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**FILED**

DEC - 7 2016

JAMES M. KIM, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT  
By: E. Chais, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF MARIN  
11 UNLIMITED CIVIL JURISDICTION

12 SUSAN DAVIA,

13 Plaintiff,

14 v.

15 MIDWEST AIR TECHNOLOGIES, INC.,  
16 MAT HOLDINGS, INC., THE HOME  
17 DEPOT, INC., HOME DEPOT, USA, INC.  
18 and DOES 1-150,

19 Defendants.

20 Case No. \_\_\_\_\_

*CW* 1604383

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

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

NATURE OF THE ACTION

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1. This Complaint is a representative action brought by plaintiff SUSAN DAVIA, in the public interest of the citizens of the State of California, to enforce the People’s right to be informed of the presence of Di(2-ethylhexyl)phthalate (“DEHP”), toxic chemicals found in certain vinyl/PVC-coated fencing products manufactured, distributed and/or otherwise sold by defendants in California.

2. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code Section 25249.6 *et seq.* (“Proposition 65”), “No 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. . . .” (*Cal. Health & Safety Code § 25249.6.*)

3. On October 24, 2003, the State listed Di(2-ethylhexyl)phthalate as a chemical known to cause birth defects and other reproductive harm. DEHP became subject to the warning requirement one year later and was therefore subject to the “clear and reasonable warning” requirements of Proposition 65, beginning on October 24, 2004. (*27 CCR § 27001(c); Cal. Health & Safety Code § 25249.8.*)

4. DEHP shall hereinafter be referred to as the “LISTED CHEMICAL.”

5. Significant levels of each LISTED CHEMICAL have been discovered in or on vinyl/PVC-coated fencing products that defendants manufacture, distribute, and/or offer for sale to consumers throughout the State of California including, but not limited to, HDX PVC Coated Hardware Cloth, HDX PVC Coated Poultry Fence, HDX PVC Coated Welded Wire, HDX PVC Coated Poultry Netting and Everbilt PVC Coated Poultry Netting. All such fencing comprised of vinyl/PVC materials containing the LISTED CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

6. Defendants’ failure to warn employees, consumers and/or other individuals in the State of California about their exposures to the LISTED CHEMICAL in conjunction with defendants’ sale of the PRODUCTS is a violation of Proposition 65.

1 7. For defendants' violations of Proposition 65, plaintiff seeks preliminary and  
2 permanent injunctive relief to compel defendants to provide employees handling the  
3 PRODUCTS and purchasers or users of the PRODUCTS with the required warning regarding  
4 the health hazards of the LISTED CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

5 8. Plaintiff also seeks civil penalties against defendants for their violations of  
6 Proposition 65, as provided for by California Health & Safety Code Section 25249.7(b).

7 **PARTIES**

8 9. Plaintiff SUSAN DAVIA is a citizen of the State of California who is dedicated to  
9 protecting the health of California citizens through the elimination or reduction of toxic  
10 exposures from consumer products, and brings this action in the public interest pursuant to  
11 California Health & Safety Code Section 25249.7.

12 10. Based upon publicly available information, plaintiff is informed and believes, and  
13 thereupon alleges, that each defendant MIDWEST AIR TECHNOLOGIES, INC., MAT  
14 HOLDINGS, INC., THE HOME DEPOT, INC. and HOME DEPOT, USA, INC. is a person doing  
15 business within the meaning of California Health & Safety Code Section 25249.11.

16 11. Based upon publicly available information, plaintiff is informed and believes, and  
17 thereupon alleges, that each defendant MIDWEST AIR TECHNOLOGIES, INC., MAT  
18 HOLDINGS, INC., THE HOME DEPOT, INC. and HOME DEPOT, USA, INC. is legally  
19 responsible for the manufacture, distribution, and/or offer of the PRODUCTS for sale or use in  
20 the State of California or implies by its conduct that it manufactures, distributes, and/or offers  
21 the PRODUCTS for sale or use in the State of California.

22 12. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons  
23 doing business within the meaning of California Health & Safety Code Section 25249.11.

24 13. MANUFACTURER DEFENDANTS engage in the process of research, testing,  
25 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they  
26 engage in the process of research, testing, designing, assembling, fabricating, and/or  
27 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.  
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1 14. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons  
2 doing business within the meaning of California Health & Safety Code Section 25249.11.

3 15. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or  
4 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in  
5 the State of California.

6 16. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing  
7 business within the meaning of California Health & Safety Code Section 25249.11.

8 17. RETAIL DEFENDANTS offer of the PRODUCTS for sale to individuals in the State  
9 of California.

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

15 19. MIDWEST AIR TECHNOLOGIES, INC., MAT HOLDINGS, INC., THE HOME  
16 DEPOT, INC., HOME DEPOT, USA, INC., MANUFACTURER DEFENDANTS, DISTRIBUTOR  
17 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to  
18 hereinafter as “DEFENDANTS”.

19 **VENUE AND JURISDICTION**

20 20. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil  
21 Procedure Sections 394, 395, and 395.5, because this Court is a court of competent jurisdiction,  
22 because one or more instances of wrongful conduct occurred, and continues to occur, in the  
23 County of Marin and/or because DEFENDANTS conducted, and continue to conduct, business  
24 in this County with respect to the PRODUCTS.

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

1 22. The California Superior Court has jurisdiction over DEFENDANTS based on  
2 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or  
3 association that either are citizens of the State of California, have sufficient minimum contacts in  
4 the State of California, or otherwise purposefully avail themselves of the California market.  
5 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California  
6 courts consistent with traditional notions of fair play and substantial justice.

7 **FIRST CAUSE OF ACTION**  
8 **(Violation of Proposition 65 - Against All Defendants)**

9 23. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,  
10 Paragraphs 1 through 22, inclusive.

11 24. In passing Proposition 65, the citizens of the State of California expressed their  
12 intent through the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986 that  
13 they must be “informed about exposures to chemicals that cause cancer, birth defects, or other  
14 reproductive harm.”

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

19 26. On October 1, 2015, and October 29, 2015, valid and compliant Proposition 65  
20 sixty-day notices of violation (“60-Day Notice”), together with valid, requisite Certificates of  
21 Merit, were provided to MIDWEST AIR TECHNOLOGIES, INC., MAT HOLDINGS, INC., THE  
22 HOME DEPOT, INC., HOME DEPOT, USA, INC. and various public enforcement agencies  
23 stating that as a result of the DEFENDANTS’ manufacture, distribution and sales of the  
24 PRODUCTS, workers, purchasers and users in the State of California are being exposed to  
25 LISTED CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS, without  
26 the individual workers, purchasers and users first having been provided with a “clear and  
27 reasonable warning” regarding such toxic exposures.  
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1           27. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of  
2 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6  
3 and plaintiff is informed and believes that DEFENDANTS' manufacture, distribution, and/or  
4 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code Section  
5 25249.6 has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice.  
6 Plaintiff further alleges and believes that such violations will continue to occur into the future.

7           28. After receipt of the claims asserted in the 60-Day Notice, the appropriate public  
8 enforcement agencies have failed to commence and diligently prosecute a cause of action against  
9 DEFENDANTS under Proposition 65.

10           29. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
11 California by DEFENDANTS, contain the LISTED CHEMICAL.

12           30. DEFENDANTS knew or should have known that the PRODUCTS contained the  
13 LISTED CHEMICAL.

14           31. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to  
15 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section  
16 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a  
17 consequence of the packing, shipping, unpacking, display and daily organization and movement  
18 of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

19           32. DEFENDANTS knew or should have known that the packing, shipping,  
20 unpacking, display and daily organization and movement of PRODUCTS as well as the  
21 reasonably foreseeable use of the PRODUCTS exposes individuals to the LISTED CHEMICAL  
22 through dermal contact and/or ingestion and/or inhalation.

23           33. DEFENDANTS' participation in the manufacture, distribution and/or offer for sale  
24 or use of PRODUCTS to individuals in the State of California was deliberate and non-accidental.

25           34. DEFENDANTS failed to provide a "clear and reasonable warning" to those  
26 employees, consumers and/or other individuals in the State of California who were or who  
27 could become exposed to the LISTED CHEMICAL during the reasonably foreseeable retail  
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1 receipt, display and organization of PRODUCTS as well as the reasonably foreseeable use of the  
2 PRODUCTS.

3 35. Contrary to the express policy and statutory prohibition of Proposition 65,  
4 employees and individuals exposed to the LISTED CHEMICAL through dermal contact and/or  
5 ingestion and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS,  
6 sold by DEFENDANTS without a “clear and reasonable warning”, have suffered, and continue  
7 to suffer, irreparable harm, for which harm they have no other plain, speedy or adequate remedy  
8 at law.

9 36. As a consequence of the above-described acts, DEFENDANTS are liable for a  
10 maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to  
11 California Health & Safety Code Section 25249.7(b).

12 37. As a consequence of the above-described acts, California Health & Safety Code  
13 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
14 DEFENDANTS.

15 **PRAYER FOR RELIEF**

16 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as  
17 follows:

18 1. That the Court, pursuant to California Health & Safety Code Section 25249.7(b),  
19 assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation  
20 alleged herein;

21 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),  
22 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or  
23 offering the PRODUCTS for sale or use in California, without providing “clear and reasonable  
24 warnings” as defined by 27 CCR Section 25601, as to the harms associated with exposures to the  
25 LISTED CHEMICAL;

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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: December 7, 2016

Respectfully submitted,  
SHEFFER LAW FIRM

By:   
Gregory M. Sheffer  
Attorneys for Plaintiff  
SUSAN DAVIA