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ENDORSED
FILED
Superior Court of the State of California
County of San Francisco
MAY 7 - 2009
GORDON PARK LL, Clerk
BY: CRISTINA MALHOTRA
CASE MANAGEMENT DEPARTMENT SET
Deputy Clerk

OCT 9 - 2009 - 9:00 AM

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

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

15 Plaintiff,

16 v.

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

20 Defendants.

Case No.

~~C GC - 09 . 488165~~

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in and/or on
11 children's vinyl zipper pulls 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.
22 (*27 CCR § 27001; Cal. Health & Safety Code § 25249.8.*)

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

25 7. Defendants manufacture, distribute, and/or sell children's vinyl zipper pulls with
26 excessive levels of the LISTED CHEMICAL including, but not limited to, *Five Star Pencil*

1 *Pouch, X-539, (#0 43100 50926 4)*. All such children’s vinyl zipper pulls containing the
2 LISTED CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

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

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

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

13 **PARTIES**

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

18 12. Defendant MEADWESTVACO CORPORATION (“MEAD”) is a person doing
19 business within the meaning of California Health & Safety Code § 25249.11.

20 13. Defendant MEAD manufactures, distributes, and/or offers the PRODUCTS for
21 sale or use in the State of California or implies by its conduct that it manufactures, distributes
22 and/or offers the PRODUCTS for sale or use in the State of California.

23 14. Defendant KMART CORPORATION (“KMART”) is a person doing business
24 within the meaning of California Health & Safety Code § 25249.11.

25 15. Defendant KMART offers the PRODUCTS for sale or use in the State of
26 California or implies by its conduct that it offers the PRODUCTS for sale or use in the State of
27 California.

1 and County of San Francisco and/or because DEFENDANTS conducted, and continue to
2 conduct, business in this County with respect to the PRODUCTS.

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

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

13 **FIRST CAUSE OF ACTION**

14 **(Violation of Proposition 65 – Against All Defendants)**

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

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

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

25 30. On January 26, 2009, a sixty-day notice of violation, together with the requisite
26 certificate of merit, was provided to MEAD, KMART and various public enforcement agencies
27 stating that as a result of DEFENDANTS’ sales of the PRODUCTS, purchasers and users in the
28

1 State of California were being exposed to the LISTED CHEMICAL resulting from the
2 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
3 having been provided with a “clear and reasonable warning” regarding such toxic exposures
4 (“60-Day Notice of Violation”).

5 31. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
6 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
7 DEFENDANTS’ manufacture, distribution and/or offering of the PRODUCTS for sale or use in
8 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
9 DEFENDANTS’ receipt of plaintiff’s 60-Day Notice of Violation. Plaintiff further alleges and
10 believes that such violations will continue to occur into the future.

11 32. After receipt of the claims asserted in the 60-Day Notice of Violation, the
12 appropriate public enforcement agencies have failed to commence and diligently prosecute a
13 cause of action against DEFENDANTS under Proposition 65.

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

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

20 35. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
21 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
22 during the reasonably foreseeable use of the PRODUCTS.

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

1 37. 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 38. 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 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 CHEMICAL 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 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 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
21 Code § 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.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation alleged herein;
2. That the Court, pursuant to California Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or offering the PRODUCTS for sale or use in California, without providing “clear and reasonable warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures to the LISTED CHEMICAL;
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.

Respectfully Submitted,

Dated: April 27 2009

HIRST & CHANLER LLP

By: 

Daniel Bornstein
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.