

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY: (Name, State Bar number, and address) Parker A. Smith (#290311), Lori A. Toyama (110021) and Stephanie Sy (247071) Sy and Smith, PC. 11622 El Camino Real, Suite 100 San Diego, CA 92130 TELEPHONE NO.: (858) 746-9554 FAX NO.: (858) 746-5199 ATTORNEY FOR (Party): Plaintiff, Kingpun Cheng		FILED BY FAX ALAMEDA COUNTY September 17, 2018 CLERK OF THE SUPERIOR COURT By Shabra Iyamu, Deputy CASE NUMBER: RG18920878
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 1221 Oak Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94612 BRANCH NAME: Administrative Building		
CASE NAME: Kingpun Cheng v. Melnor Inc., et al.		CASE NUMBER:
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)	<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23)	Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26)	Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20)
Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input checked="" type="checkbox"/> Other non-PI/PD/WD tort (35)	Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38)	Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42)
Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. monetary b. nonmonetary, declaratory or injunctive relief c. punitive
4. Number of causes of action (specify): One (1)
5. This case is is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: September 14, 2018
 Parker A. Smith, Esq. _____
 (TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

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7 Attorneys for Plaintiff, Kingpun Cheng

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF ALAMEDA**

10 **UNLIMITED CIVIL JURISDICTION**

11 KINGPUN CHENG,

12 Plaintiff,

13 vs.

14 MELNOR, INC.; ACE HARDWARE
15 CORPORATION; and DOES 1-25,

16 Defendants.

CASE NO.:

COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF

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

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18 **NATURE OF THE ACTION**

19 1. Plaintiff Kingpun Cheng (hereinafter, "Plaintiff") brings this representative
20 action, in the public interest of the citizens of the State of California (hereinafter, "citizens"), to
21 enforce the citizen's right to be informed of the presence of lead and/or lead compounds
22 (hereinafter, "Lead") found in Defendant Melnor, Inc. and Ace Hardware Corporation's
23 (hereinafter, "Defendants") products—specifically UPC082901214786 Ace Hot Water Nozzles
24 with Rear Triggers #7165657 (hereinafter, "Hot Water Nozzles").

25 2. Plaintiff seeks to remedy Defendants' failure to warn citizens about the risks of
26 exposure to lead present in Defendant's Hot Water Nozzles manufactured, distributed and/or
27 offered for sale to consumers throughout the State of California.

1 3. Defendants manufacture, distribute or offer for sale to consumers throughout the
2 State of California Hot Water Nozzles containing detectable levels of lead.

3 4. California's Safe Drinking Water and Toxic Enforcement Act of 1986, California
4 Health & Safety Code § 25249.5 et seq. ("Proposition 65") states, "No person in the course of
5 doing business shall knowingly and intentionally expose any individual to a chemical known to
6 the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
7 to such individual..." (*Cal. Health & Safety Code § 25249.6.*)

8 5. Under Proposition 65, California identified and listed lead as chemicals known to
9 cause birth defects and other reproductive harm.

10 6. Defendants manufacture, distribute or sell Hot Water Nozzles containing lead
11 without a health hazard warning in California.

12 7. Defendants' failure to warn consumers and/or other individuals in the State of
13 California about their exposure to lead in conjunction with Defendants' sale of Hot Water
14 Nozzles is a violation of Proposition 65 which subjects Defendants to enjoinder of such conduct
15 as well as civil penalties for each such violation.

16 8. For Defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
17 and permanent injunctive relief to compel Defendants to provide purchasers or users of Hot
18 Water Nozzles with the required warning regarding the health hazards of lead. (*Cal. Health &
19 Safety Code § 25249.7(a).*)

20 9. Plaintiff also seeks civil penalties against Defendants for its violations of
21 Proposition 65, as provided for by *California Health & Safety Code § 25249.7(b).*

22 **PARTIES**

23 10. Plaintiff resides in the City of Carlsbad, County of San Diego, in the State of
24 California and as such, as citizen of the state of California. Plaintiff is dedicated to protecting the
25 health of California citizens through the elimination or reduction of toxic exposures from
26 consumer products, represented by and through its counsel of record, Sy and Smith, PC. Plaintiff
27 brings this action in the public interest pursuant to *California Health & Safety Code § 25249.7.*

28 11. Melnor, Inc. is a person doing business within the meaning of *California Health &
Safety Code § 25249.11.*

1 12. Ace Hardware Corporation is a person doing business within the meaning of
2 *California Health & Safety Code § 25249.11.*

3 VENUE AND JURISDICTION

4 13. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
5 Procedure § § 394, 495, 395.5, because this Court is a court of competent jurisdiction, because
6 one or more instances of wrongful conduct occurred, and continues to occur, in the County of
7 Alameda and/or because Defendants conducted, and continues to conduct, business in this County
8 with respect to Hot Water Nozzles.

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

13 15. The California Superior Court has jurisdiction over Defendant based on Plaintiff’s
14 information and good faith belief that each Defendant is a person, firm, corporation or association
15 that either is a citizen of the State of California, has sufficient minimum contacts in the State of
16 California, or otherwise purposefully avails itself of the California market. Defendants’
17 purposeful availment renders the exercise of personal jurisdiction by California courts consistent
18 with traditional notions of fair play and substantial justice.

19 FIRST CAUSE OF ACTION

20 **(Violation of Proposition 65 – Against Defendant)**

21 16. Plaintiff alleges and incorporates by reference, as if full reference, as if full set forth
22 herein, Paragraphs 1 through 15, inclusive.

23 17. The citizens of the State of California have expressly stated in the Safe Drinking
24 Water and Toxic Enforcement Act of 1986, *California Health & Safety Code § 25249.5*, et seq.
25 (Proposition 65) that they must be informed “about exposures to chemicals that cause cancer,
26 birth defects and order reproductive harm.” (*Cal. Health & Safety Code § 25249.6.*)

27 18. Proposition 65 states, “No person in the course of doing business shall knowingly
28 and intentionally expose any individual to a chemical known to the state to cause cancer or
productive toxicity without first giving clear and reasonable warning to such individual (*Id.*)”

1 19. On June 2, 2017, a sixty-day notice of violation, together with the requisite
2 certificates of merit, was provided to Defendants, other potential violators and various public
3 enforcement agencies, including the California Attorney General's Office, stating that as a result
4 of the Defendants' sale of Hot Water Nozzles, purchasers and users in the State of California
5 were being exposed to lead resulting from the reasonably foreseeable users of the Hot Water
6 Nozzles without the individual purchasers and users first having been provided with a "clear and
7 reasonable warning" regarding such toxic exposures.

8 20. Defendants manufacture, distribute and/or offer Hot Water Nozzles for sale or use
9 in violation of *California Health & Safety Code § 25249.6* and Defendants' manufacture,
10 distribution and/or offering of Hot Water Nozzles for sale or use in violation of *California*
11 *Health & Safety Code § 25249.6* has continued to occur beyond Defendants' receipt of Plaintiff's
12 sixty-day Notice of Violation. Plaintiff further alleges and believes that such violations will
13 continue to occur into the future.

14 21. After receipt of the claims asserted in the sixty-day notices of violation, the
15 appropriate public enforcement agencies have failed to commence and diligently prosecute a
16 cause of action against Defendants under Proposition 65.

17 22. The Hot Water Nozzles manufactured, distributed, and/or offered for sale or use in
18 California by Defendants contained lead above the allowable state limits.

19 23. Defendants knew or should have known that the Hot Water Nozzles manufactured,
20 distributed, and/or for sale or use by Defendants in California contained lead.

21 24. Lead was present in or on the Hot Water Nozzles in such a way as to expose
22 individuals to lead through dermal contact and/or ingestion during the reasonably foreseeable use
23 of the Hot Water Nozzles.

24 25. The normal and reasonably foreseeable use of the Hot Water Nozzles have caused
25 and continue to cause consumer exposure to lead, as such exposure is defined by *27 CCR§*
26 *25602(b)*.

27 26. Defendants had knowledge that the normal and reasonably foreseeable use of the
28 Hot Water Nozzles would expose individuals to lead through dermal contact and/or ingestion.

1 27. Defendants intended that such exposures to lead from the reasonably foreseeable
2 use of the Hot Water Nozzles would occur by its deliberate, non-accidental participation in the
3 manufacture, distribution and/or offer for sale or use of the Hot Water Nozzles to purchasers,
4 consumers, or users in the State of California.

5 28. Defendants failed to provide a “clear and reasonable warning” to those consumers
6 and/or other individuals in the State of California who were or who could become exposed to lead
7 through dermal contact and/or ingestion during the reasonably foreseeable use of the Hot Water
8 Nozzles.

9 29. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
10 directly by California voters, individuals exposed to lead through dermal contact and/or ingestion
11 resulting from the reasonably foreseeable use of the Hot Water Nozzles, sold by Defendants
12 without a “clear and reasonable warning,” have suffered, and continue to suffer, irreparable harm,
13 for which harm they have no plain, speedy or adequate remedy at law.

14 30. As a consequence of the above-described acts, each Defendants are liable for a
15 maximum civil penal of \$2,500.00 per day for each violation pursuant to *California Health &
16 Safety Code § 25249.7(b)*.

17 31. As a consequence of the above-described acts, *California Health & Safety Code §
18 25249.7(a)* also specifically authorizes the Court to grant injunctive relief against Defendant.

19 32. Wherefore, Plaintiff prays for judgment against Defendants as set forth hereinafter.

20 PRAYER FOR RELIEF

21 Wherefore, Plaintiff prays for judgment against Defendant as follows:

22 1. That the Court, pursuant to *California Health & Safety Code § 25249.7(b)*, assess
23 civil penalties against Defendants, in the amount of \$2,500.00 per day for each violation alleged
24 herein;

25 2. That the Court, pursuant to *California Health & Safety Code § 25249.7(a)*,
26 preliminarily and permanently enjoin Defendants from manufacturing, distributing or offering
27 Hot Water Nozzles for sale or use in California, without providing “clear and reasonable
28 warnings” as detailed by *27 CCR § 25601*, as to the harms associated with exposures to lead;

3. That the Court grant Plaintiff reasonable attorneys’ fees and cost of suit; and

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

Dated: Sept. 13, 2018

Respectfully Submitted,

By: 

Parker A. Smith
Attorney for Plaintiff