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ENDORSED
FILED
ALAMEDA COUNTY

DEC 14 2010

CLERK OF THE SUPERIOR COURT
By JANE HARRIS
Deputy

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

RG10551258

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

16 Plaintiff,

17 v.

18 KLUTZ; SCHOLASTIC CORPORATION;
19 BURLINGTON COAT FACTORY
20 WAREHOUSE CORPORATION; and DOES
21 1-150, inclusive,

22 Defendants.

Case No. _____

**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 books with 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 or on
8 certain children’s books with vinyl pouches that defendants manufacture, distribute, and/or offer
9 for sale to consumers throughout the State of California.

10 3. High levels of di(2-ethylhexyl)phthalate are commonly found in and on children’s
11 books with vinyl pouches 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
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. (27
22 *CCR § 27001(c); 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 books with vinyl
26 pouches containing excessive levels of the LISTED CHEMICAL including, but not limited to,
27 the *Draw the Marvel Comic Super Heroes*, (#7 30767 40004 0). All such sell children’s books
28

1 with vinyl pouches 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 State of California
15 who is dedicated to protecting the health of California citizens through the elimination or
16 reduction of toxic exposures from consumer products, and brings this action in the public interest
17 pursuant to California Health & Safety Code § 25249.7.

18 12. Defendant KLUTZ is a person doing business within the meaning of California
19 Health & Safety Code § 25249.11.

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

23 14. Defendant SCHOLASTIC CORPORATION (“SCHOLASTIC”) is a person doing
24 business within the meaning of California Health & Safety Code § 25249.11.

25 15. Defendant SCHOLASTIC manufactures, distributes, and/or offers the
26 PRODUCTS for sale or use in the State of California or implies by its conduct that it
27 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.
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1 16. Defendant BURLINGTON COAT FACTORY WAREHOUSE CORPORATION
2 (“BCFW”) is a person doing business within the meaning of California Health & Safety Code §
3 25249.11.

4 17. Defendant BCFW manufactures, distributes, and/or offers the PRODUCTS for
5 sale or use in the State of California or implies by its conduct that it manufactures, distributes,
6 and/or offers the PRODUCTS for sale or use in the State of California.

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

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

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

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

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

20 23. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the
21 State of California.

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

1 25. KLUTZ, SCHOLASTIC, BCFW, MANUFACTURER DEFENDANTS,
2 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate,
3 collectively be referred to hereinafter as “DEFENDANTS.”

4 **VENUE AND JURISDICTION**

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

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

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

20 **FIRST CAUSE OF ACTION**

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

22 29. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
23 Paragraphs 1 through 28, inclusive.

24 30. The citizens of the State of California have expressly stated in Proposition 65 that
25 they must be informed “about exposures to chemicals that cause cancer, birth defects and other
26 reproductive harm.” (*Cal. Health & Safety Code § 25249.6.*)

27 31. Proposition 65 states, “No person in the course of doing business shall knowingly
28 and intentionally expose any individual to a chemical known to the state to cause cancer or

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

2 (*Id.*)

3 32. On February 12, 2010, a sixty-day notice of violation, together with the requisite
4 certificate of merit, was provided to KLUTZ, SCHOLASTIC, BCFW, and various public
5 enforcement agencies stating that as a result of the DEFENDANTS’ sales of the PRODUCTS,
6 purchasers and users in the State of California were being exposed to di(2-ethylhexyl)phthalate
7 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual
8 purchasers and users first having been provided with a “clear and reasonable warning” regarding
9 such toxic exposures.

10 33. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
11 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
12 DEFENDANTS’ manufacture, distribution and/or offering of the PRODUCTS for sale or use in
13 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
14 DEFENDANTS’ receipt of plaintiff’s sixty-day notice of violation. Plaintiff further alleges and
15 believes that such violations will continue to occur into the future.

16 34. After receipt of the claims asserted in the sixty-day notice of violation, the
17 appropriate public enforcement agencies have failed to commence and diligently prosecute a
18 cause of action against DEFENDANTS under Proposition 65.

19 35. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
20 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
21 limits.

22 36. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
23 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
24 LISTED CHEMICAL.

25 37. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
26 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
27 during the reasonably foreseeable use of the PRODUCTS.

28

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

4 39. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
5 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
6 and/or ingestion.

7 40. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
8 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
9 accidental participation in the manufacture, distribution, and/or offer for sale or use of
10 PRODUCTS to individuals in the State of California.

11 41. DEFENDANTS failed to provide a “clear and reasonable warning” to those
12 consumers and/or other individuals in the State of California who were or who could become
13 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
14 reasonably foreseeable use of the PRODUCTS.

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

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

23 44. As a consequence of the above-described acts, California Health & Safety Code
24 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
25 DEFENDANTS.

1 **PRAYER FOR RELIEF**

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

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

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

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

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

13 Respectfully Submitted,

14 Dated: December 14, 2010

THE CHANLER GROUP

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16 By: 

17 Josh Voorhees
18 Attorneys for Plaintiff
19 ANTHONY E. HELD, Ph.D., P.E.
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