

1 Clifford A. Chanler, State Bar No. 135534
2 HIRST & CHANLER LLP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

ENDORSED
FILED
San Francisco County Superior Court

MAY 22 2009

GORDON PARK-LI, Clerk

BY: PARAM NATT
Deputy Clerk

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

CGC-09-488636

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

12 Plaintiff,

13 v.

14 SWIBCO, INC.; and DOES 1-150, inclusive,

15 Defendants.

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

CASE MANAGEMENT CONFERENCE SET

OCT 23 2009 9:00 AM

DEPARTMENT 212

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 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 or on
8 certain 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 di(2-ethylhexyl)phthalate are commonly found in and on vinyl
11 zipper pulls 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 vinyl zipper pulls containing
26 excessive levels of the LISTED CHEMICAL including, but not limited to, the *Shoobies Zipper*
27 *Pull, Blue with “W” Plug Charm*. All such vinyl zipper pulls containing the LISTED
28 CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

1 the State of California, or otherwise purposefully avail themselves of the California market.
2 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
3 courts consistent with traditional notions of fair play and substantial justice.

4 **FIRST CAUSE OF ACTION**

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

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

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

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

16 28. On February 24, 2009, a sixty-day notice of violation, together with the requisite
17 certificate of merit, was provided to SWIBCO and various public enforcement agencies stating
18 that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in the
19 State of California were being exposed to di(2-ethylhexyl)phthalate resulting from the reasonably
20 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having
21 been provided with a "clear and reasonable warning" regarding such toxic exposures.

22 29. 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 notices of violation. Plaintiff further alleges and
27 believes that such violations will continue to occur into the future.

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

4 31. 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 32. 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
9 LISTED CHEMICAL.

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

13 34. 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 27 CCR § 25602(b).

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

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

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

27 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
28 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal

1 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold
2 by DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to
3 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

10 41. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
11 hereinafter.

12 **PRAYER FOR RELIEF**

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

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

17 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
18 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or
19 offering the PRODUCTS for sale or use in California, without providing “clear and reasonable
20 warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures to each of
21 the LISTED CHEMICAL;

22 ///

23 ///

24 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 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 21, 2009

Respectfully Submitted,
HIRST & CHANLER LLP

By: 
Clifford A. Chanler
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.