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FILED  
San Francisco County Superior Court

AUG 9 - 2009

CASE MANAGEMENT CONFERENCE SET

GORDON PARKER, Clerk  
BY: CRISTINA E. BALISTOTA  
Deputy Clerk

JAN 8 - 2010 - 9<sup>00</sup>AM

11 DEPARTMENT 212  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE CITY AND COUNTY OF SAN FRANCISCO  
14 UNLIMITED CIVIL JURISDICTION

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

16 Plaintiff,

17 v.

18 KMART CORPORATION; and DOES 1-150,  
19 inclusive,

20 Defendants.

21 Case No.

CGC-09.491275

22 **COMPLAINT FOR CIVIL PENALTIES  
23 AND INJUNCTIVE RELIEF**

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

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  
5 found in children’s vinyl bathroom animal toys sold in California.

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

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in and on children’s  
11 vinyl bathroom animal toys 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  
16 the state to cause cancer or reproductive toxicity without first giving clear and reasonable  
17 warning to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

18 5. On October 24, 2003, California identified and listed di(2-ethylhexyl)phthalate as  
19 a 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  
22 *CCR § 27001(c); Cal. Health & Safety Code § 25249.8.*)

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

25 7. Defendants manufacture, distribute, and/or sell children’s vinyl bathroom animal  
26 toys containing excessive levels of the LISTED CHEMICAL including, but not limited to, the  
27 *12pk Sealife Animals (#4 895129 725196)*. All such children’s vinyl bathroom animal toys  
28 containing the LISTED CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

1 8. Defendants' failures 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  
4 such conduct as well as civil penalties for each such violation.

5 9. 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  
8 CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

9 10. 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 11. 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 12. Defendant KMART CORPORATION. ("KMART") is a person doing business  
17 within the meaning of California Health & Safety Code § 25249.11.

18 13. Defendant KMART offers the PRODUCTS for sale or use in the State of  
19 California or implies by its conduct that it offers the PRODUCTS for sale or use in the State of  
20 California.

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

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

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

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

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

6           19.     RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the  
7 State of California.

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

13           21.     KMART, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
14 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred  
15 to hereinafter as "DEFENDANTS."

16    **VENUE AND JURISDICTION**

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

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

26           24.     The California Superior Court has jurisdiction over DEFENDANTS based on  
27 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or  
28 association that either are citizens of the State of California, have sufficient minimum contacts in

1 the State of California, or otherwise purposefully avail themselves of the California market.  
2 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California  
3 courts consistent with traditional notions of fair play and substantial justice.

4 **FIRST CAUSE OF ACTION**

5 **(Violation of Proposition 65 - Against All Defendants)**

6 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
7 Paragraphs 1 through 24, inclusive.

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

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

16 28. On August 14, 2008, a sixty-day notice of violation, together with the requisite  
17 certificate of merit, was provided to KMART and various public enforcement agencies stating  
18 that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in the  
19 State of California were being exposed to di(2-ethylhexyl)phthalate resulting from the reasonably  
20 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having  
21 been provided with a "clear and reasonable warning" regarding such toxic exposures.

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

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

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

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

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

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

16          35.     DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
17 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact  
18 and/or ingestion.

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

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

27          38.     Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
28 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal

1 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold  
2 by DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to  
3 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

7 40. As a consequence of the above-described acts, California Health & Safety Code  
8 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
9 DEFENDANTS.

10 41. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth  
11 hereinafter.

12 **PRAYER FOR RELIEF**

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

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

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

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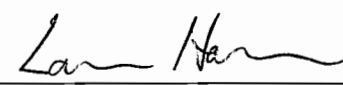
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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: August 10, 2009

Respectfully Submitted,  
HIRST & CHANLER LLP

By:   
\_\_\_\_\_  
Laurence Haveson  
Attorneys for Plaintiff  
ANTHONY E. HELD, Ph.D., P.E.