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Superior Court Of California,
Sacramento
Dennis Jones, Executive
Officer
08/15/2008
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By _____, Deputy
Case Number:
34-2008-00018502-CU-MC-GDS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SACRAMENTO
UNLIMITED CIVIL JURISDICTION

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

Plaintiff,

v.

WEAR ME APPAREL LLC; KIDS
HEADQUARTERS; and DOES 1 through 150,
inclusive,

Defendants.

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 children’s jackets 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 children’s jackets that defendants manufacture, distribute and/or offer for sale to consumers
9 throughout the State of California.

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in or on the children’s
11 jackets that defendants manufacture, distribute and/or offer for sale to consumers throughout the
12 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. (*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 sell children’s jackets containing di(2-
25 ethylhexyl)phthalate including, but not limited to, *Avirex 3 Piece Set, #49973004T (#7 89139*
26 *91373 2)*. All such children’s jackets containing the LISTED CHEMICAL shall hereinafter be
27 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
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 WEAR ME APPAREL LLC ("WEAR ME") is a person in the course of
17 doing business within the meaning of California Health & Safety Code § 25249.11.

18 12. WEAR ME manufactures, distributes and/or offers the PRODUCTS for sale or use
19 in 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 KIDS HEADQUARTERS is a person in the course of doing business
22 within the meaning of California Health & Safety Code § 25249.11.

23 14. KIDS HEADQUARTERS manufactures, distributes and/or offers the PRODUCTS
24 for 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. 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.
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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 manufacturing,
4 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 in
6 the course of 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 in the
11 course of doing 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. WEAR ME, KIDS HEADQUARTERS, MANUFACTURER DEFENDANTS,
20 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate,
21 collectively be referred to hereinafter as "DEFENDANTS."

22 **VENUE AND JURISDICTION**

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

12 **(Violation of Proposition 65)**

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

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

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

23 29. On May 23, 2008, a sixty-day notice of violation, together with the requisite
24 certificate of merit, was provided to WEAR ME, KIDS HEADQUARTERS and various public
25 enforcement agencies, stating that as a result of DEFENDANTS’ sale of children’s jackets
26 containing di(2-ethylhexyl)phthalate, purchasers and users in the State of California were being
27 exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable use of the
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1 PRODUCTS, without the individual purchasers and users first having been provided with a “clear
2 and reasonable warning” regarding such toxic exposures.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 **PRAYER FOR RELIEF**

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

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

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

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

5 4. That the Court grant such other and further relief as may be just and proper.
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7 Dated: August 15, 2008

Respectfully Submitted,
HIRST & CHANLER LLP



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