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CASE MANAGEMENT CONFERENCE SET

EMPOWERED
FILED
San Francisco County Superior Court

AUG 10 - 2009

GORDON PATRICK LI, Clerk
BY: CHRISTINA E. BALDIESTA
Deputy Clerk

JAN 8 - 2010 - 9⁰⁰ AM

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE CITY AND COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION

CGC-09.491273

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

Case No. _____

13 Plaintiff,

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

14 v.

15 SANFORD, L.P.; NEWELL RUBBERMAID
16 INC.; KMART CORPORATION; and DOES
17 1-150, inclusive,

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

18 Defendants.

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 bags 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 bags that defendants manufacture, distribute and/or offer for sale to
9 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 bags that defendants manufacture, distribute and/or offer for sale to consumers throughout
12 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 bags containing
26 excessive levels of the LISTED CHEMICAL including, but not limited to, the *Sanford Brands*
27 *Rubbermaid SpaceMaker, #1737358 (#0 71641 76537 5)*. All such children’s vinyl bags
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 SANFORD, L.P. ("SANFORD") is a person doing business within the
17 meaning of California Health & Safety Code § 25249.11.

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

21 14. Defendant NEWELL RUBBERMAID INC. ("NEWELL") is a person doing
22 business within the meaning of California Health & Safety Code § 25249.11.

23 15. Defendant NEWELL manufactures, distributes, and/or offers the PRODUCTS for
24 sale or use in the State of California or implies by its conduct that it manufactures, distributes
25 and/or offers the PRODUCTS for sale or use in the State of California.

26 16. Defendant KMART CORPORATION ("KMART") is a person doing business
27 within the meaning of California Health & Safety Code § 25249.11.
28

1 17. Defendant KMART offers the PRODUCTS for sale or use in the State of
2 California or implies by its conduct that it offers the PRODUCTS for sale or use in the State of
3 California.

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

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

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

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

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

17 23. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the
18 State of California.

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

24 25. SANFORD, NEWELL, KMART, MANUFACTURER DEFENDANTS,
25 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate,
26 collectively be referred to hereinafter as “DEFENDANTS.”

1 **VENUE AND JURISDICTION**

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

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

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

17 **FIRST CAUSE OF ACTION**

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

19 29. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 28, inclusive.

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

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

28 (*Id.*)

1 32. On January 26, 2009, a sixty-day notice of violation, together with the requisite
2 certificate of merit, was provided to SANFORD, NEWELL 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 33. On April 30, 2009, a supplemental sixty-day notice of violation, together with the
8 requisite certificate of merit, was provided to SANFORD, NEWELL, KMART and various
9 public enforcement agencies stating that as a result of the DEFENDANTS' sales of the
10 PRODUCTS, purchasers and users in the State of California were being exposed to di(2-
11 ethylhexyl)phthalate resulting from the reasonably foreseeable uses of the PRODUCTS, without
12 the individual purchasers and users first having been provided with a "clear and reasonable
13 warning" regarding such toxic exposures.

14 34. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
15 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
16 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale or use in
17 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
18 DEFENDANTS' receipt of plaintiff's sixty-day notices of violation. Plaintiff further alleges and
19 believes that such violations will continue to occur into the future.

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

23 36. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
24 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
25 limits.

26 37. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
27 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
28 LISTED CHEMICAL.

1 38. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
2 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
3 during the reasonably foreseeable use of the PRODUCTS.

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

7 40. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
8 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
9 and/or ingestion.

10 41. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
11 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
12 accidental participation in the manufacture, distribution and/or offer for sale or use of
13 PRODUCTS to individuals in the State of California.

14 42. DEFENDANTS failed to provide a “clear and reasonable warning” to those
15 consumers and/or other individuals in the State of California who were or who could become
16 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
17 reasonably foreseeable use of the PRODUCTS.

18 43. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
19 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
20 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold
21 by DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to
22 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

26 45. As a consequence of the above-described acts, California Health & Safety Code
27 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
28 DEFENDANTS.

1 46. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
2 hereinafter.

3 PRAYER FOR RELIEF

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

- 5 1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess
6 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation
7 alleged herein;
- 8 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
9 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or
10 offering the PRODUCTS for sale or use in California, without providing “clear and reasonable
11 warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures to each of
12 the LISTED CHEMICAL;
- 13 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and
14 4. That the Court grant such other and further relief as may be just and proper.

15 Respectfully Submitted,

16 Dated: August 10, 2009

HIRST & CHANLER LLP

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18 By: Laurence Haveson
19 Laurence Haveson
20 Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

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