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FILED

OCT 30 2020

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: Q. Roary, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF MARIN
11 UNLIMITED CIVIL JURISDICTION

12 SUSAN DAVIA,

13 Plaintiff,

14 v.

15 DRIVE MEDICAL, INC., DRIVE DEVILBISS
16 HEALTHCARE, INC., MEDICAL DEPOT,
17 INC. and DOES 1-150,

18 Defendants.

Case No. CIV **2002748**

**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 the
3 public interest of the citizens of the State of California, to enforce the People's right to be informed
4 of the presence of diisononyl phthalate ("DINP") and di-isodecyl phthalate ("DIDP"), toxic
5 chemicals found in certain Drive Medical home health products manufactured, distributed and/or
6 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 course
9 of doing business shall knowingly and intentionally expose any individual to a chemical known to
10 the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
11 to such individual. . . ." (*Cal. Health & Safety Code* § 25249.6.)

12 3. On December 20, 2013, the State listed DINP as a chemical known to cause cancer.
13 DINP became subject to the statutory "clear and reasonable" warning requirement on December 20,
14 2014. On April 20, 2007, the state listed DIDP as a chemical known to cause developmental toxicity.
15 DIDP became subject to the statutory "clear and reasonable" warning requirement on April 20,
16 2008. (27 CCR § 27001(c); *Cal. Health & Safety Code* § 25249.8.)

17 4. DIDP and DINP shall hereinafter be collectively referred to as "LISTED
18 CHEMICAL."

19 5. Significant levels of the LISTED CHEMICAL have been discovered in or on the
20 vinyl/PVC components of Drive medical home health products manufactured with PVC that
21 defendants design, manufacture, distribute, and/or offer for sale to consumers throughout the State
22 of California including, as example, but not limited to, Drive Medical Vinyl Mesh Bather Pouch,
23 Item 10267-1, 822383232065. All such Drive home health care products including vinyl/PVC
24 materials containing any LISTED CHEMICAL shall hereinafter be referred to as the "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 of
27 the PRODUCTS is a violation of Proposition 65.
28

7. For defendants' violations of Proposition 65, plaintiff seeks preliminary and permanent injunctive relief to compel defendants to provide employees handling the PRODUCTS and purchasers or users of the PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

8. Plaintiff also seeks civil penalties against defendants for their violations of Proposition 65, as provided for by California Health & Safety Code Section 25249.7(b).

PARTIES

9. Plaintiff SUSAN DAVIA is a citizen of the State of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products, and brings this action in the public interest pursuant to California Health & Safety Code Section 25249.7.

10. Based upon publicly available information, plaintiff is informed and believes, and thereupon alleges, that each defendant DRIVE DEVILBISS HEALTHCARE, INC., DRIVE MEDICAL, INC. and MEDICAL DEPOT, INC. is a person doing business within the meaning of California Health & Safety Code Section 25249.11.

11. Based upon publicly available information, plaintiff is informed and believes, and thereupon alleges, that each defendant DRIVE DEVILBISS HEALTHCARE, INC., DRIVE MEDICAL, INC. and MEDICAL DEPOT, INC. is legally responsible for the design, manufacture, distribution, and/or offer of the PRODUCTS for sale or use in the State of California or implies by its conduct that it designs, manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

12. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

13. MANUFACTURER DEFENDANTS engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the process of research, testing, designing, assembling, fabricating, and/or manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

14. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

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

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

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

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

19. DRIVE DEVILBISS HEALTHCARE, INC., DRIVE MEDICAL, INC., MEDICAL DEPOT, INC., MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as "DEFENDANTS".

VENUE AND JURISDICTION

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

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

22. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that either are citizens of the State of California, have sufficient minimum contacts in the State of California, or otherwise purposefully avail themselves of the California market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

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

23. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 22, inclusive.

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

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

26. On July 10, 2020, a valid and compliant Proposition 65 60-Day Notice of Violation (“60-Day Notice”), together with a valid, requisite Certificate of Merit, were served on DRIVE DEVILBISS HEALTHCARE, INC., DRIVE MEDICAL, INC., MEDICAL DEPOT, INC. and various public enforcement agencies stating that as a result of the DEFENDANTS’ manufacture, distribution and sales of the PRODUCTS, purchasers and users in the State of California are being exposed to the Listed Chemical resulting from the reasonably foreseeable uses of certain PRODUCTS, without the individual purchasers and users first having been provided with a “clear and reasonable warning” regarding such toxic exposures.

27. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 and

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

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

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

10 30. DEFENDANTS knew or should have known that the PRODUCTS contained such
11 LISTED CHEMICAL.

12 31. A LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
13 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section
14 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a consequence of
15 the packing, shipping, unpacking, display and daily organization and movement of PRODUCTS as
16 well as the reasonably foreseeable use of the PRODUCTS.

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

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

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

27 35. Contrary to the express policy and statutory prohibition of Proposition 65,
28 employees and individuals exposed to a LISTED CHEMICAL through dermal contact and/or

1 ingestion and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS, sold
2 by DEFENDANTS without a "clear and reasonable warning", have suffered, and continue to suffer,
3 irreparable harm, for which harm they have no other plain, speedy or adequate remedy at law.

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

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

10 **PRAYER FOR RELIEF**

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

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

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

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

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

23 Dated: October 28, 2020

Respectfully submitted,

24 SHEFFER LAW FIRM

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26 By: 

Gregory M. Sheffer
Attorneys for Plaintiff
SUSAN DAVIA