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**ENDORSED
FILED
ALAMEDA COUNTY**

NOV 10 2010

CLERK OF THE SUPERIOR COURT
E. Robinson Deputy

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
15

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

17 Plaintiff,

18 v.

19 OFFICE DEPOT, INC.; INNOVATIVE
20 STORAGE DESIGNS, INC.; ADVANTUS
21 CORPORATION; and DOES 1-150, inclusive,

22 Defendants.

Case No. RG09460921

**FIRST AMENDED 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 vinyl keychains and vinyl pouches 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 vinyl keychains and vinyl pouches that defendants manufacture, import, distribute, and/or
9 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 certain
11 vinyl keychains and vinyl pouches that defendants manufacture, import, distribute, and/or offer
12 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, import, distribute, and/or sell vinyl keychains and vinyl
26 pouches with excessive levels of the LISTED CHEMICAL as follows:

27 a. Defendant OFFICE DEPOT, INC. ("OFFICE DEPOT") manufactures,
28 imports, distributes, and/or sells vinyl keychains containing the Listed Chemical

1 including, but not limited to, *Office Depot Mini Notebook Keychain, SKU #179-235 (#7*
2 *35854 76539)*;

3 b. Defendants OFFICE DEPOT, INNOVATIVE STORAGE DESIGNS,
4 INC. (“INNOVATIVE”) and ADVANTUS CORPORATION (“ADVANTUS”)
5 manufacture, import, distribute, and/or sell vinyl pouches containing the Listed Chemical
6 including, but not limited to, *InFile Storage Expanding Zipper Pouch (#0 24591*
7 *50904 9)*.

8 8. All such vinyl keychains and vinyl pouches containing the Listed Chemical, as
9 listed in paragraphs 7 (a) – (b) above, shall hereinafter be collectively referred to as the
10 “PRODUCTS.” However, as to each individual defendant, “PRODUCTS” shall only refer to the
11 specific category/categories identified in paragraphs 7 (a) - (b) in conjunction with that specific
12 defendant.

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

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

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

23 **PARTIES**

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

1 13. Defendants OFFICE DEPOT, INNOVATIVE, and ADVANTUS are each persons
2 in the course of doing business within the meaning of California Health & Safety Code §
3 25249.11.

4 14. Defendants OFFICE DEPOT, INNOVATIVE, and ADVANTUS each
5 manufacture, import, distribute, and/or offer the PRODUCTS for sale or use in the State of
6 California or imply by their conduct that they manufacture, import, distribute, and/or offer the
7 PRODUCTS for sale or use in the State of California.

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

10 16. MANUFACTURER DEFENDANTS engage in the process of research, testing,
11 designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that they
12 engage in the process of research, testing, designing, assembling, fabricating, and/or
13 manufacturing, e.g., by engaging in private labeling one or more of the PRODUCTS for sale or
14 use in the State of California.

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

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

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

22 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
23 State of California and, in some circumstances, may also be manufacturers and/or distributors.

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

1 reproductive toxicity without first giving clear and reasonable warning to such individual....”

2 (*Id.*)

3 29. On February 24, 2009, a sixty-day notice of violation, together with the requisite
4 certificate of merit, was provided to OFFICE DEPOT and various public enforcement agencies
5 stating that as a result of OFFICE DEPOT’s sales of the vinyl keychains containing the LISTED
6 CHEMICAL, purchasers and users in the State of California were being exposed to the LISTED
7 CHEMICAL resulting from the reasonably foreseeable uses of the vinyl keychains, without the
8 individual purchasers and users first having been provided with a “clear and reasonable warning”
9 regarding such toxic exposures.

10 30. On August 14, 2009, a supplemental sixty-day notice of violation, together with
11 the requisite certificate of merit, was provided to OFFICE DEPOT and various public
12 enforcement agencies stating that as a result of OFFICE DEPOT’s sales of the PRODUCTS,
13 each containing the LISTED CHEMICAL, purchasers and users in the State of California were
14 being exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable uses of the
15 PRODUCTS, without the individual purchasers and users first having been provided with a
16 “clear and reasonable warning” regarding such toxic exposures.

17 31. On May 7, 2010, a sixty-day notice of violation, together with the requisite
18 certificate of merit, was provided to OFFICE DEPOT, INNOVATIVE, ADVANTUS, and
19 various public enforcement agencies stating that as a result of OFFICE DEPOT’s,
20 INNOVATIVE’s, and ADVANTUS’ sales of the PRODUCTS, purchasers and users in the State
21 of California were being exposed to the LISTED CHEMICAL resulting from the reasonably
22 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having
23 been provided with a “clear and reasonable warning” regarding such toxic exposures.

24 32. DEFENDANTS have engaged in the manufacture, importation, distribution,
25 and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety
26 Code § 25249.6 and DEFENDANTS’ manufacture, importation, distribution, and/or offering of
27 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 has
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1 continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day notices of violation.
2 Plaintiff further alleges and believes that such violations will continue to occur into the future.

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

7 34. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or
8 use in California by DEFENDANTS contained the LISTED CHEMICAL above the allowable
9 state limits.

10 35. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
11 imported, distributed, and/or offered for sale or use by DEFENDANTS in California contained
12 the LISTED CHEMICAL.

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

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

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

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

26 40. DEFENDANTS failed to provide a "clear and reasonable warning" to those
27 consumers and/or other individuals in the State of California who were or who could become
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1 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
2 reasonably foreseeable use of the PRODUCTS.

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

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

11 43. As a consequence of the above-described acts, California Health & Safety
12 Code § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
13 DEFENDANTS.

14 **PRAYER FOR RELIEF**

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

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

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

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