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ALAMEDA COUNTY  
JAN 24 2018  
CLERK OF THE SUPERIOR COURT  
By: D. OLIVER, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,  
11 Plaintiff,  
12 vs.  
13 WHITMOR, INC.,  
14 Defendant.

Case No.: **RG18890363**  
**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**  
**(Violation of Health & Safety Code §25249.5  
et seq.)**

18 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the  
19 following cause of action in the public interest of the citizens of the State of California.

20 **BACKGROUND OF THE CASE**

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

27 2. This complaint is a representative action brought by Plaintiff in the public interest  
28 of the citizens of the State of California to enforce the People's right to be informed of the health

1 hazards caused by exposure Diisononyl phthalate (DINP), a toxic chemical found in Whitmor  
2 shower curtain liners sold and/or distributed by defendant Whitmor, Inc. (“Whitmor” or  
3 “Defendant”) in California.

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

8 4. Proposition 65 requires all businesses with ten (10) or more employees that  
9 operate within California or sell products therein to comply with Proposition 65 regulations.  
10 Included in such regulations is the requirement that businesses must label any product containing  
11 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and  
12 intentionally” exposing any person to it.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
14 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety  
15 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin  
16 the actions of a defendant which “violate or threaten to violate” the statute. Health & Safety  
17 Code § 25249.7.

18 6. Plaintiff alleges that Defendant manufactures, distributes and/or offers for sale in  
19 California, without the requisite exposure warning, Whitmor shower curtain liners (the  
20 “Products”) that expose persons to DINP.

21 7. Defendant’s failure to warn consumers and other individuals in California of the  
22 health hazards associated with exposure to DINP in conjunction with the sale and/or distribution  
23 of the Products is a violation of Proposition 65 and subjects Defendant to the enjoinder and  
24 civil penalties described herein.

25 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition  
26 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
28 Defendant to provide purchasers or users of the Products with required warnings related to the

1 dangers and health hazards associated with exposure to DINP pursuant to Health and Safety  
2 Code § 25249.7(a).

3 **PARTIES**

4 10. Plaintiff is a citizen of the State of California acting in the interest of the general  
5 public to promote awareness of exposures to toxic chemicals in products sold in California and  
6 to improve human health by reducing hazardous substances contained in such items. He brings  
7 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

8 11. Defendant Whitmor, through its business, effectively manufactures, imports,  
9 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies  
10 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale  
11 or use in the State of California.

12 12. Plaintiff alleges that defendant Whitmor is a “person” in the course of doing  
13 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 13. Venue is proper in the County of Alameda because one or more of the instances  
16 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant  
17 conducted, and continues to conduct, business in the County of Alameda with respect to the  
18 Products.

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

24 15. This Court has jurisdiction over Defendant because Defendant is either a citizen  
25 of the State of California, has sufficient minimum contacts with the State of California, is  
26 registered with the California Secretary of State as foreign corporations authorized to do business  
27 in the State of California, and/or has otherwise purposefully availed itself of the California  
28

1 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts  
2 consistent and permissible with traditional notions of fair play and substantial justice.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 16. On July 18, 2017, Plaintiff gave notice of alleged violation of Health and Safety  
5 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to  
6 DINP contained in the Products without proper warning, subject to a private action to Defendant  
7 and to the California Attorney General's office and the offices of the County District attorneys  
8 and City Attorneys for each city with a population greater than 750,000 persons wherein the  
9 herein violations allegedly occurred.

10 17. The Notice complied with all procedural requirements of Proposition 65 including  
11 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at  
12 least one person with relevant and appropriate expertise who reviewed relevant data regarding  
13 DINP exposure, and that counsel believed there was meritorious and reasonable cause for a  
14 private action.

15 18. After receiving the Notice, and to Plaintiff's best information and belief, none of  
16 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted  
17 a cause of action against Defendant under Proposition 65 to enforce the alleged violations which  
18 are the subject of Plaintiff's notice of violation.

19 19. Plaintiff is commencing this action more than sixty (60) days from the date of his  
20 notice to Defendant, as required by law.

21 **FIRST CAUSE OF ACTION**

22 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

23 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of  
24 this complaint as though fully set forth herein.

25 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
26 and/or retailer of the Product.

27 22. The Products contain DINP, a hazardous chemical found on the Proposition 65  
28 list of chemicals known to be hazardous to human health.

1           23.     The Product does not comply with the Proposition 65 warning requirements.

2           24.     Plaintiff, based on his best information and belief, avers that at all relevant times  
3 herein, and at least since June 22, 2017, continuing until the present, that Defendant has  
4 continued to knowingly and intentionally expose California users and consumers of the Product  
5 to DINP without providing required warnings under Proposition 65.

6           25.     The exposures that are the subject of this notice result from the purchase.  
7 acquisition, handling and recommended use of the product. Consequently, the primary route of  
8 exposure to these chemicals is through direct contact. Direct contact between the shower curtain  
9 and the user's bare hands can occur during installation of the shower curtain and through  
10 manipulation of the curtain during entering exiting, and during showering. Should the user  
11 manipulate the shower curtain with wet hands, or the curtain become wet, aqueous HMWP skin  
12 permeation rates are faster than neat HMWP permeation. DINP that leaches from the shower  
13 curtain can accumulate in the water at the user's feet. The concentration of DINP leaching into  
14 the water from the shower curtain is dependent upon the temperature of the water. Elevated  
15 water temperatures can be expected during showering that will lead to increased kinetics of  
16 DINP leaching from the curtain into the water. For instance, exposure to low molecular weight  
17 phthalates was reported in urinary metabolites after male showering due to the use of phthalates  
18 containing, personal care products in the shower. Finally, while mouthing of the product does  
19 not seem likely, some amount of exposure through ingestion can occur by touching the product.  
20 with subsequent touching of the user's hand to mouth.

21           26.     Plaintiff, based on his best information and belief, avers that such exposures will  
22 continue every day until clear and reasonable warnings are provided to Product purchasers and  
23 users or until this known toxic chemical is removed from the Product.

24           27.     Defendant has knowledge that the normal and reasonably foreseeable use of the  
25 Product exposes individuals to DINP, and Defendant intends that exposures to DINP will occur  
26 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale  
27 and offering of the Products to consumers in California

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1 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
2 Complaint.

3 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above  
4 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.


5 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically  
6 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff demands judgment against Defendant and requests the  
9 following relief:

- 10 A. That the court assess civil penalties against Defendant in the amount of
- 11 \$2,500 per day for each violation in accordance with Health and Safety
- 12 Code § 25249.7(b);
- 13 B. That the court preliminarily and permanently enjoin Defendant mandating
- 14 Proposition 65 compliant warnings on the Product;
- 15 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 16 D. That the court grant any further relief as may be just and proper.

17 Dated: January 23, 2018

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