

ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2011 AUG 18 PM 4:19

CLERK OF SUPERIOR COURT

BY: _____
DEPUTY CLERK

D. STEPPE

1 Christopher M. Martin, State Bar No. 186021
2 THE CHANLER GROUP
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710-2565
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118

8 Attorneys for Plaintiff
9 ANTHONY E. HELD, Ph.D., P.E.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 UNLIMITED CIVIL JURISDICTION

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

14 Plaintiff,

15 v.

16 CMC GOLF, INC.; and DOES 1-150,
17 inclusive,

18 Defendants.

CGC-11-513492
Case No. _____

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

19
20
21
22
23
24
25
26
27
28
BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff, ANTHONY
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 ("DEHP"), a toxic
5 chemical found in day packs sold in California.

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

10 3. High levels of DEHP are commonly found in and on the day packs that
11 defendants manufacture, distribute, and/or offer for sale to consumers throughout the State of
12 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"), "[n]o person in the
15 course of doing business shall knowingly and intentionally expose any individual to a chemical
16 known to the state to cause cancer or reproductive toxicity without first giving clear and
17 reasonable warning to such individual ..." (Cal. Health & Safety Code, § 25249.6.)

18 5. On October 24, 2003, California identified and listed DEHP as a chemical known
19 to cause birth defects and other reproductive harm. DEHP became subject to the "clear and
20 reasonable warning" requirements of Proposition 65 one year later on October 24, 2004. (Tit.
21 27 Cal. Code Regs. ("CCR") § 27001(c); Cal. Health & Safety Code §§ 25249.8 &
22 25249.10(b).) DEHP shall be referred to hereinafter as the "LISTED CHEMICAL."

23 6. Defendants manufacture, distribute, and/or offer for sale day packs containing
24 excessive levels of the LISTED CHEMICAL including, but not limited to, the *Mini Day Pack*,
25 *ESPN (#4 00118 16101 1)*. All such day packs containing the LISTED CHEMICAL shall
26 hereinafter be referred to as the "PRODUCTS."

27 7. Defendants' failure to warn consumers and/or other individuals in the State of
28 California not covered by California's Occupational Safety Health Act, Labor Code § 6300 *et*

1 *seq.* about their exposure to DEHP and its potential to cause birth defects and other reproductive
2 harm in conjunction with Defendants' distribution, importation, manufacturing, and/or sale of
3 the PRODUCTS is a violation of Proposition 65 and subjects Defendants to enjoinderment of such
4 conduct as well as civil penalties for each such violation.

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

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

11 **PARTIES**

12 10. Plaintiff, ANTHONY HELD, Ph.D., P.E., is a citizen of the State of California
13 who is dedicated to protecting the health of California citizens through the elimination or
14 reduction of toxic exposures from consumer products; he brings this action in the public interest
15 pursuant to California Health & Safety Code § 25249.7(d).

16 11. Defendant CMC GOLF, INC. ("CMC") is a person in the course of doing
17 business within the meaning of California Health & Safety Code § 25249.11.

18 12. Defendant CMC manufactures, distributes, and/or offers the PRODUCTS for sale
19 or use in the State of California, or implies by its conduct that it manufactures, distributes,
20 and/or offers the PRODUCTS for sale or use in the State of California.

21 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each
22 persons in the course of doing business within the meaning of California Health & Safety Code
23 § 25249.11.

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

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 23. 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 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 23, inclusive.

13 25. 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 26. 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 27. On or about May 11, 2011, Plaintiff sent a sixty-day notice of violation, together
22 with the requisite certificate of merit, to CMC and various public enforcement agencies stating
23 that, as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and users in the
24 State of California were being exposed to DEHP resulting from the reasonably foreseeable use
25 of the PRODUCTS, without the individual purchasers and users first having been provided with
26 a “clear and reasonable warning” regarding such toxic exposures.

27 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
28 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6, and

1 DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale or use
2 in violation of California Health & Safety Code § 25249.6 has continued to occur beyond
3 DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and
4 believes that such violations will continue to occur into the future.

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

8 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
9 California by DEFENDANTS contained the LISTED CHEMICAL in an amount above the
10 allowable state limits.

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

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

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

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

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

26 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those
27 consumers and/or other individuals in the State of California who were, or who could become,
28

1 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
2 reasonably foreseeable use of the PRODUCTS.

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

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

11 39. As a consequence of the above-described acts, California Health & Safety Code
12 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
13 DEFENDANTS.

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

24 ///

25 ///

26 ///

27

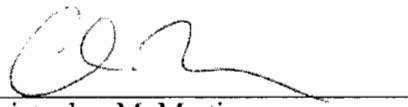
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 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: August 18, 2011

Respectfully Submitted,
THE CHANLER GROUP

By: 
Christopher M. Martin
Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.