

1 Josh Voorhees, State Bar No. 241436
2 Troy C. Bailey, State Bar No. 277424
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 ANTHONY E. HELD, PH.D., P.E.

(ENDORSED)
FILED
MAY 30 2012

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SANTA CLARA
14 UNLIMITED CIVIL JURISDICTION

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

16 Plaintiff,

17 v.

18 SILVERTOP ASSOCIATES, INC.; and
19 DOES 1-150, inclusive,

20 Defendants.

Case No. 112CV225567

**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.
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") and lead,
5 toxic chemicals found in Halloween costume accessories sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendant's continuing failure to warn
7 California citizens about their exposure to DEHP and lead, present in or on certain Halloween
8 costume accessories that defendant manufactures, imports, distributes, and/or offers for sale to
9 consumers throughout the State of California.

10 3. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
11 California Health & Safety Code § 25249.6 *et seq.* ("Proposition 65"), "No person in the course
12 of doing business shall knowingly and intentionally expose any individual to a chemical known
13 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
14 warning to such individual..." (*Cal. Health & Safety Code § 25249.6.*)

15 4. On February 27, 1987, California identified and listed lead as a chemical known to
16 cause birth defects and other reproductive harm. Lead became subject to the warning
17 requirement one year later and was therefore subject to the "clear and reasonable warning"
18 requirements of Proposition 65, beginning on February 27, 1988. (*27 CCR § 27001 (c); Cal.*
19 *Health & Safety Code § 25249.8.*)

20 5. On October 24, 2003, California identified and listed DEHP as a chemical known
21 to cause birth defects and other reproductive harm. DEHP became subject to the warning
22 requirement one year later and was, therefore, subject to the "clear and reasonable warning"
23 requirements of Proposition 65, beginning on October 24, 2004. (*Id.*)

24 6. Defendant SILVERTOP ASSOCIATES, INC. ("SILVERTOP" or "Defendant")
25 manufactures, imports, distributes, and/or sells Halloween costume accessories containing DEHP
26 and lead including, but not limited to, *The Bag Boutique by Rasta Imposta Cauldron Bag, #5906*
27 *(#7 91249 59060 4).*

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1 7. All such Halloween costume accessories containing DEHP and lead shall
2 hereinafter be collectively referred to as the "PRODUCTS."

3 8. Defendant's failure to warn consumers and/or other individuals in the State of
4 California not covered by California's Occupational Safety Health Act, Labor Code § 6300 *et*
5 *seq.* about their exposure to DEHP and lead in conjunction with Defendant's distribution,
6 importation, manufacturing, and/or sale of the PRODUCTS is a violation of Proposition 65 and
7 subjects Defendant to enjoinder of such conduct as well as civil penalties for each such
8 violation.

9 9. For Defendant's violation of Proposition 65, plaintiff seeks preliminary injunctive
10 and permanent injunctive relief to compel Defendant to provide purchasers or users of the
11 PRODUCTS with the required warning regarding the health hazards of DEHP and lead. (*Cal.*
12 *Health & Safety Code § 25249.7(a).*)

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

15 **PARTIES**

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

20 12. SILVERTOP is a person doing business within the meaning of California Health &
21 Safety Code § 25249.11.

22 13. SILVERTOP manufactures, imports, distributes, and/or offers the PRODUCTS for
23 sale or use in the State of California or implies by its conduct that it manufactures, imports,
24 distributes, and/or offers the PRODUCTS for sale or use in the State of California.

25 14. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
26 doing business within the meaning of California Health & Safety Code § 25249.11.

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

5 16. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
6 doing business within the meaning of California Health & Safety Code § 25249.11.

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

10 18. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each persons
11 doing business within the meaning of California Health & Safety Code § 25249.11.

12 19. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
13 State of California and, in some circumstances, may also be manufacturers and/or distributors.

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

19 21. SILVERTOP, MANUFACTURER DEFENDANTS, DISTRIBUTOR
20 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
21 referred to hereinafter as "DEFENDANTS."

22 VENUE AND JURISDICTION

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

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

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

11 **FIRST CAUSE OF ACTION**

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

13 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
14 Paragraphs 1 through 24, inclusive.

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

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

22 28. On December 13, 2011, a 60-Day Notice of Violation, together with the requisite
23 Certificate of Merit (the “Notice”), was provided to SILVERTOP and various public
24 enforcement agencies stating that as a result of DEFENDANTS’ manufacture, distribution and/or
25 sale of the PRODUCTS, purchasers and users in the State of California were being exposed to
26 DEHP and lead resulting from the reasonably foreseeable uses of the PRODUCTS, without the
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1 individual purchasers and users first having been provided with a “clear and reasonable warning”
2 regarding such toxic exposures.

3 29. DEFENDANTS have engaged in the manufacture, importation, distribution, and/or
4 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code
5 § 25249.6 and DEFENDANTS’ manufacture, importation, distribution, and/or offering of the
6 PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 has
7 continued to occur beyond SILVERTOP’s receipt of plaintiff’s Notice. Plaintiff further alleges
8 and believes that such violations will continue to occur into the future.

9 30. After receipt of the claims asserted in the Notice, the appropriate public
10 enforcement agencies have failed to commence and diligently prosecute a cause of action against
11 DEFENDANTS under Proposition 65.

12 31. The PRODUCTS manufactured, imported, distributed, and/or offered for sale or
13 use in California by DEFENDANTS contained DEHP and lead above the allowable state limits.

14 32. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
15 imported, distributed, and/or offered for sale or use by DEFENDANTS in California contained
16 DEHP and lead.

17 33. DEHP and lead were present in or on the PRODUCTS in such a way as to expose
18 individuals to DEHP and lead through dermal contact and ingestion during the reasonably
19 foreseeable use of the PRODUCTS.

20 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
21 continues to cause consumer and workplace exposures to DEHP and lead, as such exposure is
22 defined by 27 California Code of Regulations (“CCR”) § 25602(b).

23 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
24 the PRODUCTS would expose individuals to DEHP and lead through dermal contact and
25 ingestion.

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1 36. DEFENDANTS intended that such exposures to DEHP and lead from the
2 reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental
3 participation in the manufacture, importation, distribution, and/or offer for sale or use of
4 PRODUCTS to individuals in the State of California.

5 37. DEFENDANTS failed to provide a “clear and reasonable warning” to those
6 consumers and/or other individuals in the State of California who were or who could become
7 exposed to DEHP and lead through dermal contact and ingestion during the reasonably
8 foreseeable use of the PRODUCTS.

9 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
10 directly by California voters, individuals exposed to DEHP and lead through dermal contact and
11 ingestion, resulting from the reasonably foreseeable use of the PRODUCTS, sold by
12 DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to suffer,
13 irreparable harm, for which harm they have no plain, speedy, or adequate remedy at law.

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

17 40. As a consequence of the above-described acts, California Health & Safety Code
18 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
19 DEFENDANTS.

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PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation alleged herein;
2. That the Court, pursuant to California Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California, without providing “clear and reasonable warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures to DEHP and lead;
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: May 30, 2012

Respectfully Submitted,
THE CHANLER GROUP

By: _____
Troy C. Bailey
Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.