Josh Voorhees, State Bar No. 241436 1 Warren M. Klein, State Bar No. 303958 2 THE CHANLER GROUP 2560 Ninth Street 3 Parker Plaza, Suite 214 Berkeley, CA 94710-2565 JUL - 7 2016 Telephone: (510) 848-8880 4 Facsimile: (510) 848-8118 JAMPS M. KIM. Court Executive Officer MARIN COUNTY SUPERIOR COURT 5 E-mail iosh@chanler.com By: E. Chais, Deputy warren@chanler.com E-mail 6 Attorneys for Plaintiff 7 WHITNEY R. LEEMAN, PH.D. 8 9 SUPERIOR COURT OF THE STATE OF CALIFORNIA 10 COUNTY OF MARIN 11 UNLIMITED CIVIL JURISDICTION 12 13 WHITNEY R. LEEMAN, PH.D. Case No. CIV1600530 14 Plaintiff, FIRST AMENDED COMPLAINT FOR 15 CIVIL PENALTIES AND INJUNCTIVE RELIEF V. 16 SPORTSMAN'S WAREHOUSE, INC.; and (Health & Safety Code § 25249.5 et seq.) 17 DOES 1-150, inclusive, 18 Defendants. 19 20 21 22 23 24 25 26 27 28

FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

- 1. This Complaint is a representative action brought by plaintiff WHITNEY R. LEEMAN, PH.D. in the public interest of the citizens of the State of California to enforce the People's right to be informed of the health hazards caused by exposures to Di(2-ethylhexyl)phthalate ("DEHP"), tris(1,3-dichloro-2-propyl)phosphate ("TDCPP"), and tris(2-chloroethyl) phosphate ("TCEP"), toxic chemicals found in vinyl/PVC safety vests, gloves with vinyl/PVC components, and tent/shelter fabrics sold by defendants in California.
- 2. By this First Amended Complaint, plaintiff seeks to remedy defendants' continuing failure to warn individuals not covered by California's Occupational Safety Health Act, Labor Code section 6300 et seq., who purchase, use or handle defendants' products, about the risks of exposure to DEHP, TDCPP, and TCEP present in and on vinyl/PVC safety vests, gloves with vinyl/PVC components, and tent/shelter fabrics manufactured, distributed, and offered for sale or use throughout the State of California. Individuals not covered by California's Occupational Safety Health Act, Labor Code section 6300 et seq. who purchase, use or handle defendants' products are referred to hereinafter as "consumers".
- 3. Detectable levels of DEHP are found in and on the vinyl/PVC safety vests, and gloves with vinyl/PVC components, and detectable levels of TDCPP and TCEP are found in and on the tent/shelter fabrics that defendants manufacture, distribute, and offer for sale without a warning to consumers throughout the State of California.
- 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code section 25249.6 *et seq.* ("Proposition 65"), "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual" Health & Safety Code § 25249.6.
- 5. On October 24, 2003, California listed DEHP pursuant to Proposition 65 as a chemical that is known to cause birth defects and other reproductive harm. DEHP became subject to the "clear and reasonable warning" requirements of the act one year later on October

24, 2004. Cal. Code Regs. tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 & 25249.10(b).

- 6. On October 28, 2011, California listed TDCPP pursuant to Proposition 65 as a chemical that is known to cause cancer. TDCPP became subject to the "clear and reasonable warning" requirements of the act one year later on October 28, 2012. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
- 7. On April 1, 1992, California listed TCEP pursuant to Proposition 65 as a chemical that is known to cause cancer. TCEP became subject to the "clear and reasonable warning" requirements of the act one year later on April 1, 1993. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). DEHP, TDCPP, and TCEP shall hereinafter be referred to collectively as the "LISTED CHEMICALS."
- 8. Defendants manufacture, distribute, import, sell, and offer for sale without health hazard warnings in California, vinyl/PVC safety vests containing DEHP including, but not limited to *Breaux Utility Hunting Accessories Vinyl Safety Vest Blaze Orange, UPC #7 35345 50145 4.*
- 9. Defendants manufacture, distribute, import, sell, and offer for sale without health hazard warnings in California, gloves with vinyl/PVC components containing DEHP, including, but not limited to, the *Golden Stag All Purpose Gloves, Style 813, UPC #7 63476 08133 0*.
- 10. Defendants manufacture, distribute, import, sell, and offer for sale without health hazard warnings in California, tent/shelter fabrics containing TDCPP and TCEP, including, but not limited to, the *Ledge Pro Series Ridge 4 Tent, UPC #0 87125 70050 3*.
- 11. All vinyl/PVC safety vests containing DEHP, gloves with vinyl/PVC components containing DEHP, and tent/shelter fabrics containing TDCPP and TCEP, are referred to collectively hereinafter as "PRODUCTS."
- 12. Defendants' failure to warn consumers in the State of California of the health hazards associated with exposures to the LISTED CHEMICALS in conjunction with defendants' sales of the PRODUCTS are violations of Proposition 65, and subject defendants,

and each of them, to enjoinment of such conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

- 13. For defendants' violations of Proposition 65, plaintiff seeks preliminary and permanent injunctive relief to compel defendants to provide consumers of the PRODUCTS with the required warning regarding the health hazards associated with exposures to the LISTED CHEMICALS. Health & Safety Code § 25249.7(a).
- 14. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil penalties against defendants for their violations of Proposition 65.

PARTIES

- 15. Plaintiff WHITNEY R. LEEMAN, PH.D. is a citizen of the State of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products; and she brings this action in the public interest pursuant to Health and Safety Code section 25249.7(d).
- 16. Defendant SPORTSMAN'S WAREHOUSE, INC. ("SPORTSMAN'S") is a person in the course of doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.
- 17. SPORTSMAN'S manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California, or implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.
- 18. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each a person in the course of doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.
- MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate, and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate, and manufacture one or more of the PRODUCTS offered for sale or use in the State of California.

- 20. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons in the course of doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.
- 21. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in the State of California.
- 22. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in the course of doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.
- 23. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the State of California.
- 24. At this time, the true names of defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
- 25. SPORTSMAN'S, MANUFACTURER DEFENDANTS, DISTRIBUTOR
 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to as "DEFENDANTS."

VENUE AND JURISDICTION

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

- 27. The California Superior Court has jurisdiction over this action pursuant to California Constitution Article VI, section 10, which grants the Superior Court "original jurisdiction in all causes except those given by statute to other trial courts." The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.
- 28. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that is a citizen of the State of California, has sufficient minimum contacts in the State of California, and/or otherwise purposefully avails itself of the California market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

FIRST CAUSE OF ACTION

(Violation of Proposition 65 - Against All Defendants)

- 29. Plaintiff realleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 28, inclusive.
- 30. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986, the People of California expressly declared their right "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm."
- 31. Proposition 65 states, "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual" Health & Safety Code § 25249.6.
- 32. On December 1, 2015, plaintiff served a sixty-day notice of violation, together with the requisite certificate of merit, on SPORTSMAN'S and certain public enforcement agencies alleging that, as a result of DEFENDANTS' sales of the PRODUCTS containing DEHP, consumers in the State of California were being exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without the consumers first having been

provided with a "clear and reasonable warning" regarding the harms associated with such exposures, as required by Proposition 65.

- 33. On March 23, 2016, plaintiff served a supplemental sixty-day notice of violation, together with the requisite certificate of merit, on SPORTSMAN'S and certain public enforcement agencies alleging that, as a result of DEFENDANTS' sales of the PRODUCTS containing the LISTED CHEMICALS, consumers in the State of California were being exposed to the LISTED CHEMICALS resulting from their reasonably foreseeable use of the PRODUCTS, without the consumers first having been provided with a "clear and reasonable warning" regarding the harms associated with such exposures, as required by Proposition 65.
- 34. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS' violations have continued beyond their receipt of plaintiff's sixty-day notice of violation.

 DEFENDANTS' violations are ongoing and continuous in nature and, as such, will continue in the future.
- 35. After receiving plaintiff's sixty-day notice of violation and supplemental sixty-day notice of violation, no public enforcement agency has commenced and diligently prosecuted a cause of action against DEFENDANTS under Proposition 65 to enforce the alleged violations that are the subject of plaintiff's notice of violation and supplemental notice of violation.
- 36. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and offer for sale or use in California cause exposures to the LISTED CHEMICALS as a result of the reasonably foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by consumers in California are not exempt from the "clear and reasonable" warning requirements of Proposition 65, yet DEFENDANTS provide no warning.
- 37. DEFENDANTS knew or should have known that the PRODUCTS they manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED CHEMICALS.

- 38. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as to expose consumers to the LISTED CHEMICALS through dermal contact and/or ingestion during reasonably foreseeable use.
- 39. The normal and reasonably foreseeable use of the PRODUCTS has caused, and continues to cause, consumer exposures to the LISTED CHEMICALS, as defined by title 27 of the California Code of Regulations, section 25602(b).
- 40. DEFENDANTS know that the normal and reasonably foreseeable use of the PRODUCTS exposes consumers to the LISTED CHEMICALS through dermal contact and/or ingestion.
- DEFENDANTS intend that exposures to the LISTED CHEMICALS from the reasonably foreseeable use of the PRODUCTS will occur by their deliberate, non-accidental participation in the manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to consumers in California.
- 42. DEFENDANTS failed to provide a "clear and reasonable warning" to those consumers in California who were or who would become exposed to the LISTED CHEMICALS through dermal contact and/or ingestion resulting from their use of the PRODUCTS.
- directly by California voters, consumers exposed to the LISTED CHEMICALS through dermal contact and/or ingestion as a result of their use of the PRODUCTS that DEFENDANTS sell without a "clear and reasonable" health hazard warning, have suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.
- 44. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day for each violation.

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

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

- 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation;
- 2. That the Court, pursuant to Health and Safety Code section 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California without first providing a "clear and reasonable warning" in accordance with title 27 of the California Code of Regulations, section 25601 *et seq.*, regarding the harms associated with exposures to the LISTED CHEMICALS;
- 3. That the Court, Pursuant to Health and Safety Code section 25249.7(a), issue preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS currently in the chain of commerce in California without a "clear and reasonable warning" as defined by California Code of Regulations title 27, section 25601 et seq.;
 - 4. That the Court grant plaintiff her reasonable attorneys' fees and costs of suit; and
 - 5. That the Court grant such other and further relief as may be just and proper.

Dated: July 7, 2016

Respectfully Submitted, THE CHANLER GROUP

Warren M. Klein

Attorneys for Plaintiff

WHITNEY R. LEEMAN, PH.D.