

ENDORSED
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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE CITY AND COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION

11
12 ANTHONY E. HELD, Ph.D., P.E.,

13 Plaintiff,

14 v.

15 ASCENDIA BRANDS CO., INC.;
16 BURLINGTON COAT FACTORY
WAREHOUSE CORPORATION;
17 ANACONDA SPORTS, INC.; CUTIE PIE
BABY, INC.; TOMMY HILFIGER U.S.A.,
18 INC.; and DOES 4 through 150, inclusive,

19 Defendants.

Case No. CGC-08-481439

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

NATURE OF THE ACTION

1
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
5 found in children’s vinyl bags, vinyl bathroom toys, sporting toys, and inflatable vinyl toys sold
6 in California.

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

12 3. High levels of di(2-ethylhexyl)phthalate are commonly found in and on children’s
13 vinyl bags, vinyl bathroom toys, sporting toys, and inflatable vinyl toys that defendants
14 manufacture, distribute, and/or offer for sale to consumers throughout the State of California.

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

20 5. On October 24, 2003, California identified and listed di(2-ethylhexyl)phthalate as
21 a chemical known to cause birth defects and other reproductive harm. Di(2-ethylhexyl)phthalate
22 became subject to the warning requirement one year later and was therefore subject to the “clear
23 and reasonable warning” requirements of Proposition 65, beginning on October 24, 2004. (27
24 *CCR § 27001; Cal. Health & Safety Code § 25249.8.*)

25 6. Di(2-ethylhexyl)phthalate shall hereinafter be referred to as the “LISTED
26 CHEMICAL.”

27 7. Defendants manufacture, distribute and/or offer for sale: (a) children’s vinyl bags
28 containing di(2-ethylhexyl)phthalate including, but not limited to, *Got Milk? 4 Piece Bottle*

1 Cooler Set, #5184BMD (#0 84134 05184 7); (b) vinyl bathroom toys containing di(2-
2 ethylhexyl)phthalate including, but not limited to, *Baby Magic Starter Basket* (#0 70194 04484
3 5); (c) sporting toys containing di(2-ethylhexyl)phthalate including, but not limited to, *Special*
4 *Day It's A Boy Mini Football, Item # SDFB-BOY, (#7 15896 12101 1)*; and (d) children's
5 inflatable vinyl toys containing di(2-ethylhexyl)phthalate including, but not limited to, *Tommy*
6 *Hilfiger Layette Beach in a Bag #BAS04 (#7 48763 31466 7)*. All such children's vinyl bags,
7 vinyl bathroom toys, sporting toys, and inflatable vinyl toys containing the LISTED
8 CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

9 8. Defendants' failures to warn consumers and/or other individuals in the State of
10 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale
11 of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of
12 such conduct as well as civil penalties for each such violation.

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

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

19 PARTIES

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

24 12. Defendant ANACONDA SPORTS, INC. ("ANACONDA") is a person doing
25 business within the meaning of California Health & Safety Code § 25249.11.

26 13. Defendant ANACONDA manufactures, distributes, and/or offers the
27 PRODUCTS for sale or use in the State of California or implies by its conduct that it
28 manufactures, distributes and/or offers the PRODUCTS for sale or use in the State of California.

1 14. Defendant ASCENDIA BRANDS CO., INC. (“ASCENDIA”) is a person doing
2 business within the meaning of California Health & Safety Code § 25249.11.

3 15. Defendant ASCENDIA manufactures, distributes, and/or offers the PRODUCTS
4 for sale or use in the State of California or implies by its conduct that it manufactures, distributes
5 and/or offers the PRODUCTS for sale or use in the State of California.

6 16. Defendant BURLINGTON COAT FACTORY WAREHOUSE CORPORATION
7 (“BURLINGTON”) is a person doing business within the meaning of California Health & Safety
8 Code § 25249.11.

9 17. Defendant BURLINGTON manufactures, distributes, and/or offers the
10 PRODUCTS for sale or use in the State of California or implies by its conduct that it
11 manufactures, distributes and/or offers the PRODUCTS for sale or use in the State of California.

12 18. Defendant CUTIE PIE BABY, INC. (“CUTIE PIE”) is a person doing business
13 within the meaning of California Health & Safety Code § 25249.11.

14 19. Defendant CUTIE PIE manufactures, distributes, and/or offers the PRODUCTS
15 for sale or use in the State of California or implies by its conduct that it manufactures, distributes
16 and/or offers the PRODUCTS for sale or use in the State of California.

17 20. Defendant TOMMY HILFIGER U.S.A., INC. (“TOMMY HILFIGER”) is a
18 person doing business within the meaning of California Health & Safety Code § 25249.11.

19 21. Defendant TOMMY HILFIGER 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 22. Defendants DOES 4-50 (“MANUFACTURER DEFENDANTS”) are each
23 persons doing business within the meaning of California Health & Safety Code § 25249.11.

24 23. 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 24. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
2 doing business within the meaning of California Health & Safety Code § 25249.11.

3 25. 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 26. Defendants DOES 101-150 ("RETAIL DEFENDANTS") are each persons doing
7 business within the meaning of California Health & Safety Code § 25249.11.

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

10 28. At this time, the true names of Defendants DOES 4 through 150, inclusive, are
11 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to
12 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that
13 each of the fictitiously named defendants is responsible for the acts and occurrences herein
14 alleged. When ascertained, their true names shall be reflected in an amended complaint.

15 29. ANACONDA, ASCENDIA, BURLINGTON, CUTIE PIE, TOMMY HILFIGER,
16 MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL
17 DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as
18 "DEFENDANTS."

19 **VENUE AND JURISDICTION**

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

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

1 32. 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 avilment 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 – Against All Defendants)**

9 33. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
10 Paragraphs 1 through 32, inclusive.

11 34. 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,
14 birth defects and other reproductive harm." (*Cal. Health & Safety Code § 25249.6.*)

15 35. 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 36. On July 10, 2008, a sixty-day notice of violation, together with the requisite
20 certificate of merit, was provided to ANACONDA, BURLINGTON and various public
21 enforcement agencies stating that as a result of these DEFENDANTS' sales of the PRODUCTS,
22 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL
23 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual
24 purchasers and users first having been provided with a "clear and reasonable warning" regarding
25 such toxic exposures.

26 37. On October 10, 2008, a sixty-day notice of violation, together with the requisite
27 certificate of merit, was provided to CUTIE PIE, BURLINGTON and various public
28 enforcement agencies stating that as a result of these DEFENDANTS' sales of the PRODUCTS,

1 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL
2 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual
3 purchasers and users first having been provided with a “clear and reasonable warning” regarding
4 such toxic exposures.

5 38. On November 7, 2008, a sixty-day notice of violation, together with the requisite
6 certificate of merit, was provided to TOMMY HILFIGER, BURLINGTON and various public
7 enforcement agencies stating that as a result of these DEFENDANTS’ sales of the PRODUCTS,
8 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL
9 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual
10 purchasers and users first having been provided with a “clear and reasonable warning” regarding
11 such toxic exposures.

12 39. On December 23, 2008, a sixty-day notice of violation, together with the requisite
13 certificate of merit, was provided to ASCENDIA, BURLINGTON, and various public
14 enforcement agencies stating that as a result of these DEFENDANTS’ sales of the PRODUCTS,
15 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL
16 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual
17 purchasers and users first having been provided with a “clear and reasonable warning” regarding
18 such toxic exposures.

19 40. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
20 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
21 DEFENDANTS’ manufacture, distribution and/or offering of the PRODUCTS for sale or use in
22 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
23 DEFENDANTS’ receipt of plaintiff’s sixty-day notices of violation. Plaintiff further alleges and
24 believes that such violations will continue to occur into the future.

25 41. After receipt of the claims asserted in the sixty-day notices of violation, the
26 appropriate public enforcement agencies have failed to commence and diligently prosecute a
27 cause of action against DEFENDANTS under Proposition 65.

28

1 42. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
2 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
3 limits.

4 43. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
5 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
6 LISTED CHEMICAL.

7 44. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
8 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
9 during the reasonably foreseeable use of the PRODUCTS.

10 45. The normal and reasonably foreseeable use of the PRODUCTS has caused and
11 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
12 by 27 CCR § 25602(b).

13 46. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
14 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
15 and/or ingestion.

16 47. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
17 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
18 accidental participation in the manufacture, distribution and/or offer for sale or use of
19 PRODUCTS to individuals in the State of California.

20 48. DEFENDANTS failed to provide a “clear and reasonable warning” to those
21 consumers and/or other individuals in the State of California who were or who could become
22 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
23 reasonably foreseeable use of the PRODUCTS.

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

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

4 51. As a consequence of the above-described acts, California Health & Safety Code
5 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
6 DEFENDANTS.

7 52. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
8 hereinafter.

9 **PRAYER FOR RELIEF**

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

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

14 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
15 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or
16 offering the PRODUCTS for sale or use in California, without providing “clear and reasonable
17 warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures to the
18 LISTED CHEMICAL;

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

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

21 Respectfully Submitted,

22 Dated: February 24, 2009

HIRST & CHANLER LLP

23
24 By: 

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