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ENDORSED
FILED
ALAMEDA COUNTY

SEP 30 2011

CLERK OF THE SUPERIOR COURT

By _____ Deputy

Jamie Harris

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF ALAMEDA

10 UNLIMITED CIVIL JURISDICTION

11
12 JOHN MOORE,

13 Plaintiff,

14 v.

15 M-D BUILDING PRODUCTS, INC.; and
16 DOES 1-150, inclusive,

17 Defendants.

Case No. **RG11597931**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff, JOHN MOORE, in
3 the public interest of the citizens of the state of California, to enforce the People's right to be
4 informed of the presence of di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical found in
5 vinyl stair treads sold in California.

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

10 3. High levels of DEHP are commonly found in and on the vinyl stair treads 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 Health & Safety Code section 25249.6 *et seq.* ("Proposition 65"), "[n]o person in the course of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to
16 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual ..." (Health & Saf. 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. (Cal.
21 Code Regs., tit. 27, § 27001, subd. (c); Health & Saf. Code, §§ 25249.8 & 25249.10, subd. (b).)

22 6. Defendants manufacture, distribute, and/or offer for sale vinyl stair treads
23 containing DEHP including, but not limited to, *Stair Tread 24*" (#0 43374 75556 5). All such
24 vinyl stair treads containing DEHP shall hereinafter be referred to as the "PRODUCTS."

25 7. Defendants' failure to warn consumers and/or other individuals in the state of
26 California not covered by California's Occupational Safety Health Act, Labor Code section
27 6300 *et seq.*, about their exposure to DEHP and its potential to cause birth defects and other
28 reproductive harm in conjunction with Defendants' distribution, importation, manufacturing,

1 and/or sale of the PRODUCTS is a violation of Proposition 65 and subjects Defendants to
2 enjoinder of such conduct as well as civil penalties for each such violation.

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

7 9. Plaintiff also seeks civil penalties against defendants for their violations of
8 Proposition 65, as provided by Health & Safety Code section 25249.7, subdivision (b).

9 **PARTIES**

10 10. Plaintiff, JOHN MOORE, is a citizen of the state of California who is dedicated to
11 protecting the health of California citizens through the elimination or reduction of toxic
12 exposures from consumer products; he brings this action in the public interest pursuant to
13 Health & Safety Code section 25249.7, subdivision (d).

14 11. Defendant M-D BUILDING PRODUCTS, INC. ("M-D") is a person in the
15 course of doing business within the meaning of Health & Safety Code section 25249.11.

16 12. Defendant M-D manufactures, distributes, and/or offers the PRODUCTS for sale
17 or use in the state of California, or implies by its conduct that it manufactures, distributes,
18 and/or offers the PRODUCTS for sale or use in the state of California.

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

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

26 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
27 in the course of doing business within the meaning of Health & Safety Code section 25249.11.

28 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or

1 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
2 in the state of California.

3 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons in
4 the course of doing business within the meaning of Health & Safety Code section 25249.11.

5 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
6 state of California.

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

12 20. M-D, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS,
13 and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to as
14 “DEFENDANTS.”

15 VENUE AND JURISDICTION

16 21. Venue is proper in the Alameda County Superior Court pursuant to Code of Civil
17 Procedure sections 394, 395, & 395.5, because this Court is a court of competent jurisdiction,
18 because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda
19 County, and/or because DEFENDANTS conducted, and continue to conduct, business in this
20 County with respect to the PRODUCTS.

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

25 23. The California Superior Court has jurisdiction over DEFENDANTS based on
26 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation,
27 or association that is a citizen of the state of California, has sufficient minimum contacts in the
28 state of California, or otherwise purposefully avails itself of the California market.

1 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by
2 California courts consistent with traditional notions of fair play and substantial justice.

3 **FIRST CAUSE OF ACTION**

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

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

7 25. The citizens of the state of California have stated expressly in Proposition 65 that
8 they must be informed "about exposures to chemicals that cause cancer, birth defects and other
9 reproductive harm." (Health & Saf. Code, § 25249.6.)

10 26. Proposition 65 states, "[n]o person in the course of doing business shall
11 knowingly and intentionally expose any individual to a chemical known to the state to cause
12 cancer or reproductive toxicity without first giving clear and reasonable warning to such
13 individual...." (*Id.*)

14 27. On or about July 20, 2011, a sixty-day notice of violation, together with the
15 requisite certificate of merit, was provided to M-D and various public enforcement agencies
16 stating that, as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in
17 the state of California were exposed to DEHP resulting from the reasonably foreseeable use of
18 the PRODUCTS, without the individual purchasers and users first having received a "clear and
19 reasonable warning" regarding such toxic exposures.

20 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
21 the PRODUCTS for sale or use in violation of Health & Safety Code section 25249.6, and
22 DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale or use
23 in violation of Health & Safety Code section 25249.6 has continued to occur beyond
24 DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and
25 believes that such violations will continue to occur into the future.

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

1 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
2 California by DEFENDANTS contained DEHP in an amount above the allowable state limits.

3 31. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
4 distributed, and/or offered for sale or use in California contained DEHP.

5 32. DEHP was present in or on the PRODUCTS in such a way as to expose
6 individuals to DEHP through dermal contact and/or ingestion during the reasonably foreseeable
7 use of the PRODUCTS.

8 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
9 continues to cause, consumer exposures to DEHP, as such exposure is defined by California
10 Code of Regulations title 27, section 25602, subdivision (b).

11 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
12 the PRODUCTS would expose individuals to DEHP through dermal contact and/or ingestion.

13 35. DEFENDANTS intended that such exposures to DEHP from the reasonably
14 foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation
15 in the manufacture, distribution, and/or offering of the PRODUCTS for sale or use to
16 individuals in the state of California.

17 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those
18 consumers and/or other individuals in the state of California who were, or who could become,
19 exposed to DEHP through dermal contact and/or ingestion during the reasonably foreseeable
20 use of the PRODUCTS.

21 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
22 directly by California voters, individuals exposed to DEHP through dermal contact and/or
23 ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by
24 DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to
25 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

26 38. As a consequence of the above-described acts, DEFENDANTS are liable for a
27 maximum civil penalty of \$2,500 per day for each violation pursuant to Health & Safety Code
28 section 25249.7, subdivision (b).

