

1 Gregory M. Sheffer, State Bar No. 173124
SHEFFER LAW FIRM
2 81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941
3 Telephone: 415.388.0911
Facsimile: 415.388.9911

4 Attorneys for Plaintiff
5 SUSAN DAVIA

FILED

NOV 28 2017

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 FOR THE COUNTY OF MARIN

9 UNLIMITED CIVIL JURISDICTION

10
11 SUSAN DAVIA,

12 Plaintiff,

13 v.

14 NEMCOR INC. and DOES 1-150,

15 Defendants.

Case No. CIV 1704351

**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 SUSAN DAVIA, 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 certain
5 vinyl/PVC packaging and storage cases for textile bedding products manufactured, distributed
6 and/or otherwise sold by defendants in California.

7 2. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
8 California Health & Safety Code Section 25249.6 *et seq.* (“Proposition 65”), “No person in the
9 course of doing business shall knowingly and intentionally expose any individual to a chemical
10 known to the state to cause cancer or reproductive toxicity without first giving clear and
11 reasonable warning to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

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

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

18 5. Significant levels of the LISTED CHEMICAL have been discovered in or on
19 vinyl/PVC components of packaging and storage cases for Nemcor Inc. textile bedding products
20 that defendants manufacture, distribute, and/or offer for sale to consumers throughout the State
21 of California including, but not limited to, those for Life Comfort Velvet Touch Sheet Set, all sizes
22 (including 983551, 778267146877). All such packaging and storage cases comprised of vinyl/PVC
23 materials containing any LISTED CHEMICAL shall hereinafter be referred to as the
24 “PRODUCTS.”

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

28

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

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

6 17. RETAIL DEFENDANTS offer of the PRODUCTS for sale to individuals in the State
7 of California.

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

13 19. NEMCOR INC., MANUFACTURER DEFENDANTS, DISTRIBUTOR
14 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
15 hereinafter as “DEFENDANTS”.

16 **VENUE AND JURISDICTION**

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

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

26 22. The California Superior Court has jurisdiction over DEFENDANTS based on
27 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
28 association that either are citizens of the State of California, have sufficient minimum contacts in

1 the State of California, or otherwise purposefully avail themselves of the California market.
2 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
3 courts consistent with traditional notions of fair play and substantial justice.

4 **FIRST CAUSE OF ACTION**
5 **(Violation of Proposition 65 - Against All Defendants)**

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

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

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

16 26. On October 11, 2016, a valid and compliant Proposition 65 60-Day Notice of
17 Violation ("60-Day Notice"), together with a valid, requisite Certificate of Merit, were provided to
18 NEMCOR INC. and various public enforcement agencies stating that as a result of the
19 DEFENDANTS' manufacture, distribution and sales of the PRODUCTS, workers, purchasers and
20 users in the State of California are being exposed to DEHP resulting from the reasonably
21 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having
22 been provided with a "clear and reasonable warning" regarding such toxic exposures.

23 27. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
24 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6
25 and plaintiff is informed and believes that DEFENDANTS' manufacture, distribution, and/or
26 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code Section
27 25249.6 has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice.
28 Plaintiff further alleges and believes that such violations will continue to occur into the future.

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

4 29. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
5 California by DEFENDANTS, contain one or more LISTED CHEMICAL.

6 30. DEFENDANTS knew or should have known that the PRODUCTS contained such
7 LISTED CHEMICAL.

8 31. A LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
9 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section
10 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a consequence
11 of the packing, shipping, unpacking, display and daily organization and movement of
12 PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

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

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

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

24 35. Contrary to the express policy and statutory prohibition of Proposition 65,
25 employees and individuals exposed to a LISTED CHEMICAL through dermal contact and/or
26 ingestion and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS,
27 sold by DEFENDANTS without a "clear and reasonable warning", have suffered, and continue to
28

1 suffer, irreparable harm, for which harm they have no other plain, speedy or adequate remedy at
2 law.

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

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

9 PRAYER FOR RELIEF

10 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as
11 follows:

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

15 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),
16 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
17 offering the PRODUCTS for sale or use in California, without providing "clear and reasonable
18 warnings" as defined by 27 CCR Section 25601, as to the harms associated with exposures to the
19 LISTED CHEMICAL;

20 3. That the Court grant plaintiff her reasonable attorneys' fees and costs of suit; and

21 4. That the Court grant such other and further relief as may be just and proper.

22 Dated: November 27, 2017

Respectfully submitted,

23 SHEFFER LAW FIRM

24
25 By: 

26 Gregory M. Sheffer
27 Attorneys for Plaintiff
28 SUSAN DAVIA