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**ENDORSED
FILED
ALAMEDA COUNTY**

MAY 12 2009

CLERK OF THE SUPERIOR COURT
By E. Robinson Deputy

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF ALAMEDA
9 UNLIMITED CIVIL JURISDICTION
10

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

12 Plaintiff,

13 v.

14 NATIONAL PEN CO. LLC; NATIONAL
15 DESIGN LLC; and DOES 1-150, inclusive,

16 Defendants.

Case No. RG09 451980

**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 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 and/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/or on
11 children's vinyl bags that defendants manufacture, distribute and/or offer for sale to consumers
12 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 bags with
26 excessive levels of the LISTED CHEMICAL including, but not limited to, *Pooh Die-Cut Pad &*
27 *Pen in Pouch, Item 5791D (#0 79568 20890 6)*. All such children's vinyl bags containing the
28 LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

1 individual purchasers and users first having been provided with a “clear and reasonable warning”
2 regarding such toxic exposures (“60-Day Notice of Violation”).

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

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

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

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

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

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

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

26 38. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
27 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-

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1 accidental participation in the manufacture, distribution and/or offer for sale or use of
2 PRODUCTS to individuals in the State of California.

3 39. DEFENDANTS failed to provide a “clear and reasonable warning” to those
4 consumers and/or other individuals in the State of California who were or who could become
5 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
6 reasonably foreseeable use of the PRODUCTS.

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

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

15 42. As a consequence of the above-described acts, California Health & Safety
16 Code § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
17 DEFENDANTS.

18 43. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
19 hereinafter.

20 **PRAYER FOR RELIEF**

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

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

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

3 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

4 4. That the Court grant such other and further relief as may be just and proper.

5 Respectfully Submitted,

6 Dated: May 12, 2009

HIRST & CHANLER LLP

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8 By: 

9 Clifford A. Chanler
10 Attorneys for Plaintiff
11 ANTHONY E. HELD, Ph.D., P.E.
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