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FILED

JUN 25 2009

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: *K. Main, Deputy*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION
11

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

13 Plaintiff,

14 v.

15 BARRY-OWEN CO., INC.; and DOES 1-150,
inclusive,

16 Defendants.
17

Case No. _____

CIV **093188**

**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 bracelets with vinyl charm plugs 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 bracelets with vinyl charm plugs that defendants manufacture, distribute and/or offer for
9 sale to consumers throughout the State of California.

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in and on the
11 bracelets with vinyl charm plugs that defendants manufacture, distribute and/or offer for sale to
12 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 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 bracelets with vinyl charm plugs
26 containing excessive levels of the LISTED CHEMICAL including, but not limited to, the *Plugs*
27 *Bracelet, BO-5268 (#7 55545 05268 6)*. All such bracelets with vinyl charm plugs and other
28

1 similar jewelry items containing the LISTED CHEMICAL shall hereinafter be referred to as the
2 “PRODUCTS.”

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

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

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

13 **PARTIES**

14 11. Plaintiff ANTHONY E. HELD, Ph.D., P.E., is a citizen of the City and County of
15 Sacramento in the State of California who is dedicated to protecting the health of California
16 citizens through the elimination or reduction of toxic exposures from consumer products, and
17 brings this action in the public interest pursuant to California Health & Safety Code § 25249.7.

18 12. Defendant BARRY-OWEN CO., INC. (“BARRY-OWEN”) is a person doing
19 business within the meaning of California Health & Safety Code § 25249.11.

20 13. Defendant BARRY-OWEN manufactures distributes and/or offers the
21 PRODUCTS for sale or use in the State of California or implies by its conduct that it
22 manufactures, distributes and/or offers the PRODUCTS for sale or use in the State of California.

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

25 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,
26 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
27 engage in the process of research, testing, designing, assembling, fabricating and/or
28 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

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

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

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

8 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the
9 State of California.

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

15 21. BARRY-OWEN, MANUFACTURER DEFENDANTS, DISTRIBUTOR
16 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred
17 to hereinafter as “DEFENDANTS.”

18 VENUE AND JURISDICTION

19 22. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
20 Procedure §§ 394, 395, 395.5, because this Court is a court of competent jurisdiction, because
21 one or more instances of wrongful conduct occurred, and continues to occur, in the County of
22 Marin and/or because DEFENDANTS conducted, and continue to conduct, business in this
23 County with respect to the PRODUCTS.

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

28

1 DEFENDANTS' receipt of plaintiff's sixty-day notices of violation. Plaintiff further alleges and
2 believes that such violations will continue to occur into the future.

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

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

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

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

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

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

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

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

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

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

9 40. As a consequence of the above-described acts, California Health & Safety Code
10 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
11 DEFENDANTS.

12 41. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
13 hereinafter.

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, distributing or
21 offering the PRODUCTS for sale or use in California, without providing “clear and reasonable
22 warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures to each of
23 the LISTED CHEMICAL;

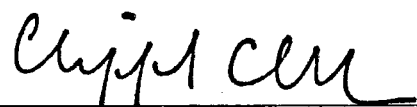
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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: June 25, 2009

Respectfully Submitted,
HIRST & CHANLER LLP
By: 
Clifford A. Chanler
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.