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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF SOLANO  
14 UNLIMITED CIVIL JURISDICTION  
15

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

17 Plaintiff,

18 v.

19 SHIMS BARGAIN, INC.; and DOES 1-150,  
20 inclusive,

21 Defendants.

Case No. EC\$033234

COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF

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

BY FAX

ASSIGNED TO  
JUDGE DAVID E. HARRIS  
FOR ALL PURPOSES

**NATURE OF THE ACTION**

1. This Complaint is a representative action brought by plaintiff ANTHONY E. HELD, Ph.D., P.E., in the public interest of the citizens of the State of California, to enforce the People's right to be informed of the presence of di(2-ethylhexyl)phthalate and lead, toxic chemicals found in children's soft vinyl balls sold in California.

2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to warn California citizens about their exposure to di(2-ethylhexyl)phthalate and lead, present in or on certain children's soft vinyl balls that defendants manufacture, distribute and/or offer for sale to consumers throughout the State of California.

3. High levels of di(2-ethylhexyl)phthalate and lead are commonly found in and on children's soft vinyl balls that defendants manufacture, distribute and/or offer for sale to consumers throughout the State of California.

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

5. On February 27, 1987, California identified and listed lead as a chemical known to cause birth defects and other reproductive harm. Lead became subject to the warning requirement one year later and was therefore subject to the "clear and reasonable warning" requirements of Proposition 65, beginning on February 27, 1988. (27 CCR § 27001 (c); *Cal. Health & Safety Code* § 25249.8.)

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

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7. Di(2-ethylhexyl)phthalate and lead shall hereinafter be collectively referred to as the “LISTED CHEMICALS.”

8. Defendants manufacture, distribute, and/or sell children's soft vinyl balls containing excessive levels of the LISTED CHEMICALS including, but not limited to, the *Super Shoot Football* (#6 03076 30752 5). All such children's soft vinyl balls containing the LISTED CHEMICALS shall hereinafter be referred to as the "PRODUCTS."

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

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

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

**PARTIES**

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

13. Defendant SHIMS BARGAIN, INC. ("SHIMS") is a person doing business within the meaning of California Health & Safety Code § 25249.11.

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

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

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

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

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

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

20. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State of California.

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

22. SHIMS, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as “DEFENDANTS.”

## VENUE AND JURISDICTION

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

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

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

**FIRST CAUSE OF ACTION**

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

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

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

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

29. On December 23, 2008, a sixty-day notice of violation, together with the requisite certificate of merit, was provided to SHIMS and various public enforcement agencies stating that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in the State of California were being exposed to lead resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first having been provided with a "clear and reasonable warning" regarding such toxic exposures.

1           30.     On December 23, 2008, an additional sixty-day notice of violation, together with  
2 the requisite certificate of merit, was provided to SHIMS 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 uses of the PRODUCTS, without the individual purchasers and users  
6 first having been provided with a "clear and reasonable warning" regarding such toxic exposures.

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

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

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

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

22           35.     The LISTED CHEMICALS were present in or on the PRODUCTS in such a way  
23 as to expose individuals to the LISTED CHEMICALS through dermal contact and/or ingestion  
24 during the reasonably foreseeable use of the PRODUCTS.

25           36.     The normal and reasonably foreseeable use of the PRODUCTS has caused and  
26 continues to cause consumer exposures to the LISTED CHEMICALS, as such exposure is  
27 defined by 27 CCR § 25602(b).  
28

1           37.     DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
2 the PRODUCTS would expose individuals to the LISTED CHEMICALS through dermal contact  
3 and/or ingestion.

4           38.     DEFENDANTS intended that such exposures to the LISTED CHEMICALS 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           39.     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 CHEMICALS through dermal contact and/or ingestion during the  
11 reasonably foreseeable use of the PRODUCTS.

12           40.     Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
13 directly by California voters, individuals exposed to the LISTED CHEMICALS 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           41.     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           42.     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           43.     Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth  
24 hereinafter.

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## COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF