

1 Brian Johnson, State Bar No. 235965
2 Kimberly Gates, State Bar No. 282369
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 E-mail: brian@chanler.com
10 E-mail: kimberly@chanler.com

FILED
San Francisco County Superior Court

APR 30 2018

CLERK OF THE COURT
BY: Kimberly Gates
Deputy Clerk

11 Attorneys for Plaintiff
12 ANTHONY E. HELD, PH.D., P.E.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION

CGC-18-566165

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

17 Plaintiff,

18 v.

19 FIMCO INC.; and DOES 1-150, inclusive,

20 Defendants.

Case No. _____

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

(Health & Safety Code § 25249.5 *et seq.*)

BY FAX

NATURE OF THE ACTION

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2 1. This Complaint is a representative action brought by plaintiff Anthony E. Held,
3 Ph.D., P.E. the public interest of the citizens of the State of California to enforce the People’s
4 right to be informed of the health hazards caused by exposures to di(2-ethylhexyl)phthalate
5 (“DEHP”), a toxic chemical found in and on the vinyl/PVC sprayer hoses sold by defendants in
6 California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
8 warn individuals not covered by California’s Occupational Safety Health Act, Labor Code §
9 6300 *et seq.*, who purchase, use or handle defendants’ products, about the risks of exposure to
10 DEHP present in and on the vinyl/PVC sprayer hoses manufactured, imported, sold or
11 distributed for sale or use throughout the State of California. Individuals not covered by
12 California’s Occupational Safety Health Act, Labor Code § 6300 *et seq.*, who purchase, use or
13 handle defendants’ products, are referred to hereinafter as “consumers.”

14 3. Detectable levels of DEHP are found in and on the vinyl/PVC sprayer hoses that
15 defendants manufacture, import, sell or distribute for sale to consumers throughout the State of
16 California.

17 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
18 Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
19 doing business shall knowingly and intentionally expose any individual to a chemical known to
20 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
21 warning to such individual” Health & Safety Code § 25249.6.

22 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
23 DEHP as a chemical known to cause birth defects (and reproductive harm). DEHP became
24 subject to the “clear and reasonable warning” requirements of the act one year later on October
25 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
26 25249.10(b).

1 6. Defendants manufacture, import, sell and distribute for sale, without health hazard
2 warnings in California, vinyl/PVC sprayer hoses that contain DEHP including, but not limited
3 to, the *Fimco Industries 15 Gallon Spot Sprayer, TS-15-EC-SP, Model #2138134, UPC #7*
4 *33029 11622 2*, referred to, hereinafter, as the “PRODUCTS”.

5 7. Defendants’ failure to warn consumers in the State of California of the health
6 hazards associated with exposures to DEHP in conjunction with defendants’ sales of the
7 PRODUCTS are violations of Proposition 65, and subject defendants, and each of them, to
8 enjoinder of such conduct as well as civil penalties for each violation. Health & Safety Code
9 §§ 25249.7(a) & (b)(1).

10 8. For defendants’ violations of Proposition 65, Plaintiff seeks preliminary and
11 permanent injunctive relief to compel defendants to provide consumers of the PRODUCTS with
12 the required warning regarding the health hazards associated with exposures to DEHP. Health
13 & Safety Code § 25249.7(a).

14 9. Pursuant to Health and Safety Code § 25249.7(b), Plaintiff also seeks civil
15 penalties against defendants for their violations of Proposition 65.

16 **PARTIES**

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

21 11. Defendant FIMCO INC. (“FIMCO”) is a person in the course of doing business
22 within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

23 12. FIMCO manufactures, imports, distributes, sells, and/or offers the PRODUCTS for
24 sale or use in the State of California, or implies by its conduct that it manufactures, imports,
25 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

26 13. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
27 person in the course of doing business within the meaning of Health and Safety Code §§
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1 25249.6 and 25249.11.

2 14. MANUFACTURER DEFENDANTS, and each of them, research, test, design,
3 assemble, fabricate, and manufacture, or each implies by its conduct that it researches, tests,
4 designs, assembles, fabricates, and manufactures one or more of the PRODUCTS offered for
5 sale or use in California.

6 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person
7 in the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
8 25249.11.

9 16. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
10 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
11 retailers for sale or use in the State of California, or each implies by its conduct that it
12 distributes, exchanges, transfers, processes, and transports one or more of the PRODUCTS to
13 individuals, businesses, or retailers for sale or use in the State of California.

14 17. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in
15 the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
16 25249.11.

17 18. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to
18 individuals in the State of California.

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

24 20. FIMCO, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS,
25 and RETAILER DEFENDANTS shall hereinafter, where appropriate, be referred to collectively
26 as the "DEFENDANTS."
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1 VENUE AND JURISDICTION

2 21. Venue is proper in the Superior Court for the County of San Francisco pursuant to
3 Code of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of competent
4 jurisdiction, because Plaintiff seeks civil penalties against DEFENDANTS, because one or more
5 instances of wrongful conduct occurred, and continue to occur, in this county, and/or because
6 DEFENDANTS conducted, and continue to conduct, business in San Francisco with respect to
7 the PRODUCTS.

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

12 23. The California Superior Court has jurisdiction over DEFENDANTS based on
13 Plaintiff’s information and good faith belief that DEFENDANTS are each a person, firm,
14 corporation or association that is a citizen of the State of California, has sufficient minimum
15 contacts in the State of California, and/or otherwise purposefully avails itself of the California
16 market. DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
17 California courts consistent with traditional notions of fair play and substantial justice.

18 FIRST CAUSE OF ACTION

19 **24. (Violation of Proposition 65 - Against All Defendants)**

20 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
21 Paragraphs 1 through 23, inclusive.

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

26 27. Proposition 65 states, “[n]o person in the course of doing business shall
27 knowingly and intentionally expose any individual to a chemical known to the state to cause
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1 cancer or reproductive toxicity without first giving clear and reasonable warning to such
2 individual” Health & Safety Code § 25249.6.

3 28. On December 13, 2017, Plaintiff served a sixty-day notice of violation, together
4 with the accompanying certificate of merit, on FIMCO, the California Attorney General’s
5 Office, and the requisite public enforcement agencies alleging that, as a result of
6 DEFENDANTS’ sales of the PRODUCTS, consumers in the State of California are being
7 exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without
8 the consumers first receiving a “clear and reasonable warning” regarding the harms associated
9 with exposures to DEHP, as required by Proposition 65.

10 29. DEFENDANTS manufacture, import, sell and distribute the PRODUCTS for sale
11 or use in violation of Health and Safety Code § 25249.6, and DEFENDANTS’ violations have
12 continued beyond their receipt of plaintiff’s sixty-day notice of violation. As such,
13 DEFENDANTS’ violations are ongoing and continuous in nature and, unless enjoined will
14 continue in the future.

15 30. After receiving plaintiff’s sixty-day notice of violation, no public enforcement
16 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS
17 under Proposition 65 to enforce the alleged violations that are the subject of Plaintiff’s notice of
18 violation.

19 31. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
20 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
21 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
22 consumers in California are not exempt from the “clear and reasonable” warning requirements
23 of Proposition 65, yet DEFENDANTS provide no clear & reasonable warning.

24 32. DEFENDANTS knew or should have known that the PRODUCTS they
25 manufacture, import, distribute, sell, and offer for sale in California contain DEHP.

26 33. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
27 through dermal contact and/or ingestion during reasonably foreseeable use.

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1. That the Court, pursuant to Health and Safety Code § 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 § 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 DEHP;
3. That the Court, pursuant to Health and Safety Code § 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, § 25601 *et seq.*;
4. That the Court grant Plaintiff his 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: April 24, 2018

Respectfully submitted,
THE CHANLER GROUP

By: Kimberly Gates
Kimberly Gates
Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.