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**ENDORSED**

2009 SEP 18 P 3: 23

David H. Mendonca, Clerk of the Superior Court  
County of Santa Clara, California  
By: Mendonca  
Clerk/Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA CLARA  
UNLIMITED CIVIL JURISDICTION

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

Plaintiff,

v.

NANCY SALES CO., INC.; and DOES 1-150,  
inclusive,

Defendants.

Case No. 109CV152731

**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  
5 found in children's vinyl plush toys and vinyl keychains 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 plush toys and vinyl keychains that defendants manufacture, distribute  
9 and/or 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 plush toys and vinyl keychains 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  
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 (1) children's vinyl plush toys  
26 containing excessive levels of the LISTED CHEMICAL including, but not limited to (a) *Bob the*  
27 *Builder Plush*, (b) *Nickelodeon SpongeBob Squarepants Plush*, (c) *It's A Knock Out Boxing*  
28 *Glove*, #00055712 (#7 47482 34720 8); and (2) vinyl keychains containing the LISTED

1 CHEMICAL including, but not limited to: *Butterfly Light Up Keychain, #00064668 (#7 4782*  
2 *35876 1)*. All such children’s vinyl plush toys and vinyl keychains containing the LISTED  
3 CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

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

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

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

14 **PARTIES**

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

19 12. Defendant NANCY SALES CO., INC.. (“NANCY SALES”) is a person doing  
20 business within the meaning of California Health & Safety Code § 25249.11.

21 13. Defendant NANCY SALES offers the PRODUCTS for sale or use in the State of  
22 California or implies by its conduct that it offers the PRODUCTS for sale or use in the State of  
23 California.

24 14. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each  
25 persons doing business within the meaning of California Health & Safety Code § 25249.11.

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

3 16. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons  
4 doing business within the meaning of California Health & Safety Code § 25249.11.

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

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

10 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the  
11 State of California.

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

17 21. NANCY SALES, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
18 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred  
19 to hereinafter as “DEFENDANTS.”

20 **VENUE AND JURISDICTION**

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

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

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

9 **FIRST CAUSE OF ACTION**

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

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

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

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

21 28. On November 7, 2008, a sixty-day notice of violation, together with the requisite  
22 certificate of merit, was provided to NANCY SALES and various public enforcement agencies  
23 stating that as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and users in  
24 the State of California were being exposed to di(2-ethylhexyl)phthalate resulting from the  
25 reasonably foreseeable use of certain children’s vinyl plush toys, without the individual  
26 purchasers and users first having been provided with a “clear and reasonable warning” regarding  
27 such toxic exposures.

1           29.     On April 30, 2008, a supplemental sixty-day notice of violation, together with the  
2 requisite certificate of merit, was provided to NANCY SALES and various public enforcement  
3 agencies stating that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and  
4 users in the State of California were being exposed to di(2-ethylhexyl)phthalate resulting from  
5 the reasonably foreseeable use of certain vinyl keychains, without the individual purchasers and  
6 users first having been provided with a "clear and reasonable warning" regarding such toxic  
7 exposures.

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

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

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

20           33.     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  
22 LISTED CHEMICAL.

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

26           35.     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  
28 by 27 CCR § 25602(b).

1           36.     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/or ingestion.

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

8           38.     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/or ingestion during the  
11 reasonably foreseeable use of the PRODUCTS.

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

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

20           41.     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           42.     Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth  
24 hereinafter.

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1 **PRAYER FOR RELIEF**

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

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

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

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

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

13 Respectfully Submitted,

14 Dated: September 17, 2009

HIRST & CHANLER LLP

15  
16 By: 

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