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FILED BY FAX
ALAMEDA COUNTY
January 11, 2019
CLERK OF
THE SUPERIOR COURT
By Cheryl Clark, Deputy
CASE NUMBER:
RG18920878

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

KINGPUN CHENG,

Plaintiff,

vs.

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

Defendants.

CASE NO.: RG18920878

**FIRST AMENDED COMPLAINT
FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

NATURE OF THE ACTION

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

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

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

8 20. On or about October 8, 2018, a supplemental sixty-day notice of violation, together
9 with the requisite certificates of merit, was provided to Melnor, Inc. and various public
10 enforcement agencies, including the California Attorney General's Office, stating that as a result
11 of Melnor, Inc.'s sale of Hot Water Nozzles, purchasers and users in the State of California were
12 being exposed to lead, resulting from the reasonably foreseeable uses of the Hot Water Nozzles
13 without the individual purchasers and users first having been provided with a "clear and
14 reasonable warning" regarding such toxic exposures.

15 21. Defendants manufacture, distribute and/or offer Hot Water Nozzles for sale or use
16 in violation of *California Health & Safety Code § 25249.6* and Defendants' manufacture,
17 distribution and/or offering of Hot Water Nozzles for sale or use in violation of *California*
18 *Health & Safety Code § 25249.6* has continued to occur beyond Defendants' receipt of Plaintiff's
19 sixty-day Notices of Violation. Plaintiff further alleges and believes that such violations will
20 continue to occur into the future.

21 22. After receipt of the claims asserted in the sixty-day Notices of Violation, the
22 appropriate public enforcement agencies have failed to commence and diligently prosecute a
23 cause of action against Defendants under Proposition 65.

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

26 24. Defendants knew or should have known that the Hot Water Nozzles manufactured,
27 distributed, and/or for sale or use by Defendants in California contained lead.
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1. That the Court, pursuant to *California Health & Safety Code § 25249.7(b)*, assess civil penalties against Defendants, in the amount of \$2,500.00 per day for each violation alleged herein;

2. That the Court, pursuant to *California Health & Safety Code § 25249.7(a)*, preliminarily and permanently enjoin Defendants from manufacturing, distributing or offering Hot Water Nozzles for sale or use in California, without providing "clear and reasonable 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 the Court grant such other and further relief as may be just and proper.

Respectfully Submitted,

Dated: Jan. 10, 2019

By:



Parker A. Smith
Attorney for Plaintiff