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ENDORSED
FILED
Superior Court of California
County of San Francisco

MAR 26 2012

CLERK OF THE COURT
BY: MARYANN MORAN
Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SAN FRANCISCO

13 UNLIMITED CIVIL JURISDICTION

14 ANTHONY E. HELD, PhD., P.E.,

15 Plaintiff,

16 v.

17 HOT TOPIC, INC.; T.U.K., INC.; and DOES
18 2-150, inclusive,

19 Defendants.

Case No. CGC-11-512246

**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
3 HELD, PhD, 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 ("DEHP"), a toxic
5 chemical found in footwear sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to
7 warn California citizens about their exposure to DEHP present in or on footwear that defendants
8 manufacture, distribute, and/or offer for sale to consumers throughout the State of California.

9 3. High levels of DEHP are commonly found in and on the footwear that defendants
10 manufacture, distribute, and/or offer for sale to consumers throughout the State of California.

11 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
12 California Health & Safety Code § 25249.6 *et seq.* ("Proposition 65"), "[n]o person in the
13 course of doing business shall knowingly and intentionally expose any individual to a chemical
14 known to the state to cause cancer or reproductive toxicity without first giving clear and
15 reasonable warning to such individual ..." (Cal. Health & Safety Code § 25249.6.)

16 5. On October 24, 2003, California identified and listed DEHP as a chemical known
17 to cause birth defects and other reproductive harm. DEHP became subject to the "clear and
18 reasonable warning" requirements of Proposition 65 one year later on October 24, 2004. (Tit.
19 27 Cal. Code Regs. § 27001(c); Cal. Health & Safety Code §§ 25249.8 & 25249.10(b).) DEHP
20 shall be referred to hereinafter as the "LISTED CHEMICAL."

21 6. Defendants manufacture, distribute, and/or offer for sale footwear containing
22 excessive levels of the LISTED CHEMICAL including, but not limited to, the *HT Scribble STR*
23 *STD Flip Flops, #161860-002, Style No. TS9J6*. All such footwear containing the LISTED
24 CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

25 7. Defendants' failure to warn consumers and/or other individuals in the State of
26 California about their exposure to the LISTED CHEMICAL in conjunction with defendants'
27 sale of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder
28 of such conduct as well as civil penalties for each such violation.

1 in all causes except those given by statute to other trial courts.” The statute under which this
2 action is brought does not specify any other basis of subject matter jurisdiction.

3 25. The California Superior Court has jurisdiction over DEFENDANTS based on
4 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation,
5 or association that is a citizen of the State of California, has sufficient minimum contacts in the
6 State of California, or otherwise purposefully avails itself of the California market.
7 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
8 California courts consistent with traditional notions of fair play and substantial justice.

9 **FIRST CAUSE OF ACTION**

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

11 26. Plaintiff realleges and incorporates by reference, Paragraphs 1 through 25,
12 inclusive, as if fully set forth herein.

13 27. The citizens of the State of California have expressly stated in the Safe Drinking
14 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 *et seq.*
15 that they must be informed “about exposures to chemicals that cause cancer, birth defects and
16 other reproductive harm.” (Cal. Health & Safety Code, § 25249.6.)

17 28. Proposition 65 states, “[n]o person in the course of doing business shall
18 knowingly and intentionally expose any individual to a chemical known to the state to cause
19 cancer or reproductive toxicity without first giving clear and reasonable warning to such
20 individual....” (*Ibid.*)

21 29. On or about April 25, 2011, plaintiff’s sixty-day notice of violation together with
22 the requisite certificate of merit was provided to HOT TOPIC and various public enforcement
23 agencies stating that, as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers
24 and users in the State of California were being exposed to DEHP resulting from the reasonably
25 foreseeable use of the PRODUCTS, without the individual purchasers and users first having
26 been provided with a “clear and reasonable warning” regarding such toxic exposures.

27 30. On or about December 13, 2011, plaintiff served a supplemental sixty-day notice
28 of violation together with the requisite certificate on HOT TOPIC, HOT TOPIC’S supplier,

1 T.U.K., and various public enforcement agencies which included the additional allegation that
2 T.U.K. was also responsible for purchasers' and users' exposed to DEHP during the reasonably
3 foreseeable use of the PRODUCTS resulting from DEFENDANTS' unwarned sales of the
4 PRODUCTS in California.

5 31. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
6 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6, and
7 DEFENDANTS' violations have continued beyond their receipt of Plaintiff's sixty-day notice
8 of violation and supplemental sixty-day notice of violation. Plaintiff further alleges and
9 believes that such violations are ongoing and continuous in nature.

10 32. After receipt of the claims asserted in the sixty-day notice and supplemental sixty-
11 day notice of violation, the appropriate public enforcement agencies have failed to commence
12 and diligently prosecute a cause of action against DEFENDANTS under Proposition 65.

13 33. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
14 California by DEFENDANTS contain the LISTED CHEMICAL in an amount above that level
15 at which Proposition 65 requires a "clear and reasonable warning."

16 34. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
17 distributed, and/or offered for sale or use in California contain the LISTED CHEMICAL.

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

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

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

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

1 accidental participation in the manufacture, distribution, and/or offering of the PRODUCTS for
2 sale or use 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 they have no plain, speedy, or adequate remedy at law.

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

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

18 **PRAYER FOR RELIEF**

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

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

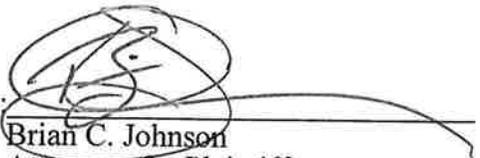
22 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
23 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
24 offering the PRODUCTS for sale or use in California, without first providing a “clear and
25 reasonable warning” as such warning is defined by Tit. 27 Cal. Code Regs. § 25601, as to the
26 harms associated with exposure the LISTED CHEMICAL;

27 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and
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1 4. That the Court grant such other and further relief as may be just and proper.
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3 Dated: March 2nd, 2012
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Respectfully Submitted,
THE CHANLER GROUP

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6 By: 

Brian C. Johnson
Attorneys for Plaintiff
ANTHONY E. HELD, PHD., P.E.
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