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ENDORSED
FILED
ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By Maria Carrera
Maria Carrera Bonito

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 ANTHONY FERREIRO and GABRIEL
11 ESPINOSA,

12 Plaintiffs,

13 vs.

14 ACE HARDWARE CORP., SHEPHERD
15 HARDWARE PRODUCTS, INC., and
SHEPHERD HARDWARE PRODUCTS,
LLC.

16 Defendants.

CASE NO.: RG 16 803636

JUDGE

DEPT.:

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

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18
19 Plaintiffs Anthony Ferreiro (“Ferreiro”) and Gabriel Espinosa (“Espinosa”) (collectively,
20 “Plaintiffs”), by and through their attorneys, allege the following cause of action in the public
21 interest of the citizens of the State of California.

22 **BACKGROUND OF THE CASE**

23 1. Plaintiffs bring this representative action on behalf of all California citizens to
24 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
25 at the Health and Safety Code § 25249.5 *et seq* (“Proposition 65”), which reads, in relevant part,
26 “[n]o person in the course of doing business shall knowingly and intentionally expose any
27 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
28 giving clear and reasonable warning to such individual ...” Health & Safety Code § 25249.6.

1 2. This complaint is a representative action brought by Plaintiffs in the public
2 interest of the citizens of the State of California to enforce the People’s right to be informed of
3 the health hazards caused by exposures to Di(2-ethylhexyl) phthalate (DEHP) and Diisononyl
4 phthalate (DINP), toxic chemicals found in (a) washing machine connectors, and (b) flooring
5 protectors, manufactured, sold, and/or distributed by defendants Ace Hardware Corp. (“Ace”),
6 Shepherd Hardware Products, Inc., and Shepherd Hardware Products, LLC (collectively,
7 “Shepherd”)¹ in California.

8 3. DEHP is a harmful chemical, known to the State of California to cause both
9 cancer and reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a
10 chemical known to the State to cause cancer and it has come under the purview of Proposition 65
11 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
12 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical
13 known to cause developmental male reproductive toxicity.

14 4. DINP is a harmful chemical known to the State of California to cause cancer. On
15 December 20, 2013, the State of California listed DINP as a chemical known to cause cancer and
16 it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit.
17 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

18 5. Proposition 65 requires all businesses with ten (10) or more employees that
19 operate within California or sell products therein to comply with Proposition 65 regulations.
20 Included in such regulations is the requirement that businesses must label any Proposition 65
21 listed chemical with a “clear and reasonable” warning before knowingly or intentionally
22 exposing it to any person.

23 6. Plaintiffs allege that Defendants distribute, manufacture, produce, import, sell,
24 and/or offer for sale, without the required warning, washing machine connectors and floor
25 protectors that include, but are not limited to, (1) *Ace Washing Machine Connectors, ¾” x ¾”*
26 (*“Ace Washing Machine Connectors”*), UPC No. 0 82901 03924 2; (2) *Ace Vinyl Tips, UPC No.*

27
28 ¹ Ace and Shepherd are collectively referred to herein as, “Defendants.”

1 0 82901 02398 2 (“*Ace Vinyl Tips*”); and (3) ½” *Hi-Vinyl Leg Tips*, UPC No. 0 39003 19205 4
2 (“*Hi-Vinyl Leg*”) (collectively, the “Products”).

3 7. Defendants’ failure to warn consumers, and other individuals in California of the
4 health hazards associated with exposure to DEHP and DINP in conjunction with the sale,
5 manufacture, and/or distribution of the Products is a violation of Proposition 65 and subjects
6 Defendants to the enjoinder and civil penalties described herein.

7 8. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
8 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety
9 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
10 the actions of a defendant which “violate or threaten to violate” the statute. Health & Safety
11 Code § 25249.7. Plaintiffs seek civil penalties against Defendants for their violations of
12 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

13 9. Plaintiffs also seek injunctive relief, preliminarily and permanently, requiring
14 Defendants to provide purchasers or users of the Products with the required warnings related to
15 the dangers and health hazards associated with exposure to DEHP and DINP pursuant to Health
16 and Safety Code § 25249.7(a).

17 **PARTIES**

18 10. Plaintiff Ferreiro is a citizen of the State of California acting in the interest of the
19 general public to promote awareness of exposures to toxic chemicals in products sold in
20 California and to improve human health by reducing hazardous substances contained in such
21 items. She brings this action in the public interest pursuant to Health and Safety Code §
22 25249.7(d).

23 11. Plaintiff Espinosa is a citizen of the State of California acting in the interest of the
24 general public to promote awareness of exposures to toxic chemicals in products sold in
25 California and to improve human health by reducing hazardous substances contained in such
26 items. He brings this action in the public interest pursuant to Health and Safety Code §
27 25249.7(d).

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1 12. Defendant Ace is a retailers' cooperative based in Oak Brook, Illinois. As of
2 2015, Ace has over 4,600 locations, and does over \$13 billion in retail hardware sales annually.
3 Defendant Ace manufactures, imports, distributes, sells, and/or offers the Products for sale or use
4 in California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or
5 offers the Products for sale or use in the State of California. Defendant Ace can be served care
6 of Corporation Service Company d/b/a CSC, 2710 Gateway Oaks Dr., Ste. 150N, Sacramento,
7 CA 95833.

8 13. Defendant Shepherd Hardware Products, Inc., a division of the Colson Group of
9 Chicago, IL is headquartered in Three Oaks Michigan. Defendant Shepherd Hardware Products,
10 Inc. offers a full line of general duty and industrial casters, replacement wheels and an
11 unsurpassed range of floor and surface protection products including but not limited to felt,
12 sliders, anti-skid products, rubber cups and bumpers. Defendant Shepherd Hardware Products,
13 Inc. manufactures, imports, distributes, sells, and/or offers the *Hi-Vinyl Legs* for sale or use in
14 California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or
15 offers the Products for sale or use in the State of California.

16 14. Defendant Shepherd Hardware Products, LLC, a division of the Colson Group of
17 Chicago, IL is headquartered in Three Oaks Michigan. Defendant Shepherd Hardware Products,
18 LLC offers a full line of general duty and industrial casters, replacement wheels and an
19 unsurpassed range of floor and surface protection products including but not limited to felt,
20 sliders, anti-skid products, rubber cups and bumpers. Defendant Shepherd Hardware Products,
21 LLC manufactures, imports, distributes, sells, and/or offers the *Hi-Vinyl Legs* for sale or use in
22 California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or
23 offers the Products for sale or use in the State of California.

24 15. Upon information and belief, Plaintiffs aver that at all relevant times herein, each
25 Defendant was a person doing business within the meaning of Health and Safety Code §
26 25249.11(b) and that each and every Defendant had ten (10) or more employees at all relevant
27 times.

28

1 VENUE AND JURISDICTION

2 16. Venue is proper in the County of Alameda, because one or more of the instances
3 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants
4 conducted, and continue to conduct, business in the County of Alameda with respect to the
5 Product.

6 17. This Court has jurisdiction over this action pursuant to California Constitution
7 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
8 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
9 enforcement of violations of Proposition 65 in any Court of competent jurisdiction, therefore,
10 this Court has jurisdiction over this lawsuit.

11 18. This Court has jurisdiction over the Defendants as each Defendant either is a
12 citizen of the State of California, has sufficient minimum contacts with the State of California, is
13 registered with the California Secretary of State as foreign corporations authorized to do business
14 in the State of California, and/or has otherwise purposefully availed themselves of the California
15 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
16 consistent and permissible with traditional notions of fair play and substantial justice.

17 SATISFACTION OF NOTICE REQUIREMENTS

18 19. On May 21, 2015, Plaintiff Ferreiro gave notice of alleged violations of Health
19 and Safety Code § 25249.6, concerning the exposure of California citizens to DEHP and DINP
20 through the *Ace Washing Machine Connectors* and *Ace Vinyl Tips* without proper warning,
21 subject to a private action to the Defendants and to the California Attorney General’s office and
22 the offices of the County District attorneys and City Attorneys for each city with a population
23 greater than 750,000 persons wherein the herein violations allegedly occurred.

24 20. On September 21, 2015, Plaintiff Espinosa gave notice of alleged violations of
25 Health and Safety Code § 25249.6, concerning the exposure of California citizens to DEHP and
26 DINP through the *Hi Vinyl Legs* without proper warning, subject to a private action to the
27 Defendants and to the California Attorney General’s office and the offices of the County District
28

1 attorneys and City Attorneys for each city with a population greater than 750,000 persons
2 wherein the herein violations allegedly occurred.

3 21. The May 21st Notice and the September 21st Notice are collectively referred to as,
4 the “Notices.” The Notices complied with all procedural requirements of Proposition 65
5 including the attachment of a Certificates of Merit affirming that Plaintiffs’ counsel has
6 consulted with at least one person with relevant and appropriate expertise who reviewed relevant
7 data regarding DEHP and DINP exposure, and that counsel believed there was meritorious and
8 reasonable cause for a private action.

9 22. After receiving the Notices, and to Plaintiffs’ best information and belief, none of
10 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
11 a cause of action against Defendants under Proposition 65 to enforce the alleged violations which
12 are the subject of the Notices.

13 23. Plaintiffs are commencing this action more than sixty (60) days from the date of
14 the last-in-time notice to Defendants, as required by law.

15 **FIRST CAUSE OF ACTION**

16 **(By Plaintiffs against all Defendants for the Violation of Proposition 65)**

17 24. Plaintiffs hereby repeat and incorporate by reference paragraphs 1 through 23 of
18 this complaint as though fully set forth herein.

19 25. Defendants have, at all times mentioned herein, acted as manufacturer, distributor,
20 and/or retailer of the Products.

21 26. The Products contain DEHP and DINP, hazardous chemicals found on the
22 Proposition 65 list of a chemical known to be hazardous to human health.

23 27. The Products do not comply with the Proposition 65 warning requirements.

24 28. Plaintiffs, based on their best information and belief, aver that at all relevant times
25 hereto, and at least since March 17, 2015 and continuing to the present, Defendants have
26 continued to knowingly and intentionally expose California users and consumers of the Products
27 to DEHP and DINP without providing required warnings under Proposition 65.
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1 29. The exposures that are the subject of this Complaint result from the purchase,
2 acquisition, handling and recommended use of the Products. Consequently, the primary route of
3 exposure to the chemicals in the *Ace Vinyl Tips* and *Hi Vinyl Legs* is through dermal exposure
4 and inhalation. Direct dermal exposure to DEHP and DINP is likely to occur through contact
5 with skin on the user's hand during installation. The vinyl cane tip can be expected to be in
6 direct contact with dust/soil on floors and surfaces. Consequently, DEHP and DINP can be
7 absorbed by the dust/soil on these surfaces. Subsequent exposure may arise from indirect dermal
8 exposure to these phthalate containing dust/soils, or exposure through inhalation of the phthalate
9 containing dust/soil. Finally, while mouthing of the product does not seem likely, some amount
10 of exposure through ingestion can occur by handling the product with subsequent touching of the
11 users hand to mouth. The primary route of exposure to the chemicals in the *Ace Washing*
12 *Machin Connectors* is through dermal absorption through indirect contact with clothes exposed
13 to the washer water containing phthalates that has leached from the hose. User contact with the
14 wet clothes such as during transfer to the dryer can indirectly lead to dermal absorption through
15 the skin. When dry, it can be expected that phthalates may accumulate in clothes, and when
16 these clothes are worn, dermal exposure could increase substantially.

17 30. Plaintiffs, based on their best information and belief, aver that such exposures will
18 continue every day until clear and reasonable warnings are provided to the purchasers or users of
19 the Products or until this known toxic chemical is removed from the Products.

20 31. Defendants have knowledge that the normal and reasonably foreseeable use of the
21 Products exposes individuals to DEHP and DINP, and Defendants intend that exposures to
22 DEHP and DINP will occur by their deliberate, non-accidental participation in the manufacture,
23 importation, distribution, sale and offering of the Products to consumers in California.

24 32. Plaintiffs have engaged in good faith efforts to resolve the herein claims prior to
25 this Complaint.

26 33. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
27 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per
28 violation.

