

1 Reuben Yeroushalmi (SBN 193981)
 2 reuben@yeroshalmi.com
 3 **YERUSHALMI & YERUSHALMI***
 4 9100 Wilshire Boulevard, Suite 240W
 5 Beverly Hills, California 90212
 6 Telephone: (310) 623-1926
 7 Facsimile: (310) 623-1930
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 9 Attorneys for Plaintiff,
 10 CONSUMER ADVOCACY GROUP, INC.

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 12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 13
 14 **COUNTY OF LOS ANGELES**

15 CONSUMER ADVOCACY GROUP, INC.,
 16 in the public interest,
 17
 18 Plaintiff,
 19
 20 v.
 21
 22 MIDLAND HARDWARE COMPANY NO.
 23 4, a Missouri Corporation;
 24 KITTRICH CORPORATION, a California
 25 Corporation;
 26 and DOES 1-10,
 27
 28 Defendants.

CASE NO. **21STCV02859**

 COMPLAINT FOR PENALTY AND
 INJUNCTION

 Violation of Proposition 65, the Safe
 Drinking Water and Toxic Enforcement
 Act of 1986 (*Health & Safety Code, §*
25249.5, et seq.)

 ACTION IS AN UNLIMITED CIVIL
 CASE (exceeds \$25,000)

Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
 defendants MIDLAND HARDWARE COMPANY NO. 4, KITTRICH CORPORATION, and
 DOES 1-10 as follows:

THE PARTIES

1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff” or “CAG”) is an organization qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code Section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code Section 25249.7, subdivision (d).
2. Defendant MIDLAND HARDWARE COMPANY NO. 4 (“MIDLAND”) is a Missouri Corporation doing business in the State of California at all relevant times herein.
3. Defendant KITTRICH CORPORATION (“KITTRICH”) is a California Corporation doing business in the State of California at all relevant times herein.
4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-10, and therefore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
5. At all times mentioned herein, the term “Defendants” includes MIDLAND, KITTRICH, and DOES 1-10.
6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
7. Upon information and belief, at all times relevant to this action, each of the Defendants, including DOES 1-10, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing

1 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the
2 alleged wrongful conduct of each of the other Defendants.

- 3 8. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
4 Defendants was a person doing business within the meaning of Health and Safety Code
5 Section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
6 employees at all relevant times.

7 **JURISDICTION**

- 8 9. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
9 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
10 those given by statute to other trial courts. This Court has jurisdiction over this action
11 pursuant to Health and Safety Code Section 25249.7, which allows enforcement of
12 violations of Proposition 65 in any Court of competent jurisdiction.

- 13 10. This Court has jurisdiction over Defendants named herein because Defendants either
14 reside or are located in this State or are foreign corporations authorized to do business in
15 California, are registered with the California Secretary of State, or who do sufficient
16 business in California, have sufficient minimum contacts with California, or otherwise
17 intentionally avail themselves of the markets within California through their
18 manufacture, distribution, promotion, marketing, or sale of their products within
19 California to render the exercise of jurisdiction by the California courts permissible
20 under traditional notions of fair play and substantial justice.

- 21 11. Venue is proper in the County of Los Angeles because one or more of the instances of
22 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
23 because Defendants conducted, and continue to conduct, business in the County of Los
24 Angeles with respect to the consumer product that is the subject of this action.

25 **BACKGROUND AND PRELIMINARY FACTS**

- 26 12. In 1986, California voters approved an initiative to address growing concerns about
27 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
28

1 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
2 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
3 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code Sections
4 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
5 from contamination, to allow consumers to make informed choices about the products
6 they buy, and to enable persons to protect themselves from toxic chemicals as they see
7 fit.

8 13. Proposition 65 requires the Governor of California to publish a list of chemicals known
9 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
10 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains over
11 700 chemicals and chemical families. Proposition 65 imposes warning requirements and
12 other controls that apply to Proposition 65-listed chemicals.

13 14. All businesses with ten (10) or more employees that operate or sell products in California
14 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
15 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
16 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
17 reasonable" warnings before exposing a person, knowingly and intentionally, to a
18 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

19 15. Proposition 65 provides that any person "violating or threatening to violate" the statute
20 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
21 25249.7. "Threaten to violate" means "to create a condition in which there is a
22 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
23 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
24 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

25 16. Plaintiff identified certain practices of exposing, knowingly and intentionally, persons in
26 California to Diisononyl Phthalate ("DINP") without first providing clear and reasonable
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1 warnings of such to the exposed persons prior to the time of exposure. Plaintiff later
2 discerned that Defendants engaged in such practice.

3 17. On December 20, 2013, the Governor of California added DINP to the list of chemicals
4 known to the State to cause cancer (*Cal. Code Regs. tit. 27, § 27001(b)*). Pursuant to
5 Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months after
6 addition of DINP to the list of chemicals known to the State to cause cancer, DINP
7 became fully subject to Proposition 65 warning requirements and discharge prohibitions.

8 **SATISFACTION OF PRIOR NOTICE**

9 18. Plaintiff served the following notices for alleged violations of Health and Safety Code
10 Section 25249.6, concerning consumer products exposures:

- 11 a. On or about October 28, 2020, Plaintiff gave notice of alleged violations of
12 Health and Safety Code Section 25249.6, concerning consumer products
13 exposures subject to a private action to MIDLAND, KITTRICH, and to the
14 California Attorney General, County District Attorneys, and City Attorneys for
15 each city containing a population of at least 750,000 people in whose
16 jurisdictions the violations allegedly occurred, concerning Bath Mat with PVC
17 Components.

18 19. Before sending the notice of alleged violations, Plaintiff investigated the consumer
19 products involved, the likelihood that such products would cause users to suffer
20 significant exposures to DINP, and the corporate structure of each of the Defendants.

21 20. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
22 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
23 Plaintiff who executed the certificate had consulted with at least one person with relevant
24 and appropriate expertise who reviewed data regarding the exposures to DINP, the
25 subject Proposition 65-listed chemical of this action. Based on that information, the
26 attorney for Plaintiff who executed the Certificate of Merit believed there was a
27 reasonable and meritorious case for this private action. The attorney for Plaintiff

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1 attached to the Certificate of Merit served on the Attorney General the confidential
2 factual information sufficient to establish the basis of the Certificate of Merit.

3 21. Plaintiff's notice of alleged violations also included a Certificate of Service and a
4 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
5 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

6 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
7 gave notice of the alleged violations to MIDLAND and the public prosecutors referenced
8 in Paragraph 18.

9 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
10 any applicable district attorney or city attorney has commenced and is diligently
11 prosecuting an action against the Defendants.

12 **FIRST CAUSE OF ACTION**

13 **(By CONSUMER ADVOCACY GROUP, INC. and against MIDLAND,**
14 **KITTRICH, and DOES 1-10 for Violations of Proposition 65, The Safe Drinking**
15 **Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, et**
16 **seq.))**

17 **Bathroom Accessories**

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

20 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
21 distributor, promoter, or retailer of Bath Mat with PVC Components ("Bath Mat"),
22 including but not limited to: "Bath Mat"; "Decorative bath mat softly massages your feet
23 while providing cushion, saety and comfort"; "Gentle to skin, drains easily, machine
24 washable"; "Con.Tact Brand ® Enjoy a moment of comfort"; "29.5 in. x 14 in"; "74,9
25 cm x 35,5 cm"; "BMAT-C02495-01 Nautical Blue 29.5 x14"; "X001PGT6OZ";
26 "Contact BMAT-C02495-04 2 14" Blue Pebble Bath Mat"; "Kittrich Corporation ®";
27 "UPC 7 90444 02495 2"; "Made in China".

28 26. Bath Mat contains DINP.

1 27. Defendants knew or should have known that DINP has been identified by the State of
2 California as a chemical known to cause cancer and therefore was subject to Proposition
3 65 warning requirements. Defendants were also informed of the presence of DINP in
4 Bath Mat within Plaintiff's notice of alleged violations further discussed above at
5 Paragraph 18a.

6 28. Plaintiff's allegations regarding Bath Mat concerns "[c]onsumer products exposure[s],"
7 which "is an exposure that results from a person's acquisition, purchase, storage,
8 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
9 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
10 Bath Mat is a consumer product, and, as mentioned herein, exposures to DINP took
11 place as a result of such normal and foreseeable consumption and use.

12 29. Plaintiff is informed, believes, and thereon alleges that between October 28, 2017 and
13 the present, each of the Defendants knowingly and intentionally exposed California
14 consumers and users of Bath Mat, which Defendants manufactured, distributed, or sold
15 as mentioned above, to DINP, without first providing any type of clear and reasonable
16 warning of such to the exposed persons before the time of exposure. Defendants have
17 distributed and sold Bath Mat in California. Defendants know and intend that California
18 consumers will use Bath Mat, thereby exposing them to DINP. Defendants thereby
19 violated Proposition 65.

20 30. The principal routes of exposure are through dermal contact, ingestion and inhalation.
21 Persons sustain exposures by using, carrying, or handling Bath Mat without wearing
22 gloves or any other personal protective equipment, or by touching bare skin or mucous
23 membranes with gloves after handling Bath Mat, as well as through direct and indirect
24 hand to mouth contact, hand to mucous membrane, or breathing in particulate matter
25 emanating from Bath mat during use, as well as through environmental mediums that
26 carry the DINP once contained within the Bath Mat.

1 31. Plaintiff is informed, believes, and thereon alleges that MIDLAND is selling Bath Mat
2 under a brand or trademark that is owned or licensed by MIDLAND or an entity
3 affiliated thereto; has knowingly introduced DINP into Bath Mat or knowingly caused
4 DINP to be created in Bath Mat; has covered, obscured or altered a warning label that
5 has been affixed to Bath Mat by the manufacturer, producer, packager, importer, supplier
6 or distributor of Bath Mat; has received a notice and warning materials for exposure
7 from Bath Mat without conspicuously posting or displaying the warning materials;
8 and/or has actual knowledge of potential exposure to DINP from Bath Mat.

9 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
10 Proposition 65 as to Bath Mat have been ongoing and continuous, as Defendants
11 engaged and continue to engage in conduct which violates Health and Safety Code
12 Section 25249.6, including the manufacture, distribution, promotion, and sale of Bath
13 Mat, so that a separate and distinct violation of Proposition 65 occurred each and every
14 time a person was exposed to DINP by Bath Mat as mentioned herein.

15 33. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
16 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
17 violations alleged herein will continue to occur into the future.

18 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
19 \$2,500.00 per day per individual exposure to DINP from Bath Mat, pursuant to Health
20 and Safety Code Section 25249.7(b).

21 35. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
22 filing this Complaint.

23 **PRAYER FOR RELIEF**

24 Plaintiff demands against each of the Defendants as follows:

- 25 1. A permanent injunction mandating Proposition 65-compliant warnings;
- 26 2. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);
- 27 3. Costs of suit;
- 28 4. Reasonable attorney fees and costs; and

1 5. Any further relief that the court may deem just and equitable.

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3 Dated: January 22, 2021

YEROUSHALMI & YEROUSHALMI*

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7 Reuben Yeroushalmi
8 Attorneys for Plaintiff,
9 CONSUMER ADVOCACY GROUP, INC.
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