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FILED

APR 17 2009

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF MARIN
9 UNLIMITED CIVIL JURISDICTION

12 ANTHONY E. HELD, PH.D., P.E.,

13 Plaintiff,

14 v.

15 D.M. MERCHANDISING, INC.; and DOES 1
16 through 150, inclusive,

17 Defendants.

Case No. 01W 091884

**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 children's vinyl zipper pulls manufactured and sold by defendants 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 (DEHP) present in or on
8 certain children's vinyl zipper pulls that defendants manufacture, distribute, and/or offer for sale to
9 consumers throughout the State of California.

10 3. High levels of DEHP are commonly found in and on children's vinyl zipper pulls
11 that defendants manufacture, distribute and/or offer for sale to consumers throughout the State of
12 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 DEHP as a chemical known to
19 cause birth defects and other reproductive harm. DEHP became subject to the warning
20 requirement one year later and was therefore subject to the "clear and reasonable warning"
21 requirements of Proposition 65, beginning on October 24, 2004. (*CCR §12000(c); Cal. Health &*
22 *Safety Code §25249.8.*) DEHP shall hereinafter be referred to as the "LISTED CHEMICAL."

23 6. Defendants manufacture and sell children's vinyl zipper pulls containing DEHP
24 including, but not limited to, *Zipper Buddies 3 Zipper Pulls, #ZIP-BUDS (#7 22950 13100 8)*,
25 which contain excessive levels of the LISTED CHEMICAL. All such children's vinyl zipper pulls
26 containing the LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

27 7. Defendants' failure to warn consumers and/or other individuals in the State of
28

1 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale
2 of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such
3 conduct as well as civil penalties for each such violation.

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

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

10 **PARTIES**

11 10. ANTHONY E. HELD, PH.D., P.E. is a citizen living in the State of California who
12 is dedicated to protecting the health of California citizens through the elimination or reduction of
13 toxic exposures from consumer products, and brings this action in the public interest pursuant to
14 California Health & Safety Code §25249.7.

15 11. Defendant D.M. MERCHANDISING, INC. ("D.M. MERCHANDISING") is a
16 person doing business within the meaning of California Health & Safety Code §25249.11.

17 12. D.M. MERCHANDISING manufactures, distributes, and/or offers the PRODUCTS
18 for sale or use in the State of California or implies by its conduct that it manufactures, distributes,
19 and/or offers the PRODUCTS for sale or use in the State of California.

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

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

26 15. Defendants DOES 51-100 (DISTRIBUTOR DEFENDANTS) are each persons
27 doing business within the meaning of California Health & Safety Code §25249.11.
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1 association that either are citizens of the State of California, have sufficient minimum contacts in
2 the State of California, or otherwise purposefully avail themselves of the California market.
3 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
4 courts consistent with traditional notions of fair play and substantial justice.

5 **FIRST CAUSE OF ACTION**

6 **(Violation of Proposition 65)**

7 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
8 Paragraphs 1 through 23, inclusive.

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

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

16 27. On November 28, 2008, a sixty-day notice of violation, together with the requisite
17 certificate of merit, was provided to D.M. MERCHANDISING and various public enforcement
18 agencies stating that as a result of DEFENDANTS' sale of PRODUCTS, purchasers and users in
19 the State of California were being exposed to the LISTED CHEMICAL resulting from the
20 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
21 having been provided with a "clear and reasonable warning" regarding such toxic exposures.

22 28. 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 notice of violation. Plaintiff further alleges and
27 believes that such violations will continue to occur into the future.
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1 29. After receipt of the claims asserted in the sixty-day notice of violation, the
2 appropriate public enforcement agencies have failed to commence and diligently prosecute a cause
3 of action against DEFENDANTS under Proposition 65.

4 30. 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 31. 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 LISTED
9 CHEMICAL.

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

13 33. 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 22 CCR §12601(b).

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

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

23 36. 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 ingestion and/or dermal contact during the
26 reasonably foreseeable use of the PRODUCTS.

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

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

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

11 40. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
12 set forth hereinafter.

13 **PRAYER FOR RELIEF**

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

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

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

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

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

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1 Dated: April 17, 2009

Respectfully Submitted,

HIRST & CHANLER LLP



Christopher M. Martin
Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.

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