

FILED

MAR 13 2015

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
Bar & Crisis Deputy

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.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF MARIN

13 UNLIMITED CIVIL JURISDICTION

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

15 Plaintiff,

16 v.

17 THE KROGER CO.; and DOES 1-150,
18 inclusive,

19 Defendants.

) Case No. CIV 15 00959

) COMPLAINT FOR CIVIL PENALTIES
) AND INJUNCTIVE RELIEF

) (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. 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 benzophenone, a toxic chemical found in sunscreens sold
5 in California.

6 2. By this Complaint, plaintiff seeks to remedy defendant's continuing failure to
7 warn California citizens about the risk of exposure to benzophenone present in sunscreens
8 manufactured, distributed, and offered for sale or use to consumers throughout the State of
9 California.

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

15 4. Pursuant to Proposition 65, on June 22, 2012, California identified and listed
16 benzophenone as a chemical known to cause cancer. Benzophenone became subject to the
17 "clear and reasonable warning" requirements of the act one year later on June 22, 2013. Cal.
18 Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

19 5. Defendant THE KROGER CO. manufactures, distributes, imports, sells and/or
20 offers for sale in California *Kroger Sport Sunscreen Broad Spectrum SPF 30, UPC #0 41260*
21 *35981 1*, containing benzophenone in levels that require a health hazard warning under
22 Proposition 65.

23 6. Defendant THE KROGER CO. manufactures, distributes, imports, sells and/or
24 offers for sale in California sunscreen containing benzophenone in levels that require a health
25 hazard warning under Proposition 65.

26 7. All products containing benzophenone, as listed in paragraphs 5 through 6 above,
27 shall hereinafter be referred to as the "PRODUCTS."

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1 and manufacture one or more of the PRODUCTS offered for sale or use in the State of
2 California.

3 16. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
4 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

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

8 18. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each persons in
9 the course of doing business within the meaning of Health and Safety Code section 25249.11.

10 19. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
11 State of California.

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

17 21. KROGER, MANUFACTURER DEFENDANTS, DISTRIBUTOR
18 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
19 referred to as "DEFENDANTS."

20 **VENUE AND JURISDICTION**

21 22. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
22 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
23 because one or more instances of wrongful conduct occurred, and continue to occur, in Marin
24 County, and/or because DEFENDANTS conducted, and continue to conduct, business in this
25 county with respect to the PRODUCTS.

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

3 24. 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 or
5 association that is a citizen of the state of California, has sufficient minimum contacts in the
6 state of California, and/or otherwise purposefully avails itself of the California market.
7 DEFENDANT’S 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 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 24, inclusive.

13 26. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
14 Enforcement Act of 1986, the People of California expressly declare their right “[t]o be
15 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
16 harm.”

17 27. 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 . . .” Health & Safety Code § 25249.6.

21 28. On November 25, 2014, plaintiff’s 60-Day Notice of Violation, together with the
22 requisite Certificate of Merit, was provided to KROGER and certain public enforcement
23 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing
24 benzophenone, purchasers and users in the State of California were being exposed to
25 benzophenone resulting from the reasonably foreseeable uses of the PRODUCTS, without the
26 individual purchasers and users first having been provided with a “clear and reasonable
27 warning” regarding such toxic exposures, as required by Proposition 65 (“Notice”).
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1 29. DEFENDANTS have engaged in the manufacture, distribution, and offering of
2 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
3 such violations have continued to occur beyond DEFENDANTS' receipt of plaintiff's Notice.
4 As such, DEFENDANTS' violations are ongoing and continuous in nature, and will continue to
5 occur in the future.

6 30. After receiving PLAINTIFF'S sixty-day notice of violation, the appropriate
7 public enforcement agencies have failed to commence and diligently prosecute a cause of action
8 against DEFENDANTS under Proposition 65.

9 31. The PRODUCTS manufactured, distributed, and offered for sale or use in
10 California by DEFENDANTS contain benzophenone in amounts above the allowable state
11 limits, such that they require a "clear and reasonable" warning under Proposition 65.

12 32. DEFENDANTS knew or should have known that the PRODUCTS they
13 manufactured, distributed, and offered for sale or use in California contained benzophenone.

14 33. Benzophenone is present in or on the PRODUCTS in such a way as to expose
15 individuals through dermal contact and/or ingestion during reasonably foreseeable use.

16 34. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
17 continue to cause, consumer exposures to benzophenone, as such exposures are defined by
18 California Code of Regulations title 27, section 25602(b).

19 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
20 of the PRODUCTS exposed individuals to benzophenone through dermal contact and/or
21 ingestion.

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

26 37. DEFENDANTS failed to provide a "clear and reasonable warning" to those
27 consumers and other individuals in the State of California who were or who would become
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1 exposed to benzophenone through dermal contact and/or ingestion during the reasonably
2 foreseeable uses of the PRODUCTS.

3 38. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
4 directly by California voters, individuals exposed to benzophenone through dermal contact
5 and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by
6 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 39. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
9 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
10 for each violation.

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

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1 **PRAYER FOR RELIEF**

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

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

5 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
6 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
7 offering the PRODUCTS for sale or use in California without first providing a "clear and
8 reasonable warning" as defined by California Code of Regulations title 27, section 25601 *et*
9 *seq.*, as to the harms associated with exposures to benzophenone;

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

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

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13 Dated: March 13, 2015

Respectfully Submitted,

14 THE CHANLER GROUP

15
16 By: 

17 Troy C. Bailey
18 Attorneys for Plaintiff
19 ANTHONY E. HELD, PH.D., P.E.
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