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Superior Court Of California,
Sacramento
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By _____, Deputy
Case Number:
34-2009-00044151

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO
UNLIMITED CIVIL JURISDICTION

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

Plaintiff,

v.

WISHING WELL ENTERPRISES, INC.; and
DOES 1-150, inclusive,

Defendants.

Case No. _____

**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 soft vinyl balls, vinyl keychains and inflatable vinyl balls 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 soft vinyl balls, vinyl keychains and inflatable vinyl balls that defendants
9 manufacture, distribute 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/or on
11 children’s soft vinyl balls, vinyl keychains and inflatable vinyl balls that defendants manufacture,
12 distribute and/or offer for sale 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
15 of doing business shall knowingly and intentionally expose any individual to a chemical known
16 to 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 the following products with
26 excessive levels of the LISTED CHEMICAL: a) children’s soft vinyl balls including, but not
27 limited to, *Baseball*; b) vinyl keychains including, but not limited to, *Keychain, T-Shirt, #69*; and
28 c) inflatable vinyl balls including, but not limited to, *Kiss My Class Goodbye Beach Ball 24,*”

1 No. 50002 (#0 34689 50002 5). All such children's soft vinyl balls, vinyl keychains and
2 inflatable vinyl balls containing the LISTED CHEMICAL shall hereinafter be referred to as the
3 "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 WISHING WELL ENTERPRISES, INC. ("WISHING WELL") is a
20 person doing business within the meaning of California Health & Safety Code § 25249.11.

21 13. Defendant WISHING WELL 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 persons
25 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 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 in the
7 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 State
11 of California.

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

17 21. WISHING WELL, 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 Sacramento 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 Sacramento 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 January 26, 2009, a sixty-day notice of violation, together with the requisite
22 certificate of merit, was provided to WISHING WELL and various public enforcement agencies
23 stating that as a result of DEFENDANTS’ sales of the PRODUCTS, purchasers and users in the
24 State of California were being exposed to the LISTED CHEMICAL resulting from the
25 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
26 having been provided with a “clear and reasonable warning” regarding such toxic exposures
27 (“60-Day Notice of Violation”).
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1 29. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
2 the PRODUCTS for sale in violation of California Health & Safety Code § 25249.6 and
3 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale in
4 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
5 DEFENDANTS' receipt of plaintiff's 60-Day Notice of Violation. Plaintiff further alleges and
6 believes that such violations will continue to occur into the future.

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

10 31. The PRODUCTS manufactured, distributed, and/or offered for sale in California
11 by DEFENDANTS contained the LISTED CHEMICAL above the allowable state limits.

12 32. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
13 distributed, and/or offered for sale by DEFENDANTS in California contained the LISTED
14 CHEMICAL.

15 33. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
16 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
17 during the reasonably foreseeable use of the PRODUCTS.

18 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
19 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
20 by Title 27 of the California Code of Regulations, § 25602(b).

21 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
22 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
23 and/or ingestion.

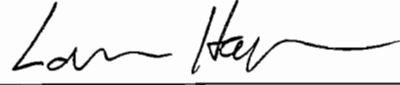
24 36. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
25 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
26 accidental participation in the manufacture, distribution and/or offer for sale of PRODUCTS to
27 individuals in the State of California.

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- 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.

Dated: May 13 2009

Respectfully Submitted,
HIRST & CHANLER LLP

By: 

Laurence Haveson
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.