and was therefore subject to the “clear and reasonable warning” requirements of Proposition 65, beginning on October 24, 2004. (*CCR §12000(c); Cal. Health & Safety Code §25249.8.*) DEHP shall hereinafter be referred to as the “LISTED CHEMICAL.”

6. Defendants manufacture, distribute, and/or sell vinyl bathroom toys/ children’s items containing DEHP including, but not limited to, *Suave Kids 7 Piece Bath Set, #SVK9500W (#0 24576 74658 2)*, which contain excessive levels of the LISTED CHEMICAL. All such vinyl bathroom toys/ children’s items containing the LISTED CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

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
3 of 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
14 citizens through the elimination or reduction of toxic exposures from consumer products, and
15 brings this action in the public interest pursuant to California Health & Safety Code §25249.7.

16 11. Defendant ALMAR SALES CO., INC. (ALMAR) is a person doing business within
17 the meaning of California Health & Safety Code §25249.11.

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

21 13. Defendant NATIONAL STORES, INC. (NATIONAL STORES) is a person doing
22 business within the meaning of California Health & Safety Code §25249.11.

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

26 15. Defendant FACTORY 2-U is a person doing business within the meaning of
27 California Health & Safety Code §25249.11.
28

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

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

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

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

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

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

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

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

24 24. ALMAR, NATIONAL STORES, FACTORY 2-U, MANUFACTURER
 25 DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where
 26 appropriate, collectively be referred to hereinafter as "DEFENDANTS."

27 ////
 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VENUE AND JURISDICTION

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

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

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

FIRST CAUSE OF ACTION

(Violation of Proposition 65)

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

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

30. Proposition 65 states, "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or

1 reproductive toxicity without first giving clear and reasonable warning to such individual....” (*Id.*)

2 31. On April 22, 2008, a sixty-day notice of violation, together with the requisite
3 certificate of merit, was provided to ALMAR, NATIONAL STORES, FACTORY 2-U, and
4 various public enforcement agencies stating that as a result of DEFENDANTS’ sale of
5 PRODUCTS, purchasers and users in the State of California were being exposed to the LISTED
6 CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS, without the
7 individual purchasers and users first having been provided with a “clear and reasonable warning”
8 regarding such toxic exposures.

9 32. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
10 the PRODUCTS for sale or use in violation of California Health & Safety Code §25249.6 and
11 DEFENDANTS’ manufacture, distribution, and/or offering of the PRODUCTS for sale or use in
12 violation of California Health & Safety Code §25249.6 has continued to occur beyond ALMAR’s,
13 NATIONAL STORES’, and FACTORY 2-U’s receipt of plaintiff’s sixty-day notice of violation.
14 Plaintiff further alleges and believes that such violations will continue to occur into the future.

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

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

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

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

27 37. The normal and reasonably foreseeable use of the PRODUCTS has caused and
28

1 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
2 by 22 CCR §12601(b).

3 38. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
4 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
5 and/or ingestion.

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

10 40. DEFENDANTS failed to provide a "clear and reasonable warning" to those
11 consumers and/or other individuals in the State of California who were or who could become
12 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
13 reasonably foreseeable use of the PRODUCTS.

14 41. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
15 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
16 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold by
17 DEFENDANTS without "clear and reasonable warning," have suffered, and continue to suffer,
18 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

22 43. As a consequence of the above-described acts, California Health & Safety Code
23 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against
24 DEFENDANTS.

25 44. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
26 set forth hereinafter.

27 ///

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to California Health & Safety Code §25249.7(b), assess civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation alleged herein;
2. That the Court, pursuant to California Health & Safety Code §25249.7(a), preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing, distributing or offering the PRODUCTS for sale or use in California, without providing "clear and reasonable warnings" as defined by 22 CCR §12601, as to the harms associated with exposures to the LISTED CHEMICAL;
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: July 2, 2008

Respectfully Submitted,

HIRST & CHANLER LLP



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