

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

Clifford A. Chanler, State Bar No. 135534
David R. Bush, State Bar No. 154511
HIRST & CHANLER LLP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710
Telephone: (510) 848-8880
Facsimile: (510) 848-8188

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

**ENDORSED
FILED**
Superior Court of California
County of San Francisco

OCT 8 - 2008

GORDON PARK-LI, Clerk
BY CRISTINA BAUTISTA
CASE MANAGEMENT CONFERENCE Deputy Clerk

MAR 13 2009 - 9 AM

DEPARTMENT 218
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, Ph.D., P.E.,
Plaintiff,
v.
26 CALIFORNIA BAZAR, INC.; and DOES 1
through 150, inclusive,
Defendants.

CGC - . 0 8 - 4 8 0 7 3 2
Case No. _____

**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, found
5 in certain bibs and inflatable vinyl toys/children's 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 bibs
8 and inflatable vinyl toys/children's items that defendants manufacture, distribute and/or offer for
9 sale to consumers throughout the State of California.

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in or on the bibs and
11 inflatable vinyl toys/children's items that defendants manufacture, distribute and/or offer for sale
12 to consumers 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 October 24, 2003, California identified and listed di(2-ethylhexyl)phthalate as a
19 chemical known to cause reproductive and developmental 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 October 24, 2004. (*27 CCR*
22 *§27001; 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 sell bibs and inflatable vinyl
25 toys/children's items for children containing di(2-ethylhexyl)phthalate including, but not limited
26 to, *Fancy Baby Bib*, *Baby-Garden, GN123 (#7 35932 46123 9)* and *Spiderman Swim Ring, SS1286*
27 *(#7 35932 18286 8)*. All such bibs and inflatable vinyl toys/children's items containing the
28

1 LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

2 7. Defendants' failure to warn consumers and/or other individuals in the State of
3 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale
4 of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such
5 conduct as well as civil penalties for each such violation.

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

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

12 **PARTIES**

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

17 11. Defendant 26 CALIFORNIA BAZAR, INC. is a person in the course of doing
18 business within the meaning of California Health & Safety Code §25249.11.

19 12. 26 CALIFORNIA BAZAR, INC. manufactures, distributes and/or offers the
20 PRODUCTS for sale or use in the State of California or implies by its conduct that it
21 manufactures, distributes and/or offers the PRODUCTS for sale or use in the State of California.

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

24 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,
25 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
26 engage in the process of research, testing, designing, assembling, fabricating and/or
27 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

28

1 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons in
2 the course of doing business within the meaning of California Health & Safety Code §25249.11.

3 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
4 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
5 the State of California.

6 17. Defendants DOES 101-150 ("RETAIL DEFENDANTS") are each persons in the
7 course of doing business within the meaning of California Health & Safety Code §25249.11.

8 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
9 of California.

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

15 20. 26 CALIFORNIA BAZAR, INC., MANUFACTURER DEFENDANTS,
16 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate,
17 collectively be referred to hereinafter as "DEFENDANTS."

18 **VENUE AND JURISDICTION**

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

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

28

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

7 **FIRST CAUSE OF ACTION**

8 **(Violation of Proposition 65)**

9 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
 10 Paragraphs 1 through 23, inclusive.

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

15 26. Proposition 65 states, "No person in the course of doing business shall knowingly
 16 and intentionally expose any individual to a chemical known to the state to cause cancer or
 17 reproductive toxicity without first giving clear and reasonable warning to such individual"
 18 (*Id.*)

19 27. On April 22, 2008, a sixty-day notice of violation, together with the requisite
 20 certificate of merit, was provided to 26 CALIFORNIA BAZAR, INC. and various public
 21 enforcement agencies, stating that as a result of DEFENDANTS' sale of bibs containing
 22 di(2-ethylhexyl)phthalate, purchasers and users in the State of California were being exposed to
 23 the LISTED CHEMICAL resulting from the reasonably foreseeable use of the PRODUCTS,
 24 without the individual purchasers and users first having been provided with a "clear and
 25 reasonable warning" regarding such toxic exposures.

26 28. On April 22, 2008, an additional sixty-day notice of violation, together with the
 27 requisite certificate of merit, was provided to 26 CALIFORNIA BAZAR, INC. and various public
 28

1 enforcement agencies, stating that as a result of DEFENDANTS' sale of inflatable vinyl
2 toys/children's items containing di(2-ethylhexyl)phthalate, purchasers and users in the State of
3 California were being exposed to the LISTED CHEMICAL resulting from the reasonably
4 foreseeable use of the PRODUCTS, without the individual purchasers and users first having been
5 provided with a "clear and reasonable warning" regarding such toxic exposures.

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

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

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

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

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

24 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
25 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
26 by 27 CCR §25601(b).

27
28

1 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
2 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
3 and ingestion.

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

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

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

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

20 40. As a consequence of the above-described acts, California Health & Safety Code
21 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against
22 DEFENDANTS.

23 41. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
24 set forth hereinafter.

25 **PRAYER FOR RELIEF**

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

- 27 1. That the Court, pursuant to California Health & Safety Code §25249.7(b), assess
28

1 civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each
2 violation alleged herein;

3 2. That the Court, pursuant to California Health & Safety Code §25249.7(a),
4 preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing,
5 distributing and/or offering the PRODUCTS for sale or use in California, without providing "clear
6 and reasonable warnings" as defined by 27 CCR §25601, as to the harms associated with exposures
7 to the LISTED CHEMICAL;

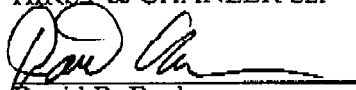
8 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

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

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 8, 2008

Respectfully Submitted,
HIRST & CHANLER LLP



David R. Bush
Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.