

FILED

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Court Executive Officer
MARIN COUNTY SUPERIOR COURT
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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **FOR THE COUNTY OF MARIN**

14 **UNLIMITED CIVIL JURISDICTION**

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

16 Plaintiff,

17 v.

18 CVS PHARMACY, INC.; CVS CAREMARK
19 CORPORATION; and DOES 1-150, inclusive,

20 Defendants.

Case No. CIV095907

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

BY FAX

1 **NATURE OF THE ACTION**

2 1. This complaint is a representative action brought by plaintiff ANTHONY E. HELD,
3 Ph.D., P.E., in the public interest of the citizens of the State of California, to enforce the People's
4 right to be informed of the presence of di(2-ethylhexyl)phthalate, a toxic chemical found in bags,
5 plush toys with vinyl components, and children's vinyl baseball/sporting toys sold in California.

6 2. By this complaint, plaintiff seeks to remedy defendants' continuing failures to warn
7 California citizens about their exposure to di(2-ethylhexyl)phthalate present in bags, plush toys with
8 vinyl components, and children's vinyl baseball/sporting toys that defendants manufacture,
9 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 bags, plush toys with
11 vinyl components, and children's vinyl baseball/sporting toys 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 of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to the
16 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
17 such individual. . . ." (*Cal. Health & Safety Code § 25249.6.*)

18 5. On October 24, 2003, California identified and listed di(2-ethylhexyl)phthalate as a
19 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 CCR*
22 *§ 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: (a) bags containing excessive levels
26 of the LISTED CHEMICAL including, but not limited to, the *11" Carry Case Baby HS, No. 13519*
27 *(#0 42607 93519 4)*; (b) plush toys with vinyl components containing excessive levels of the
28 LISTED CHEMICAL including, but not limited to, the *Tickle Tickle Santa, Item #460551 (#6*

1 69703 53312 5); and (c) children’s vinyl baseball/sporting toys containing excessive levels of the
2 LISTED CHEMICAL including, but not limited to, the *Jr. Baseball Glove & Baseball, #80784 (#6*
3 *35016 80784 0)*. All such bags, plush toys with vinyl components, and children’s vinyl
4 baseball/sporting toys containing the LISTED CHEMICAL shall hereinafter be referred to as the
5 “PRODUCTS.”

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

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

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

16 **PARTIES**

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

21 12. Defendant CVS PHARMACY, INC. (“CVS PHARMACY”) is a person doing
22 business within the meaning of California Health & Safety Code § 25249.11.

23 13. Defendant CVS PHARMACY manufactures, distributes or offers the PRODUCTS
24 for sale or use in the State of California or implies by its conduct that it manufactures, distributes or
25 offers the PRODUCTS for sale or use in the State of California.

26 14. Defendant CVS CAREMARK CORPORATION (“CAREMARK”) is a person doing
27 business within the meaning of California Health & Safety Code § 25249.11.

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1 15. Defendant CAREMARK distributes or offers the PRODUCTS for sale or use in the
2 State of California or implies by its conduct that it distributes or offers the PRODUCTS for sale or
3 use in the State of California.

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

6 17. MANUFACTURER DEFENDANTS engage in the process of research, testing,
7 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage
8 in the process of research, testing, designing, assembling, fabricating and/or manufacturing, one or
9 more of the PRODUCTS for sale or use in the State of California.

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

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

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

17 21. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State of
18 California.

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

24 23. CVS PHARMACY, CAREMARK, MANUFACTURER DEFENDANTS,
25 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate,
26 collectively be referred to hereinafter as “DEFENDANTS.”

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1 **VENUE AND JURISDICTION**

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

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

11 26. The California Superior Court has jurisdiction over DEFENDANTS based on
12 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
13 association that either are citizens of the State of California, have sufficient minimum contacts in
14 the State of California, or otherwise purposefully avail themselves of the California market.
15 DEFENDANTS’ purposeful avilment renders the exercise of personal jurisdiction by California
16 courts consistent with traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

18 **(Violation of Proposition 65 – Against All Defendants)**

19 27. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 26, inclusive.

21 28. The citizens of the State of California have expressly stated in the Safe Drinking
22 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.5 *et seq.*
23 (“Proposition 65”) that they must be informed “about exposures to chemicals that cause cancer,
24 birth defects and other reproductive harm.” (*Cal. Health & Safety Code § 25249.6.*)

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

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1 30. On April 2, 2009, a sixty-day notice of violation, together with the requisite
2 certificate of merit, was provided to CVS PHARMACY, CAREMARK and various public
3 enforcement agencies stating that as a result of DEFENDANTS' sales of bags and plush toys with
4 vinyl components containing excessive levels of the LISTED CHEMICAL, purchasers and users in
5 the State of California were being exposed to the LISTED CHEMICAL resulting from the
6 reasonably foreseeable uses of the bags and plush toys with vinyl components, without such
7 individuals first having been provided with a "clear and reasonable warning" regarding such toxic
8 exposures.

9 31. On April 30, 2009, a sixty-day notice of violation, together with the requisite
10 certificate of merit, was provided to CVS PHARMACY, CAREMARK and various public
11 enforcement agencies stating that as a result of DEFENDANTS' sales of bags, plush toys with vinyl
12 components and children's vinyl baseball/sporting toys containing excessive levels of the LISTED
13 CHEMICAL, purchasers and users in the State of California were being exposed to the LISTED
14 CHEMICAL resulting from the reasonably foreseeable uses of the bags, plush toys with vinyl
15 components and children's vinyl baseball/sporting toys, without such individuals first having been
16 provided with a "clear and reasonable warning" regarding such toxic exposures.

17 32. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of the
18 PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
19 DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale and/or use
20 in violation of California Health & Safety Code § 25249.6 has continued to occur beyond
21 DEFENDANTS' receipt of plaintiff's sixty-day notices of violation. Plaintiff further alleges and
22 believes that such violations will continue to occur into the future.

23 33. After receipt of the claims asserted in the sixty-day notices of violation, the
24 appropriate public enforcement agencies have neither commenced nor prosecuted a cause of action
25 against DEFENDANTS under Proposition 65.

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

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1 35. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
2 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED
3 CHEMICAL.

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

7 37. The normal and reasonably foreseeable use of the PRODUCTS has caused and
8 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined by
9 27 CCR § 25602(b).

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

13 39. DEFENDANTS, and each of them, intended that such exposures to the LISTED
14 CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their
15 deliberate, non-accidental participation in the manufacture, distribution, and/or offer for sale or use
16 of PRODUCTS to individuals in the State of California.

17 40. DEFENDANTS failed to provide a "clear and reasonable warning" to those
18 consumers and/or other individuals in the State of California who were or who could become
19 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the reasonably
20 foreseeable use of the PRODUCTS or those consumers and/or individuals who were guardians,
21 custodians, parents or decision makers for those consumers and/or other individuals in the State of
22 California who were or who could become exposed to the LISTED CHEMICAL through dermal
23 contact and/or ingestion during the reasonably foreseeable use of the PRODUCTS.

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

