

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 Lavine, State Bar No. 166744  
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.

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

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

FEB 20 2009

LEAN CARLSON, Clerk of the Court

F. IBARRA, DEPUTY

30-2009

0018955

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

Plaintiff,

v.

KITTRICH CORPORATION; J.C. COLLINS,  
INC.; MLB CLUBHOUSE.; and DOES 1  
through 150, inclusive,

Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

JUDGE FRANZ E. MILLER  
DEPT. C9

**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 sporting toys and children's items sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to warn  
7 citizens of California about their exposure to di(2-ethylhexyl)phthalate present in or on certain in  
8 certain sporting toys and 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 in certain  
11 sporting toys and children's items that defendants manufacture, distribute and/or offer for sale to  
12 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 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 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 offer for sale sporting toys and children's  
25 items and accessories containing Di(2-ethylhexyl)phthalate including, but not limited to, *Plush*  
26 *NBA Mini Basketball, #84-186 (0 87508 06675 2)*. All such sporting toys and children's items  
27 containing the LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."  
28

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

16 11. Defendant KITTRICH CORPORATION is a person in the course of doing business  
17 within the meaning of California Health & Safety Code §25249.11.

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

21 13. Defendant J.C. COLLINS, INC. is a person in the course of doing business within  
22 the meaning of California Health & Safety Code §25249.11.

23 14. J.C. COLLINS, INC. 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 MLB CLUBHOUSE is a person in the course of doing business within  
27 the meaning of California Health & Safety Code §25249.11.  
28

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

4           17.     Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons  
5 in the course of 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 engage  
8 in the process of research, testing, designing, assembling, fabricating and/or manufacturing, one or  
9 more of the PRODUCTS for sale or use in the State of California.

10          19.     Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons in  
11 the course of 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 the  
14 State of California.

15          21.     Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons in the  
16 course of doing 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.     KITTRICH CORPORATION, J.C. COLLINS, INC., MLB CLUBHOUSE,  
25 MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL  
26 DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as  
27 “DEFENDANTS.”  
28

1 **VENUE AND JURISDICTION**

2 25. Venue is proper in the Orange 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 Orange  
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

1 (Id.)

2 31. On July 10, 2008, a sixty-day notice of violation, together with the requisite  
3 certificate of merit, was provided to KITTRICH CORPORATION, J.C. COLLINS, INC., MLB  
4 CLUBHOUSE, and various public enforcement agencies, stating that as a result of the  
5 DEFENDANTS' sale of the PRODUCTS, purchasers and users in the State of California were  
6 being exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable uses of the  
7 PRODUCTS, without the individual purchasers and users first having been provided with a "clear  
8 and reasonable warning" regarding such toxic exposures.

9 32. DEFENDANTS have engaged in the manufacture, distribution and/or offering of the  
10 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  
13 DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and  
14 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 limits.

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

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

26 37. The normal and reasonably foreseeable use of the PRODUCTS has caused and  
27 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined by  
28

1 27 CCR §25601(b).

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

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

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

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

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

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

23 44. Wherefore, plaintiff prays judgment against DEFENDANTS as set forth hereinafter.

24 **PRAYER FOR RELIEF**

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

26 1. That the Court, pursuant to California Health & Safety Code §25249.7(b), assess  
27 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation alleged  
28

1 herein;

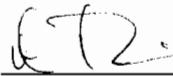
2           2.       That the Court, pursuant to California Health & Safety Code §25249.7(a),  
3 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing and/or  
4 offering the PRODUCTS for sale or use in California, without providing “clear  
5 and reasonable warnings” as defined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

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

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

9  
10 Dated: February 16, 2009

Respectfully Submitted,  
HIRST & CHANLER LLP



\_\_\_\_\_  
David Lavine  
Attorneys for Plaintiff  
ANTHONY E. HELD, Ph.D., P.E.

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