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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

14 MARK MOORBERG,

15 Plaintiff,

16 v.

17 E. MISHAN & SONS, INC.; RITE AID
18 CORPORATION and DOES 1 -100,
19 inclusive,

20 Defendants.

Case No. CGC - 14 - 541132

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

21 **NATURE OF THE ACTION**

22 1. This Complaint is a representative action brought by plaintiff MARK
23 MOORBERG ("PLAINTIFF") in the public interest of the citizens of the State of California to
24 enforce the People's right to be informed of the presence of Di(2-ethylhexyl)phthalate
25 ("DEHP"), a toxic chemical found in vinyl/PVC cables sold in California. DEHP is a toxic
26 chemical used to treat vinyl/PVC, which is used in a variety of products.
27
28

ENDORSED
FILED
San Francisco County Superior Court

AUG 14 2014

CLERK OF THE COURT
ELIAS BUTT
Deputy Clerk

1 2. By this Complaint, PLAINTIFF seeks to remedy Defendants continuing failures
2 to warn California citizens about the risk of exposure to DEHP present in and on vinyl/PVC
3 cables manufactured, distributed, and offered for sale or use to consumers throughout the State
4 of California.

5 3. Detectable levels of DEHP are commonly found in and on vinyl/PVC cables that
6 Defendants manufacture, distribute, and offer for sale to consumers throughout the State of
7 California. Individuals in California, including infants and children, are exposed to DEHP in
8 the products through various routes of exposure: (i) through inhalation when DEHP are
9 released from vinyl/PVC cables; (ii) through dermal exposure when DEHP from vinyl/PVC
10 cables accumulate in ambient particles that are subsequently touched by such individuals; and
11 (iii) through ingestion when such particles are brought into contact with the mouth.

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

17 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
18 DEHP as a chemical known to cause cancer. DEHP became subject to the “clear and
19 reasonable warning” requirements of the Act one year later on October 24, 2004. Cal. Code
20 Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

21 6. DEHP is hereinafter referred to as the “LISTED CHEMICAL.”

22 7. Defendant E. MISHAN & SONS, INC. (“E. MISHAN”) manufactures,
23 distributes, imports, sells and/or offers for sale in California vinyl/PVC cables containing DEHP
24 without a warning including, but not limited to, Bell+Howell Solar Charger with Keychain, *Item*
25 *No. 8791CD-6, UPC #0 80313 08791 2.*

26 8. Defendant RITE AID CORPORATION (“RITE AID”) manufactures, distributes,
27 imports, sells and/or offers for sale in California vinyl/PVC cables containing DEHP without a
28

1 warning including, but not limited to, Bell+Howell Solar Charger with Keychain, *Item No.*
2 *8791CD-6, UPC #0 80313 08791 2.*

3 9. All products containing the LISTED CHEMICALS as listed in paragraph 7
4 above, shall hereinafter be referred to as the "PRODUCTS."

5 10. Although Defendants expose infants, children, and other people to the LISTED
6 CHEMICALS in the PRODUCTS, Defendants provides no warnings about the carcinogenic
7 hazards associated with exposures to the LISTED CHEMICALS. DEFENDANTS' failures to
8 warn consumers and other individuals and workers (specifically those not subject to
9 California's Occupational Health Act, Labor Code section 6300 et seq. or exempted under the
10 out-of-state manufacturer rule) in the State of California about their exposures to the LISTED
11 CHEMICALS in conjunction with DEFENDANTS' sales of the PRODUCTS, is a violation of
12 Proposition 65, and subjects DEFENDANTS to enjoinder of such conduct as well as civil
13 penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

14 11. As a result of DEFENDANTS' violations of Proposition 65, PLAINTIFF seeks
15 preliminary and permanent injunctive relief to compel Defendants to provide purchasers or
16 users of the PRODUCTS with the required warning regarding the health hazards of the
17 LISTED CHEMICAL in the PRODUCTS. Health & Safety Code § 25249.7(a).

18 12. Pursuant to Health and Safety Code section 25249.7(b), PLAINTIFF also seeks
19 civil penalties against DEFENDANTS for their violations of Proposition 65.

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PARTIES

22 13. Plaintiff MARK MOORBERG ("PLAINTIFF"), is a citizen of the State of
23 California who is dedicated to protecting the health of California citizens through the
24 elimination or reduction of toxic exposures from consumer products; and he brings this action
25 in the public interest pursuant to Health and Safety Code section 25249.7(d).

26 14. Defendant E. MISHAN & SONS, INC. ("E. MISHAN") is a person in the course
27 of doing business within the meaning of Health and Safety Code sections 25249.6 and
28 25249.11.

1 15. E. MISHAN manufactures, imports, distributes, sells, and/or offers the
2 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
3 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
4 State of California.

5 16. Defendant RITE AID CORPORATION (“RITE AID”) is a person in the course
6 of doing business within the meaning of Health and Safety Code sections 25249.6 and
7 25249.11.

8 17. RITE AID manufactures, imports, distributes, sells, and/or offers the PRODUCTS
9 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
10 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

11 18. Defendants DOES 1 -100 are each persons in the course of doing business within
12 the meaning of Health and Safety Code section 25249.11(b), which manufacture, distribute,
13 sell, and/or offer the PRODUCTS for sale in the State of California. At this time, the true
14 names and capacities of defendants DOES 1 through 100, inclusive, are unknown to
15 PLAINTIFF, who, therefore, sues said defendants by their fictitious names pursuant to Code of
16 Civil Procedure section 474. PLAINTIFF is informed and believes, and on that basis alleges,
17 that each of the fictitiously named defendants is responsible for the acts and occurrences
18 alleged herein. When ascertained, their true names and capacities shall be reflected in an
19 amended complaint.

20 19. E. MISHAN, RITE AID, and Defendants DOES 1 -100 are collectively referred
21 to herein as “DEFENDANTS.”

VENUE AND JURISDICTION

22
23 20. Venue is proper in San Francisco Superior Court, pursuant to Code of Civil
24 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
25 because PLAINTIFF seeks civil penalties against DEFENDANTS, because one or more
26 instances of wrongful conduct occurred, and continue to occur, in the City and County of San
27 Francisco, and/or because DEFENDANTS conducted, and continue to conduct, business in this
28 county with respect to the PRODUCTS.

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

5 22. The California Superior Court has jurisdiction over DEFENDANTS based on
6 PLAINTIFF’S information and good faith belief that each of the DEFENDANTS is a person,
7 firm, corporation, or association that is a citizen of the State of California, has sufficient
8 minimum contacts in the State of California, and/or otherwise purposefully avails itself of the
9 California market. DEFENDANTS’ purposeful availment of California as a marketplace for
10 the PRODUCTS renders the exercise of personal jurisdiction by California courts over
11 DEFENDANTS consistent with traditional notions of fair play and substantial justice.

12 **FIRST CAUSE OF ACTION**

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

14 23. PLAINTIFF re-alleges and incorporates by reference, as if fully set forth herein,
15 Paragraphs 1 through 22, inclusive.

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

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

24 26. On May 21, 2014, PLAINTIFF’S sixty-day notice of violation, together with the
25 requisite certificate of merit, was provided to E. MISHAN, RITE AID, and certain public
26 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
27 containing DEHP, purchasers and users in the State of California were being exposed to DEHP
28 resulting from their reasonably foreseeable use of the PRODUCTS, without the individual

1 purchasers and users first having been provided with a “clear and reasonable warning”
2 regarding such toxic exposures, as required by Proposition 65.

3 27. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
4 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
5 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
6 PLAINTIFF’S sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing
7 and continuous in nature, and will continue to occur in the future.

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

11 29. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
12 or use in California by DEFENDANTS contain the LISTED CHEMICAL such that they
13 require a “clear and reasonable” warning under Proposition 65.

14 30. DEFENDANTS knew or should have known that the PRODUCTS they
15 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED
16 CHEMICAL.

17 31. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as
18 to expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
19 inhalation during reasonably foreseeable use of the PRODUCTS including through workplace
20 exposure to the PRODUCTS.

21 32. The normal and reasonably foreseeable uses of the PRODUCTS have caused,
22 and continue to cause, consumer exposures to the LISTED CHEMICAL; as such exposures are
23 defined by the California Code of Regulations Title 27, section 25602(b).

24 33. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
25 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact,
26 ingestion, and/or inhalation.

27 34. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
28 the reasonably foreseeable uses of the PRODUCTS would occur by DEFENDANTS’

1 deliberate, non-accidental participation in the manufacture, importation, distribution, sale, and
2 offering of the PRODUCTS for sale or use to individuals in the State of California.

3 35. DEFENDANTS failed to provide a “clear and reasonable warning” to those
4 consumers and other individuals in the State of California who were or who would become
5 exposed to the LISTED CHEMICAL through dermal contact, ingestion, and/or inhalation
6 during the reasonably foreseeable uses of the PRODUCTS including through workplace
7 exposure to the PRODUCTS.

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

14 37. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
15 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per
16 day for each violation.

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

20 **PRAYER FOR RELIEF**

21 Wherefore, plaintiffs pray for judgment against DEFENDANTS, and each of them, as
22 follows:

- 23 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
24 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;
- 25 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
26 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
27 offering the PRODUCTS for sale or use in California without first providing a “clear and
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1 reasonable warning” as defined by the California Code of Regulations title 27, section 25601 *et*
2 *seq.*, as to the harms associated with exposures the LISTED CHEMICAL;

3 3. That the Court, pursuant to Health and Safety Code section 25249.7(a), issue
4 preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS
5 currently in the chain of commerce in California without a “clear and reasonable warning” as
6 defined by California Code of Regulations title 27, section 25601 *et seq.*,

7 4. That the Court grant PLAINTIFF his reasonable attorneys’ fees and costs of suit;
8 and

9 5. That the Court grant such other and further relief as may be just and proper.

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11 Dated: August 13, 2014

Respectfully Submitted,

12 MOSCONE EMBLIDGE SATER & OTIS LLP

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14 By: 
15 Steven L. Iriki
16 Attorneys for Plaintiff MARK MOORBERG