

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: LUMBER LIQUIDATORS
CHINESE-MANUFACTURED FLOORING
PRODUCTS MARKETING, SALES
PRACTICES AND PRODUCTS LIABILITY
LITIGATION

MDL No. 1:15-md-02627 (AJT/TRJ)

This Document Relates to ALL Cases

**PLAINTIFFS' RESPONSE TO MOTION TO DISMISS FIRST AMENDED
REPRESENTATIVE CLASS ACTION COMPLAINT AND TO STRIKE
REQUEST FOR INJUNCTIVE RELIEF CLASSES**

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I. INTRODUCTION

Lumber Liquidators increased its profits by using cheaper composite core-boards that contained high levels of formaldehyde in its laminate flooring. At the same time, it aggressively marketed its compliance with California’s strict formaldehyde emissions regulations. Then Lumber Liquidators got caught. Over one hundred independently run tests from a number of certified laboratories confirmed that Defendant’s Chinese-made laminate flooring containing Medium Density Fiberboard (“MDF”) cores emit formaldehyde at levels that were many times those of similar U.S.-made products its competitors sold. Defendant’s MDF cores also emitted formaldehyde at levels that exceeded limits set by the California Air Resources Board (“CARB”). In fact, employees at Defendant’s Chinese mills

[o]penly admitted that they use core boards with higher levels of formaldehyde to make Lumber Liquidators laminates, saving the company 10-15 percent on the price [and] falsely labeling the company’s laminate flooring as CARB compliant. [¶ 11.¹]

Plaintiffs’ claims are straightforward: each bought Lumber Liquidators’ laminate flooring products that have been found to contain formaldehyde at levels many times those in comparable products and many times the CARB limits. Defendant hid this from the Plaintiffs, along with the fact that it did not actually regulate its manufacturers as required. Moreover, each Plaintiff saw and relied on Lumber Liquidators’ assurances that its products met or exceeded California’s strict emissions limits for all composite laminate products – no matter where they were sold. These representations were false. Plaintiffs bring claims under their respective state laws based on omissions and misrepresentations, and for breach of implied warranties.

¹ “¶” references are to paragraph numbers in Plaintiffs First Amended Representative Class Action Complaint (Doc. No. 562).

Defendant first claims it did not violate CARB regulations.² As addressed in Section IV(A), this argument is at odds with the statutory text, which specifically prohibits retailers from selling finished goods containing MDF cores that exceed CARB's formaldehyde limits.

Defendant then asks the Court to dismiss Plaintiffs' claims under the consumer protection laws of their respective states. Sections IV(B) and (C) show that Defendant ignores the omissions of fact Plaintiffs alleged as an independent basis for these claims, ignore allegations that state what each Plaintiff saw and on what they relied, and seeks to impose incorrect legal standards. Section IV(D) addresses how Defendant's misrepresentations and omissions also support claims for fraudulent concealment and negligent misrepresentation.

Sections IV(E) and (F) address the alleged breach of implied warranties and the related claims under the Magnusson-Moss Warranty Act. Section IV(G) explains why injunctive relief is necessary to prevent Defendant from exacerbating the potential harms by misleading people about the health risks they face. Finally, Section IV(H) shows why declaratory relief is warranted. Defendant's motion should be denied.

II. STATEMENT OF FACTS

A. **Plaintiffs Allege that MDF Cores in Defendant's Flooring Emitted Formaldehyde at Levels Far Above California's Limits and Emission Levels of Competitors' Products**

Chronic and long-term exposure to formaldehyde is linked to increased risk of cancer of the nose and sinuses, nasopharyngeal and oropharyngeal cancer, lung cancer, and leukemia. ¶ 5. Formaldehyde also causes sensory irritations, exacerbates asthma, and poses an acute risk to children. *Id.* The California Airborne Toxic Control Measure ("ATCM" or "Regulation") aims

² Defendant has apparently abandoned its arguments that Plaintiffs' claims are barred by the doctrine of primary jurisdiction and that Plaintiffs used the wrong testing method. *See* Def. Mot. to Dismiss or Stay filed in *Balero v. Lumber Liquidators*, Case No. 15-cv-01005 (N.D. Cal.) (ECF No. 12) at 8-17, 18-19.

to reduce public exposure to formaldehyde by setting maximum amounts of formaldehyde that products may contain. ¶ 6. In 2009, the Regulation became final, and set maximum formaldehyde emission limits for MDF products to take effect in two phases. The CARB Phase 2 emission standard went into effect as of January 1, 2011.

As detailed in Section IV(A) below, the ATCM mandates that MDF cores in products such as laminated flooring may emit formaldehyde at levels no higher than 0.11 parts per million (“ppm”). ¶ 35.³ Goods containing cores that exceed the limits may not lawfully be sold in California. This prohibition applies to retailers, such as Lumber Liquidators. Plaintiffs allege that certified laboratories tested the MDF cores in Lumber Liquidators’ products using a test method specified in the Regulation, and that the cores dramatically exceeded CARB’s limits. ¶¶ 8, 10, 43. Laboratories also tested Defendant’s competitors’ laminate flooring products and found that they emitted formaldehyde at levels below the CARB limits. ¶ 8.

B. Plaintiffs Allege that Defendant Knew and Hid the Fact that Its Products Contained High Levels of Formaldehyde

Lumber Liquidators exploited California’s exacting standards as a marketing tool and touted its products as meeting or exceeding California’s standards no matter where they are sold. ¶¶ 9, 13, 29, 30. Yet Lumber Liquidators knew this was untrue. ¶ 60. Employees in its Chinese mills admitted to using high formaldehyde levels to save Lumber Liquidators 10-15% on the price of production. ¶ 11. Defendant also knew, or should have known, that its finished products emitted formaldehyde at levels that far exceeded CARB limits. ¶¶ 57-59. Indeed, it conceded that its own testing showed as much. ¶ 49.

To comply with CARB requirements, Defendant was required to regulate the production methods, quality control systems and testing procedures its suppliers used to ensure the products

³ See CAL. CODE REGS. tit. 17, § 93120.2(a). Thin MDF (defined as having a maximum thickness of 8mm) can contain no more than 0.13 ppm of formaldehyde. *Id.*

complied with CARB limits. ¶¶ 30, 48. Indeed, Defendant claimed that it tightly controlled and regulated the manufacturing process. *Id.* As such, it was more than a downstream retailer. But Defendant did not actually control the practices of the Chinese mills that manufactured its flooring products. ¶ 55. The composite laminate products it sold were manufactured without proper oversight and Defendant did not ensure that its flooring was actually safe to have in a home – yet it kept this information from its customers. ¶ 56. Despite knowing that products it was selling for home use contained high and possibly dangerous formaldehyde levels, Defendant did not inform Plaintiffs, or any of its customers, that its products might contain many times the formaldehyde of equivalent products and many times the levels considered safe. ¶¶ 1, 51, 53, 76, 86, 93, 107, 123, 132, 141. Plaintiffs allege they were deceived by Defendant’s omission and would not have purchased the product had they known it contained more formaldehyde than similar products manufactured in the United States. ¶¶ 79, 90, 99, 115, 127, 133, 142.

C. The Complaint Alleges that Lumber Liquidators Misrepresented the Safety of its Products and the Subsequent Danger to its Customers

1. Lumber Liquidators misrepresented the safety of its products.

In addition to failing to disclose the extent to which it left its Chinese manufacturers unregulated, and that its products had been shown to contain high and often dangerous levels of formaldehyde, Plaintiffs allege that Defendant affirmatively misrepresented that it took adequate and exacting steps to ensure that its manufacturers met CARB’s standards in both their processes and in their products. ¶¶ 48, 50. Defendant also falsely represented on its website and in various other materials that its composite flooring products meet the CARB standards for formaldehyde emissions no matter where they are sold, and are therefore safe. ¶¶ 29, 30. Indeed, each package of MDF flooring sold by Defendant was stamped with a label stating that the product complies with CARB standards for formaldehyde. ¶ 46. It further warranted that all of its products

comply with all applicable regulations. ¶ 47. Defendant knew, or should have known, that these representations were not true. ¶¶ 53-57. Plaintiffs allege visiting Defendant's website or otherwise seeing its representations stating that its products complied with California's formaldehyde regulations no matter where they are sold. ¶¶ 72, 83, 93, 103, 119, 130, 139. Each Plaintiff relied on Defendant's representations that its products were safe and suitable to have in their home and would not have purchased Defendant's flooring products otherwise. ¶¶ 74, 79, 84, 90, 94, 99, 105, 115, 121, 127, 133, 142.

2. Lumber Liquidators continues to misrepresent the health risks its products pose to customers.

On March 1, 2015, *60 Minutes* reported its findings that virtually all of the samples of Defendant's Chinese-made flooring tested at many times CARB's formaldehyde emissions standards. ¶ 10. In response, Defendant launched a marketing campaign to discredit the results and to cover up the risks its products posed. Defendant began offering free do-it-yourself air testing kits. ¶¶ 14, 62. Unlike the laboratory tests, these kits do not comply with accepted industry standards, are inherently unreliable, and are designed to under-report the formaldehyde levels present. *Id.* Even when results show dangerous levels of formaldehyde, Defendant falsely tells customers that the formaldehyde levels are "normal" and safe. ¶¶ 15, 63, 65.

The Brandts' experience is a telling example. Ms. Brandt was pregnant when she and her husband purchased Defendant's flooring and installed it in the nursery they were preparing. ¶ 101. The Brandts relied on Lumber Liquidators' safety assurances. ¶ 105. Upon seeing the *60 Minutes* report, the Brandts had the flooring and the surrounding air tested by independent professionals. ¶¶ 109, 113. On Lumber Liquidators' insistence, they also tested the air using Defendant's do-it-yourself testing kit. ¶¶ 110, 111. Though Defendant has not provided the

actual test results, it sent the Brandts letters stating that the results show that the floors and the air in their infant's room are safe and normal. ¶¶ 65, 111, 112.⁴

These representations were not only false but were in callous disregard for the health of the Brandts' child. The independent air test, conducted by a Certified Industrial Hygienist, showed formaldehyde concentration at a level that exceeds all recommended threshold limits for chronic exposure in a home, and that even exceeds limits for a workplace environment (based on an eight-hour exposure to an adult). ¶ 113. Upon seeing the results, the Brandts' pediatrician advised that their child not be allowed to sleep in the room in which the flooring was located. *Id.*

D. Plaintiffs Bring Claims Under Their Respective States' Laws

All Plaintiffs bring claims for fraudulent concealment (Count I) based on allegations that Defendant, but not Plaintiffs, possessed knowledge regarding the production methods and the true content of formaldehyde in its products, and actively concealed these facts.

The Washingtons, Ronquillos, and Balero bring claims under three California consumer protection laws (Counts II-IV). Their claims are predicated on Defendant's misrepresentations and omissions, and also because it was unlawful to sell finished goods containing non-compliant MDF in California. *See* ¶¶ 167-68. The Plaintiffs from Florida, Illinois, New York, and Texas bring similar consumer fraud claims under their respective states' laws (Counts V-VIII). These claims are based on the allegation that Defendant hid the fact that it failed to provide the necessary oversight to ensure that its products were manufactured in compliance with CARB standards, and that those products actually emitted more formaldehyde than domestic products. They are also based on Defendant's representation that all its composite flooring products met or

⁴ Copies of the letters the Brandts received are attached hereto as **Appendix A**. The letter dated June 9, 2015, is consistent with form letters that Lumber Liquidators sent to customers whose air testing results show levels of formaldehyde up to 0.08 parts per million. *See* ¶ 65. The Court can consider documents referred to in the operative complaint in deciding a Rule 12(b)(6) motion. *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

exceeded California's formaldehyde regulations, regardless of where they were sold. *See* ¶¶ 29, 30. These misrepresentations also serve as basis for all Plaintiffs' negligent misrepresentation claim (Count XI).

All Plaintiffs bring claims for breach of the implied warranty of merchantability (Count IX), and for violation of the Magnuson-Moss Warranty Act (Count X). These claims are predicated on the fact that Defendant's product did not conform to its labeling. ¶¶ 244, 256.

In addition to damages, Plaintiffs seek injunctive relief to prevent Lumber Liquidators from continuing to mislead customers as to risks to which they are exposed through its home air testing program (Count XI) and a declaratory judgment that the products do not comply with CARB regulations and cannot be labeled as CARB-compliant (Count XII).

III. LEGAL STANDARD

A court reviewing a Rule 12(b)(6) motion must accept well-pleaded allegations as true and construe factual allegations in favor of the plaintiff.⁵ To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a plausible claim for relief. A claim is facially plausible when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."⁶

Claims based on omissions of material facts do not "sound in fraud" and need not meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). Courts have relaxed the requisite pleading standard "when factual information is peculiarly within the defendant's knowledge or control."⁷ To state a claim for consumer fraud based on an omission, most states require a

⁵ *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994).

⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

⁷ *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989); *see also Ademiluyi v. PennyMac Mortg. Inv. Trust Holdings I, LLC*, 929 F. Supp. 2d 502, 533 (D. Md. 2013) (holding

plaintiff to allege that the defendant failed to disclose material information that induced the plaintiff to enter into a transaction.⁸ Where subject matter jurisdiction is challenged based on standing, “general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss [the court] ‘presume[s] that general allegations embrace those specific facts that are necessary to support the claim.’”⁹

IV. ARGUMENT

A. Defendant Violated the ATCM by Selling Products Containing MDF Cores that Exceeded Formaldehyde Emission Limits

Plaintiffs allege that Lumber Liquidators’ laminated flooring products exceed straightforward formaldehyde emission limits set forth in the ATCM. Plaintiffs base this allegation on over 100 test results showing excess formaldehyde emissions from Defendant’s products (¶¶ 8, 12, 39, 43, 57); on admissions from employees at the mills that manufactured Defendant’s MDF core-boards (¶ 11); and on Defendant’s own admissions (¶¶ 49, 55). Because they did not comply with the ATCM, the products could not legally be sold in California and Lumber Liquidators’ representations that its products met CARB standards were false. Lumber Liquidators’ arguments to the contrary are incorrect based on the text of the ATCM.

that Rule 9(b) is less strictly applied with respect to claims of fraud by concealment or omission of material facts, as opposed to affirmative misrepresentations, because an omission cannot be described in terms of the time, place, maker, or contents of the misrepresentation). *Accord Pelman v. McDonald’s Corp.*, 396 F.3d 508, 511 (2d Cir. 2005) (“[A]n action under [N.Y. Gen. Bus. L.] § 349 [which does not include misrepresentations] is not subject to the pleading-with-particularity requirements ... but need only meet the bare-bones notice-pleading requirements of Rule 8(a)...”).

⁸ See, e.g., *Benjamin v. CitiMortgage, Inc.*, 2013 WL 1891284, at *4 (S.D. Fla. May 6, 2013); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill. 1996).

⁹ *Trinity Outdoor, L.L.C. v. City of Rockville, MD*, 123 F. App’x 101, 105 (4th Cir. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1991)).

1. The ATCM applies to Lumber Liquidators' sale of formaldehyde-contaminated laminate wood flooring.

The ATCM sets forth formaldehyde emission limits for “composite wood products,” such as MDF, and for the finished goods that contain them.¹⁰ The ATCM states:

No person shall sell, supply, offer for sale, or manufacture for sale in California any composite wood product which, at the time of sale or manufacture, does not comply with the emission standards in Table 1.^[11]

Table 1 sets the currently applicable limit as 0.11 ppm for MDF and 0.13 ppm for Thin MDF.¹² Section 8(a) goes on to state:

[A]ll retailers *must* comply with the requirements of section 93120.2(a) for all composite wood products *and finished goods containing these materials* that are sold, supplied, offered for sale, or purchased in California.^[13]

The Regulation sets out five “conditions,” each of which constitutes a violation of the emission limits.¹⁴ The first three specify ways a “composite wood product” (such as the MDF core) can violate emissions standards.¹⁵ The third condition is violated when an MDF core “is tested at any time after it is manufactured, using either the compliance test method specified in section 93120.9(a) or the enforcement test method specified in section 93120.9(b), and found to

¹⁰ For the Court’s convenience, a copy of the full ATCM to Reduce Formaldehyde Emissions from Composite Wood Products, CAL. CODE REGS. tit. 17, § 93120, *et seq.*, is attached hereto as **Appendix B**.

¹¹ CAL. CODE REGS. tit. 17, § 93120.2(a) (Table 1, setting emission limits for MDF cores); *see also id.*, § 93120.1(a)(8) (defining “composite wood product” to include MDF); *id.*, § 93120.1(a)(25) (defining “laminated product” to include finished goods made with laminate affixed to a composite wood platform).

¹² *Id.*, § 93120.2(a).

¹³ *Id.*, § 93120.8(a) (emphasis added).

¹⁴ *See id.*, §§ 93120.2(a)(1)-(5) (“A product ‘does not comply with the emission standards in Table 1’ if....”).

¹⁵ *Id.* §§ 93120.2(a)(1)-(3); *see also id.*, § 93120.1(8) (defining “Composite wood products” to include Medium Density Fiberboard (MDF)); *id.*, § 93120.1(28) (defining MDF).

exceed the applicable emission standard specified in Table 1.”¹⁶ In other words, if an MDF core is found to emit formaldehyde above the 0.11 ppm limit, using either of the specified test methods, the product does not comply – and it cannot be sold in California.

The fourth and fifth conditions apply to finished goods, such as Defendant’s laminate flooring. The fourth condition provides that when a finished good contains an MDF core, the MDF core must comply with the first three conditions.¹⁷ Specifically, the fourth condition states that a product “does not comply with the emission standards” if:

A finished good contains any composite wood product which does not comply with the emission standards in Table 1, based on the criteria set forth in paragraphs (1), (2), or (3) above [*i.e.*, the first three conditions].^[18]

Therefore, if a finished good contains an MDF core that is shown, using one of the specified methods, to emit formaldehyde above the limits, the finished good also does not comply with CARB limits and cannot be sold in California.¹⁹

Defendant does not dispute that it sells laminate wood flooring containing an MDF core. Plaintiffs allege that, in keeping with the “compliance test method,” certified laboratories tested MDF cores in Defendant’s Chinese-sourced laminated flooring using one of the authorized test

¹⁶ See *id.*, § 93120.2(a)(3).

¹⁷ See *id.*, §§ 93120.2(a)(4)-(5).

¹⁸ See *id.*, § 93120.2(a)(4).

¹⁹ In addition to this explicit statement in the fourth condition, the ATCM elsewhere confirms that a finished good violates emission limits if its MDF core violates the emission limits. For example, “laminated product” is defined as “*a finished good ... in which a laminate or laminates are affixed to a platform. If the platform consists of a composite wood product [e.g., an MDF core], the platform must comply with the applicable emission standards.*” *Id.*, § 93120.1(a)(25) (emphasis added); see also *id.*, § 93120.12(e)(2)(C)(2) (“*Finished goods containing ... MDF that does not comply with the Phase 2 standard may be sold ... by retailers until June 30, 2012. Beginning July 1, 2012, finished goods containing ... MDF ... must comply with the Phase 2 standard, regardless of the date that the product was fabricated.*”) (emphasis added).

methods – the “ASTM D 6007-02” method, colloquially known as the “small-chamber” test.²⁰

The Complaint alleges that 134 samples were tested “in accordance with the ASTM D 6007-02 as mandated by CARB regulations.” ¶ 43; *see also* ¶¶ 8, 10, 12, 57. Virtually all the samples violated the ATCM’s formaldehyde emission limit. ¶ 43. Even tests Defendant itself conducted showed that the MDF cores in its flooring exceeded ATCM emission limits. ¶ 49.

2. Lumber Liquidators’ ATCM arguments misread the Regulation.

The ATCM’s provisions are straightforward and Defendant’s interpretation is contrary to the plain language of the statute. First, Defendant analyzes Section 93120.8(b) while entirely ignoring the previous section, 93120.8(a). It then invents a “safe harbor” provision,²¹ where none exists. Next, Defendant claims a separate standard exists for “finished goods” that the Regulation’s text explicitly contradicts. Then Defendant superimposes a requirement that only government entities can test for compliance.

a. The ATCM prohibits retailers from selling finished goods that contain non-compliant MDF cores.

Defendant claims the Regulation applies a different standard to retailers and applies a different standard for finished goods.²² This relies on Section 93120.8(b) (addressed in Section 2.b. below). But Defendant ignores the immediately preceding provision, which states: “all retailers must comply with the requirements of section 93120.2(a) [the limits on formaldehyde emissions] for all composite wood products *and finished goods containing these materials...*”²³

Defendant also creates a false distinction between determining whether composite wood products violate the ATCM and whether finished goods containing those products violate the

²⁰ *See id.*, § 93120.9(a).

²¹ Def. Mem. at 1, 3.

²² *Id.* at 2-3.

²³ CAL. CODE REGS. tit. 17, § 93120.8(a).

ATCM. Lumber Liquidators asserts that “Plaintiffs rely on the third condition, Subsection 93120(a)(3), for their claim of non-compliance” (*i.e.*, that MDF cores may not test above emission limits), and argues that “Plaintiffs do not allege that Lumber Liquidators’ *finished goods* failed either” the fourth or fifth conditions.²⁴ But as explained above, the fourth condition (Section 93120.2(a)(4)) simply incorporates the previous 3 provisions, and provides that “[a] finished good contains any composite wood product which does not comply with” the first three conditions.²⁵ Therefore, if the finished good contains a non-compliant core (product), the finished good violates the Regulation.²⁶ Plaintiffs allege that compliance method testing reveals that MDF cores exceed the emission standards, and have thus stated a claim.²⁷

b. There is no “safe harbor” for retailers who sell non-compliant goods and no requirement to show that Defendant knew of violations.

Though it ignores the clear prohibition in § 93120.8(a), against retailers selling finished goods that contain non-compliant composite wood products, Defendant argues that the following section, (§ 8(b)), “creates a ‘safe harbor’ for retailers” who take reasonable precautions to assure compliance.²⁸ This is no “safe harbor.” The section is entitled “*Additional Requirements to Help Ensure that Complying Composite Wood Products and Finished Goods are Purchased.*” While this provision adds “additional” requirements, such as maintaining records and instructing suppliers, compliance with these “additional” requirements is in addition to, *not in lieu of*, compliance with the emission limits. Not only does the section not mention the words “safe

²⁴ Def. Mem. at 7 (emphasis in original).

²⁵ See CAL. CODE REGS. tit. 17, §§ 93120.2(a)(3)-(4) (emphasis added).

²⁶ See *id.*; see also *supra* n.22, citing other PROVISIONS in the Regulation showing that finished goods may not be sold if they contain non-compliant cores.

²⁷ See, e.g., ¶ 43.

²⁸ Def. Mem. at 3.

harbor,” it expressly states that it does *not* create a safe harbor: “This section *does not affect the liability* of any person for any violation of [the emission limits].”²⁹

As part of its fabricated “safe harbor,” Defendant asserts that “[a]n ‘emissions’ violation alone is not enough” to give rise to liability, that Plaintiffs must show that Defendant “knew at the time of sale that its products did not comply with emission standards,” and that Lumber Liquidators failed to take “reasonable prudent precautions.”³⁰ The text does not support this assertion. A “knowledge” requirement is Defendant’s own invention. The “reasonable prudent precautions” language is found in Section 93120.8(b), which sets out “additional” requirements retailers must take to help ensure that they purchase compliant products; create any exception to the preceding section’s prohibition against selling goods containing non-compliant MDF cores. In any event, even if the Regulation contained a knowledge requirement (which it does not), the Complaint alleges both that Defendant had such knowledge, and that it failed to take reasonable prudent precautions. *See, e.g.*, ¶¶ 49, 53, 55, 56, 60.

c. Defendant’s claim that CARB itself must perform the test ignores the compliance testing provision.

Defendant incorrectly argues that, based on the ATCM’s “enforcement” testing provision, a finished good violates the ATCM only if CARB (or “local air district personnel”) conducts the test that discovers the violation.³¹ But Defendant again ignores the preceding “compliance” testing provision. As stated above, the third condition (Section 93120.2(a)(3) as

²⁹ CAL. CODE REGS. tit. 17, § 93120.8(b) (emphasis added). Further confirming that compliance with the “additional requirements” is not a safe harbor, the Retailer Section also provides that Retailers “may be inspected by ARB,” not only to audit records, but also to “secure samples for testing ... to determine compliance with the applicable emission standards.” *See id.*, § 93120.8(c).

³⁰ Def. Mem. at 3, 4, 6 (*e.g.*, “there must be proof that Lumber Liquidators *knew* ‘at the time of sale’ that its finished goods did not comply...” (emphasis added)).

³¹ *See id.* at 8 (citing Cal. Code Regs. tit. 17, § 93120.9(c)).

applied to finished goods by section 93120.2(a)(4)), states that a product does not comply if it is found to exceed emissions standards “any time after it is manufactured, using *either* the compliance test method specified in Section 93120.9(a) *or* the enforcement test method specified in section 93120.9(b).”³² Unlike the enforcement method, the compliance method does not refer to CARB, but merely states that compliance “shall be demonstrated by conducting [specified] product emissions tests, verified by third party certification.”³³ A finished good violates the ATCM if a certified laboratory tests the MDF core of the finished product using the ASTM D 6007-02 test method, and the tests show that the core emits formaldehyde at a level that exceeds 0.11 ppm.³⁴ This is exactly what Plaintiffs have alleged.³⁵

Defendant’s argument that private parties cannot challenge violations of the ATCM when the violation involves a finished good is also contrary to California’s Unfair Competition Law (“UCL”). As discussed below, the UCL allows plaintiffs to challenge “any *unlawful* business act or practice ... as unfair competition that is independently actionable.”³⁶ The purpose is to prevent businesses from gaining an unfair edge on competitors by violating the law.³⁷ The UCL authorizes private citizens to bring suit for violation of *any* law. This would be frustrated if, as Defendant contends, no one other than CARB could establish that it violated the ATCM.

³² CAL. CODE REGS. tit. 17, § 93120.2(a)(3) (emphasis added).

³³ *See id.*, § 93120.9(a).

³⁴ *See id.*, §§ 93120.2(a)(3)-(4), 93120.9(a)(2).

³⁵ Defendant’s assertion that “Plaintiffs do not allege core testing” (Def. Mem. at 8 n.6) is incorrect. The tests Plaintiffs conducted were “core” tests: the ASTM 6007-02 tests that are authorized by the “compliance” method in the third condition for MDF cores. The Regulation incorporates this testing method for finished goods. *See* ¶ 43; CAL. CODE REGS. tit. 17, §§ 93120.2(a)(3)-(4).

³⁶ CAL. BUS. & PROF. CODE § 17200. *See* ¶ 166 (Count II). *See also Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949 (2002) (internal quotations omitted).

³⁷ *See Stop Youth Addiction, Inc.*, 17 Cal. 4th 553, 579 (1998) (superseded by statute on other grounds).

B. Defendant Misrepresented and Omitted Material Facts, Injuring Plaintiffs

1. Plaintiffs have standing to base claims on Defendant's misrepresentations.

Defendant argues that Plaintiffs do not have standing to challenge misrepresentations about formaldehyde compliance because, according to Defendant, Plaintiffs did not see the alleged representations.³⁸ Defendant is attempting to contradict the Plaintiffs' factual allegations that they saw Defendant's formaldehyde representations, and that they influenced their purchase.³⁹ On a motion to dismiss, even where standing is alleged, the Court should accept the allegations as true, and construe all inferences in the plaintiffs' favor.⁴⁰

Moreover, even if no Plaintiff saw the representations about formaldehyde compliance, Plaintiffs still have standing as Defendant's misrepresentations caused injury. If the buying public knew that Lumber Liquidator's products contained many times the formaldehyde of its competitors, the market for the products would have dissipated, the prices would not have been sustainable, and as such Plaintiffs paid prices that were higher than they would have been absent Defendant's misrepresentations.⁴¹ Defendant's standing argument lacks merit.

2. The alleged truth of the representations is disputed and would not preclude state consumer protection law claims.

Defendant argues that whatever statements it made are not actionable because "statements of fact are not misleading."⁴² Ignoring, that its statements regarding CARB

³⁸ Def. Mem. at 10.

³⁹ See, e.g., ¶¶ 72, 79, 83, 90, 94, 103-105, 115, 119, 121, 127, 130, 133, 139, 142.

⁴⁰ *Trinity Outdoor*, 123 F. App'x at 105; *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982) (applying same standard for 12(b)(6) where Article III standing is at issue).

⁴¹ *Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590, 607 (C.D. Cal. 2012) (noting deception that caused the price to be higher, caused harm to all purchasers, regardless of reliance); *Ebin v. Kangadis Food Inc.*, 2014 WL 737960, at *7 (S.D.N.Y Feb. 25, 2014) (noting that the injury was an increased price of a good based on a deception).

⁴² Def. Mem. at 14-15.

compliance are false, Defendant cites no cases in support, and precedent contradicts the argument. “A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under [UCL] Section 17200.”⁴³

Here, Defendant claims that its website contains three truthful statements: (1) that the products are purchased from mills that were certified by a third-party certifier; (2) that it requires its vendors to comply with the ATCM; and (3) that it regularly selects goods for testing.⁴⁴ Even if all of these assertions are true, these claims are likely to mislead a consumer into believing the flooring complied with CARB and did not have excessive formaldehyde – when it did not. The statements were intended to assuage any concern as to formaldehyde and elicit purchases. Defendant knew the products emitted more formaldehyde than it claimed, and that it lacked sufficient oversight of its Chinese vendors. Either way, it renders the statements of certification, of vendor compliance, and regular testing deceptive.

3. Defendant omitted material facts.

Defendant claims its omissions are not actionable because its representations about ATCM compliance were technically true, and it was not obligated to disclose anything it knew to the contrary.⁴⁵ The first argument relies on Defendant’s claim that it complied with the ATCM by selling finished goods containing non-compliant MDF cores, but this is incorrect. *See supra*

⁴³ *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1255 (2009) (internal citation omitted); *see also Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 450 (N.D. Cal. 2012) (rejecting summary judgment and finding that while the statements may have been “technically accurate,” a dispute still existed as to whether an ordinary consumer would be misled by defendant’s description); *Khoday v. Symantec Corp.*, 2014 WL 1281600, at *17 (D. Minn. Mar. 31, 2014) (applying California law, finding website representation regarding re-downloading software that may have been technically accurate was nonetheless potentially misleading).

⁴⁴ Def. Mem. at 15.

⁴⁵ *Id.* at 16.

§ IV(A). Defendant also faces liability for not disclosing the excessive formaldehyde in its Chinese-made products compared to U.S.-manufactured laminate flooring. ¶ 51. Defendant’s second argument – that it is not responsible for any misleading misrepresentations – is both incorrect (ignoring its own website, ¶ 48), and irrelevant, because Defendant still faces liability for its deliberate omissions and misstatements regarding the high formaldehyde emission levels of its products. ¶¶ 13, 51, 76, 86, 93, 107, 123, 132, 141, 159-64, 171, 172, 197, 208, 231-32. Defendant, and not Plaintiffs, knew where the product came from, how little it was paying for it compared to other sources, and had been put on notice regarding formaldehyde concerns.⁴⁶ The laws of all states pled in the Complaint make Defendant’s omissions actionable.⁴⁷

C. Defendant’s Actions Violated State Consumer Fraud Statutes

1. The California Plaintiffs pled violations of California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act.

California’s Unfair Competition Law (“UCL”) permits restitution and injunctive relief when a defendant engages in unfair, fraudulent, or unlawful conduct.⁴⁸ For the fraudulent prong, “[a] ‘reasonable consumer’ standard applies when determining whether a given claim is

⁴⁶ ¶¶ 49, 54-55, 57, 59-60. *Accord Parenteau v. Gen. Motors, LLC*, 2015 WL 1020499, at *6 (C.D. Cal. Mar. 5, 2015) (finding knowledge of defect pled where plaintiffs alleged preproduction testing, post-production analysis, other customer complaints); *Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d 1161, 1177 (E.D. Cal. 2013) (finding plaintiffs pled a duty to disclose where tag stated laptop’s battery life as longer than defendant knew it to be).

⁴⁷ Florida and Illinois make omissions actionable if they induced a party to enter into a transaction. *See, e.g., Benjamin v. CitiMortgage, Inc.*, 2013 WL 1891284, at *4 (S.D. Fla. May 6, 2013); *Connick v. Suzuki Motor Co.*, 675 N.E.2d at 595. New York requires a seller to disclose material information that is in the seller’s exclusive possession. *Oswego Laborer’s Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741 (N.Y. 1995). California and Texas require disclosure, under the same circumstances, where a partial representation was made, or if a safety issue exists. *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 995-96 (N.D. Cal. 2013); *Hoffman v. AmericaHomeKey, Inc.*, 23 F. Supp. 3d 734, 744-45 (N.D. Tex. 2014).

⁴⁸ CAL. BUS. & PROF. CODE § 17200; *Cel-Tech Commc’n, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999).

misleading or deceptive,”⁴⁹ and the plaintiff must establish reliance.⁵⁰

The California Plaintiffs allege seeing Defendant’s website, its advertisements, and labels asserting CARB compliance. ¶¶ 72, 73, 83. They also allege that they were not informed of excessive formaldehyde levels in the product. ¶¶ 76, 86, 93. Each Plaintiff alleges relying on the representations and omissions, that had they known the truth they would not have purchased the flooring, and suffering damages as a result. ¶¶ 74, 79, 80, 84, 89, 90, 94, 99, 173, 174. Plaintiffs sufficiently allege that Defendant’s practices were fraudulent under the UCL.⁵¹

Plaintiffs also state a UCL claim based on unlawful acts. ¶¶ 167-70. The UCL allows claims based on “any *unlawful* ... business act or practice” even if the law in question contains no private right of action.⁵² Defendant argues that Plaintiffs failed to properly “borrow” a statute.⁵³ But Plaintiffs allege violations of four statutes, along with the ATCM.⁵⁴

Plaintiffs have already demonstrated the UCL unlawful practice can rest on a violation of CARB. *See* § A(2)(c), *supra*. Plaintiffs can also rely on a violation of the Greenwashing

⁴⁹ *Colgan v. Leatherman Tool Grp.*, 135 Cal. App. 4th 663, 682 (2006).

⁵⁰ *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009); *Mazza v. Am. Honda Motors Corp.*, 666 F.3d 581, 591 (9th Cir. 2012).

⁵¹ *See, e.g., Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d at 1172 (finding fraud prong met where plaintiff alleged he was induced to purchase a laptop and paid more for it due to misleading statements about battery life).

⁵² *See Kasky v. Nike, Inc.*, 27 Cal. 4th at 949 (internal quotations omitted) (emphasis added).

⁵³ Def. Mem. at 18.

⁵⁴ Under California law, “[v]irtually any law or regulation – federal or state, statutory or common law – can serve as [a] predicate for a [UCL] “unlawful” violation.” *See Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 681 (2006). Here, Lumber Liquidators violated the ATCM, Proposition 65 (CAL. HEALTH & SAFETY CODE § 25249.6), the Consumer Legal Remedies Act (CAL. BUS. & PROF. CODE § 1750), the False Advertising Act (CAL. BUS. & PROF. CODE § 17500), and the “Greenwashing” Statute (CAL. BUS. & PROF. CODE § 17580.5). *See* ¶¶ 167-70.

Statute,⁵⁵ which proscribes deceptive environmental marketing and cites to the Federal Trade Commission (“FTC”) document for guidance. The claims here fall under the FTC guidance as deceptive. For example, the FTC deems deceptive falsely representing that a product is “non-toxic,” and even cites “formaldehyde-free,” where it is not, *as an example of a deceptive claim*.⁵⁶ While Defendant cites a case claiming that “formaldehyde free” was not actionable under the Greenwashing statute, the decision merely noted that a defendant cannot use the statute’s safe harbor provision to obtain dismissal if the plaintiff has not plead a claim under that statute.⁵⁷

Defendant also asserts that Plaintiffs cannot rely on “Proposition 65” because they did not provide pre-suit notice.⁵⁸ Defendant does not mention that it had notice of a Proposition 65 violation in 2014 and is heading toward trial. Defendant cannot claim any prejudice based on the absence of a redundant notice that their products contained excessive formaldehyde.

In addition, California’s Consumer Legal Remedies Act (“CLRA”) proscribes “unfair methods of competition and unfair or deceptive acts or practices ... in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.”⁵⁹ Conduct “likely to mislead a reasonable consumer” violates the CLRA.⁶⁰ § 1770(a)(5) prohibits “[r]epresenting that goods or services have ... characteristics, ingredients, uses, benefits, or quantities which they do not have....” Section 1770(a)(7) prohibits “[r]epresenting that goods or

⁵⁵ CAL. BUS. & PROF. CODE § 17580.5.

⁵⁶ See “Guides for the Use of Environmental Marketing Claims,” 16 C.F.R. §§ 260.6, 260.9, and 260.101.

⁵⁷ *Dodson v. Tempur-Sealy Int’l, Inc.*, 2014 WL 1493676, at *3 (N.D. Cal. Apr. 16, 2014).

⁵⁸ Def. Mem. at 18.

⁵⁹ CAL. CIV. CODE § 1770(a).

⁶⁰ *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d 1306, 1314 (C.D. Cal. 2013).

services are of a particular standard, quality, or grade ... if they are of another.” The CLRA does not require reliance, only that the consumer suffered damage from the misconduct.⁶¹

For their CLRA claims, the California Plaintiffs pled that Defendant misrepresented the goods through statements and omissions, and that Plaintiffs suffered harm as a result. ¶¶ 184-189. Nothing more is required.

This same conduct supports a claim under the False Advertising Law.⁶² To prove a violation, the plaintiff must show that (1) the defendant engaged in unfair, deceptive, untrue or misleading advertising and (2) the plaintiff suffered injury in fact and lost money or property.⁶³ “Advertising” includes any statement made in connection with the sale of goods or services.⁶⁴ Defendant’s misleading assertions about CARB compliance satisfy this requirement, and Plaintiffs alleged that the representations caused harm. ¶¶ 178-182. The California Plaintiffs have adequately pled Counts II-IV.

2. The Brandts sufficiently alleged a violation of the Florida Deceptive and Unfair Trade Practices Act.

The Florida Deceptive and Unfair Trade Practices Act⁶⁵ has three elements: a deceptive or unfair practice, causation, and actual damages.⁶⁶ The Florida Act does not require reliance, but only a showing that the practice would deceive the reasonable consumer, where uniform material misrepresentations are at issue.⁶⁷

⁶¹ CAL. CIV. CODE § 1780.

⁶² CALIFORNIA BUSINESS & PROFESSIONS CODE § 17500.

⁶³ *Buckland v. Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 819 (2007).

⁶⁴ *Chern v. Bank of Am.*, 15 Cal. 3d 866, 875-76 (1976).

⁶⁵ FLA. STA. § 501.201, *et seq.*

⁶⁶ *Siever v. BWGaskets, Inc.*, 669 F. Supp. 2d 1286, 1292 (M.D. Fla. 2009).

⁶⁷ *Rikos v. Procter & Gamble Co.*, 2015 WL 4978712, at *13-14 (6th Cir. Aug. 20, 2015) (collecting cases).

The Brandts reviewed Defendant's website and saw various safety representations.

¶ 103. The flooring they purchased stated that it complied with CARB standards, and the Brandts were not told that the product actually exceeded those standards and emitted far more formaldehyde than other comparable flooring products, as testing showed. ¶¶ 105-107, 113. Had they known about the formaldehyde levels, the Brandts would not have bought Defendant's flooring. ¶ 115. The Brandts' assertions demonstrate deceptive conduct, causation, and damages.

3. The Cloudens allege a sufficient claim under GBL § 349.

New York General Business Law ("GBL") § 349 provides a private right of action to those injured by "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." The elements include: (1) that the act or practice was consumer-oriented; (2) that the act or practice was misleading in a material respect; and (3) that the plaintiff was injured as a result.⁶⁸ Reliance is not a required element.⁶⁹

The Cloudens saw Defendant's website and advertisements describing the products as safe, and also saw the label warranting CARB compliance. ¶¶ 119-120. The Cloudens were not informed of the amount of formaldehyde the flooring actually had. ¶ 123. Testing showed the Cloudens' flooring exceeded CARB limits. ¶ 125. Because of the omissions and misrepresentations, the Cloudens bought a product they would not have bought, paid for

⁶⁸ *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009).

⁶⁹ *See, e.g., Stutman v. Chem. Bank*, 731 N.E.2d 608, 612 (N.Y. 2000) ("[A]s we have repeatedly stated, reliance is not an element of a section 349 claim.").

installation, face the costs of replacement, and suffered consequential damages. ¶¶ 127, 216.

These allegations state a claim under GBL § 349.⁷⁰

Defendant argues that the Complaint fails to state a GBL claim because it only alleges that the Cloudens would not have bought the flooring had they been told the truth, citing *Small v. Lorillard Tobacco Co., Inc.*⁷¹ In contrast to *Small*, where the plaintiffs did not allege that they would have paid any less for the cigarettes had the addictive nature of the products been disclosed and thus failed to plead a “manifestation of either pecuniary or ‘actual’ harm,”⁷² the Cloudens allege they would not have purchased the flooring, that they suffered additional costs, and that they face further remediation costs. ¶¶ 127, 214, 215.⁷³ In addition, in *Small*, there was no difference between the purchase price for cigarettes after the fraud was revealed; thus the plaintiffs did not show a pecuniary harm related to the fraud. Here, Defendant removed the flooring from the market after the deceptive conduct was exposed.

4. Defendant violated the Texas Deceptive Trade Practices Act.

The Texas Act makes breaches of both express and implied warranties actionable.⁷⁴ The Parnellas pled that a written warranty under the Magnusson-Moss Act constitutes an express warranty created by statute, making it actionable under the Texas Act.⁷⁵ *Id.* See § E, *infra*. By

⁷⁰ See, e.g., *Woods v. Maytag Co.*, 807 F. Supp. 2d 112, 129 (E.D.N.Y. 2011) (holding that plaintiff plausibly alleged the defendants had knowledge of a purported defect and failed to disclose that information sufficed a deceptive practice by omission under GBL § 349).

⁷¹ Def. Mem. at 19 (citing *Small v. Lorillard Tobacco Co., Inc.*, 720 N.E.2d 892 (1999)).

⁷² *Id.*

⁷³ See, e.g., *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d at 1331-33 (finding GBL claim pled where plaintiff alleged out-of-pocket expenses related to fraud).

⁷⁴ *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995).

⁷⁵ A written warranty under the MMWA falls well within the umbrella of an express warranty as defined in Texas. See TEX. BUS. & COM. CODE § 2.313(a)(1) (an express warranty

importing Magnuson-Moss, the Texas Act also imports the FTC's interpretation of the "basis of the bargain" requirement in the Magnuson-Moss definition of "written warranty."⁷⁶ And, as set forth below, the "basis of the bargain" test does not require pleading reliance under the Act. Furthermore, in contrast to Defendant's assertion,⁷⁷ the Parnellas gave pre-litigation notice when they contacted Lumber Liquidators, received an air test kit, and were rebuffed from further relief. See § IV(D), *infra*, and ¶ 135.

5. Defendant violated the Illinois Consumer Fraud Act.

Under the Illinois Act, a Plaintiff must allege: (1) a deceptive act or practice; (2) an intent that plaintiff rely on the deception; (3) that the deception occurred in the course of commerce; and (4) actual damages as a result.⁷⁸ Reliance is not a required element.⁷⁹ Instead, the causal requirement is whether the deception caused an injury through direct or indirect communication or advertising from the Defendant.⁸⁰ The statute explicitly covers omissions of material fact.⁸¹

Here, Tanya Burke viewed Defendant's website and saw information about the safety and compliance of its product. ¶ 139. The Burkes did not know, because Defendant did not disclose, that Defendant's flooring actually emitted formaldehyde at levels far in excess of other available

constitutes an "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain").

⁷⁶ *Parkway*, 901 S.W.2d at 438.

⁷⁷ Def. Mem. at 27 n.32.

⁷⁸ *De Bouse v. Bayer AG*, 922 N.E.2d 309, 313 (Ill. 2009).

⁷⁹ *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 499 (N.D. Ill. 1998) ("[P]roof of actual reliance on the part of each Plaintiff is not required under the ICFA.").

⁸⁰ *Rikos v. Proctor & Gamble Co.*, 2015 WL 4978712, at *12.

⁸¹ 815 I.C.S. § 505/2.

products. ¶¶ 141, 231. Had the Burkes known this, they would not have purchased Defendant's flooring, and they suffered an injury as a result. ¶¶ 142-143, 233, 237, 238.⁸²

D. Plaintiffs Properly Pled Fraudulent Concealment and Negligent Misrepresentation

As noted above, Plaintiffs allege actionable misrepresentations and material omissions. See §§ IV(B) & (C), *supra*. Plaintiffs have also pled the elements for fraudulent concealment. The Complaint alleges that Defendant knew about excessive formaldehyde levels, knew about its lack of oversight over its Chinese vendors, and failed to disclose what it knew to purchasers such as Plaintiffs. ¶¶ 51, 53, 60, 158-61, 259-262.⁸³ Defendant's unreliable air test kits and disingenuous communications regarding risks customers now face also support these claims.⁸⁴

Defendant mistakenly asserts that the economic loss doctrine precludes fraudulent concealment and negligent misrepresentation claims.⁸⁵ The economic loss doctrine applies to prevent tort remedies from displacing contract remedies. The highest courts in California, Illinois, and Texas preclude applying the economic loss doctrine to claims involving frauds that induced purchases and negligent misrepresentation.⁸⁶ New York law is in accord.⁸⁷

⁸² Defendant also claims that the Burkes did not plead an intent to deceive because Plaintiffs failed to allege a violation of ATCM. Def. Mem. at 19. First, Plaintiffs adequately alleged violations of the ATCM. See § A, *supra*. Second, independent of the ATCM, Plaintiffs pled Defendant intentionally hid that its Chinese-made flooring contained more formaldehyde than comparable U.S.-made flooring. ¶¶ 231, 232, 236.

⁸³ See *Marsikian v. Mercedes Benz USA, LLC*, 2009 WL 8379784, at *6 (C.D. Cal. May 4, 2009) (finding allegations that defendant's "measured and selective responses" to owners' complaints but "concealed the problem from the general customer base" to be sufficient); see, e.g., *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1192 (C.D. Cal. 2010) (finding allegations that Toyota repeatedly denied the existence of the alleged defect demonstrated active concealment).

⁸⁴ *Id.* at 1192 (finding allegations that Toyota repeatedly denied the existence of the alleged defect demonstrated active concealment).

⁸⁵ Def. Mem. at 20-21.

⁸⁶ *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 274 (Cal. 2004); *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 88-89 (1982) (excepting fraud and negligent

Notwithstanding Defendant's assertion,⁸⁸ under Florida law the economic loss doctrine is not applied to fraud or negligent misrepresentations claims where "the fraud is in a term of the bargain," but only where the "fraud relates to an act of performance" covered by the contract.⁸⁹ Here, the fraud is alleged not as an act of performance, but that the fraudulently omitted facts induced the Plaintiffs to buy the flooring. ¶¶ 74, 84, 94, 115, 121, 133, 142, 162-164.⁹⁰ Thus, the economic loss doctrine does not bar Plaintiffs' fraud or negligent misrepresentation claims.

The doctrine also does not apply where the product damages property beyond what was purchased.⁹¹ Here, the Brandts (and others), allege that the product damaged their home, requiring removal of the product and consequential damages. *See, e.g.*, ¶¶ 115, 127, 220, 227.

misrepresentation from the economic loss doctrine); *Formosa Plastic Corp. USA v. Presidio Eng'rs & Contractors*, 960 S.W.2d 41, 47 (Tex. 1998).

⁸⁷ *Elkind v. Revlon Consumer Prods. Corp.*, 2015 WL 2344134, at *12 (E.D.N.Y. May 14, 2015) (noting that New York courts permit fraud and contract claims to proceed in tandem to recover pure economic loss); *Weisblum v. Prophase Labs, Inc.*, 2015 WL 738112, at *12 (S.D.N.Y. Feb. 20, 2015) (declining to dismiss negligent misrepresentation and fraud claims based on economic loss doctrine).

⁸⁸ Def. Mem. at 23; *Burns v. Winnebago Indus., Inc.*, 2013 WL 4437246, at *4 (M.D. Fla., Aug. 16, 2013).

⁸⁹ *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 965 (N.D. Cal. 2014) (applying Florida law to hold that fraudulent concealment claims premised on presale failure to disclose defects were not barred by economic loss doctrine). *See generally Gov't of Guam v. Kim*, 2015 WL 1956531, at *15 (Guam Apr. 28, 2015) (collecting cases).

⁹⁰ Defendant cites to *WeBoost Media S.R.L. v. LookSmart Ltd.*, 2014 WL 2621465, at *6 (N.D. Cal. June 12, 2014), to argue that California does not except fraudulent concealment from the economic loss doctrine. Def. Mem. at 23. While the *WeBoost* court dismissed the fraudulent concealment claims, it granted plaintiffs leave "either to explain how its fraudulent concealment theory avoids being barred by the economic loss rule, to reframe its fraud theory in terms of fraudulent inducement, or both." *Id.* at *10. Here, Plaintiffs pled that the fraud induced them to make their purchases. As such, the Economic Loss Doctrine does not apply to California claims.

⁹¹ *Schuster Equip. Co. v. Design Elec. Servs., Inc.*, 554 N.E.2d 1097, 1099 (1990) (rejecting the economic loss doctrine where defect led to fire that damaged other property); *Burns*, 2013 WL 4437246, at *3 (noting that the economic loss doctrine applies only where the defect did not cause "any injuries or damage to other property").

E. Plaintiffs Sufficiently Pled an Implied Warranty Claim

UCC Section 2-314(2)(f) defines a product as un-merchantable when it fails to conform to promises or affirmations on its label. In contrast to Defendant's protestation,⁹² Plaintiffs need not allege that the flooring was unsafe, or unfit for use. "The language is simply a restatement of the express warranty under § 2-313, although there is no necessity of showing any reliance or other 'basis of the bargain' when the buyer uses the implied warranty theory."⁹³ The label here promised compliance with CARB as to formaldehyde. ¶ 46. All of the representative states recognize UCC Section 2-314(f). ¶ 244 (citing statutes). Defendant's cases regarding "fitness for its ordinary purpose" and UCC Section 2-314(c) are irrelevant.

Defendant also overstates the notice of breach of warranty requirement.⁹⁴ The notice requirement of Section 2-607 of the UCC is intended to eliminate any prejudice to sellers from having to defend against lawsuits related to problems that they did not know about, and could not remedy prior to litigation.⁹⁵ Here, there was a television program in which the Defendant's then

⁹² Def. Mem. at 23 (citing the wrong statute, UCC § 2-314(2)(c)).

⁹³ The Law of Prod. Warranties, § 5:11 (Dec. 2014); 1 White & Summers, Uniform Commercial Code, § 9-13 at 523 (5th ed.). See also *Hauter v. Zogarts*, 534 P.2d 377 (Cal. 1975) (finding golf-training device did not conform to label where label said it was "completely safe"; reliance not required); *Native Am. Arts, Inc. v. Bundy-Howard, Inc.*, 2002 WL 1488861, at *2 (N.D. Ill. July 11, 2002) (permitting suit against sellers based on label suggesting products were made by Native Americans).

⁹⁴ Def. Mem. at 23.

⁹⁵ *In re Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig.*, 2015 WL 4591236, at *27-28 (D.N.J. July 29, 2015); U.C.C. § 2-607 cmt. 4 (2004). In addition, New York does not require pre-litigation notice for retail sales like those here. *Neri v. R.J. Reynolds Tobacco Co.*, 2000 WL 33911224, at *19 (N.D.N.Y. Sept. 28, 2000). Florida courts hold that making the defendant aware of a problem with the product suffices. *Exim Brickell LLC v. PDVSA Servs. Inc.*, 516 F. App'x 742, 752-53 (11th Cir. 2013) (holding that email to defendant reporting the problem with the product constituted sufficient notice); *Horton v. Woodman Labs, Inc.*, 2014 WL 1329355, at *3 (M.D. Fla. Apr. 2, 2014) (allegations that plaintiff orally communicated problem with the product constituted sufficient pleading of notice); *Stella v. LVMH Perfumes & Cosmetics USA*,

CEO participated and was put on notice about the breach. Thereafter, Defendant stopped selling the product and started offering incorrect advice on acceptable formaldehyde levels. Even assuming notice of breach was missing here, Defendant can cite no prejudice.

Further, several Plaintiffs did give notice to the Defendant. The Parnellas, Mr. Balero, and the Brandts all contacted Lumber Liquidators and expressed concern about their purchase. Defendant sent some of them air test kits. ¶¶ 95, 110, 135. Defendant replied that the formaldehyde results (which the Plaintiffs never got to see) showed no reasons to worry. *See, e.g.,* ¶¶ 111, 112. This post-purchase contact qualifies as notice of breach.⁹⁶

F. Defendant Violated the Magnuson-Moss Warranty Act

The Magnuson-Moss Act provides for two claims relevant to Plaintiffs' complaint: (1) a federal cause of action for breach of a "written warranty,"⁹⁷ and (2) a federal cause of action for breach of implied warranty that incorporates state law.⁹⁸ Defendant makes five arguments for dismissal of the Magnuson-Moss count – all of which fail.⁹⁹

First, Defendant argues that the Complaint does not name 100 individual plaintiffs. But the Court's CAFA jurisdiction moots that jurisdictional requirement.¹⁰⁰ Second, Defendant

Inc., 564 F. Supp. 2d 833, 837 (N.D. Ill. 2008) (Illinois does not require a party to plead direct notice when "the seller has actual knowledge of the defect of the particular product.").

⁹⁶ *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 1983); *Maldonado v. Creative Woodworking Concepts, Inc.*, 694 N.E.2d 1021, 1026 (Ill. Ct. App. 1998), *as modified on denial of reh'g* (June 12, 1998); *Hubbard v. Gen. Motors Corp.*, 1996 WL 274018, at *4 (S.D.N.Y. May 22, 1996).

⁹⁷ 15 U.S.C. §§ 2301(6) & 2310(d)(1).

⁹⁸ 15 U.S.C. §§ 2301(7) & 2310(d)(1). Caroline L. Carter, *et al.*, NATIONAL CONSUMER LAW CENTER, *Consumer Warranty Law* §§ 2.2.3.1, 2.3.1.1 & 2.3.4 (4th ed. 2010); *see also Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402, 405 (7th Cir. 2004).

⁹⁹ *See* Def. Mem. at 25-27.

¹⁰⁰ *Birdsong v. Apple, Inc.*, 590 F.3d 955, 957 n.1 (9th Cir. 2009); *Chavis v. Fid. Warranty Servs., Inc.*, 415 F. Supp. 2d 620, 626 (D.S.C. 2006).

argues that Plaintiffs fail to plead the existence of a “written warranty.” But the complaint identifies the “written warranty” Defendant breached as the warranty that came with the purchase orders. ¶ 47.¹⁰¹ Plaintiffs adequately allege that Defendant breached the written warranty. *See, e.g.*, ¶¶ 61-68, 255.

Third, Defendant’s reliance argument fails because the Act requires only that the “written warranty” be part of the “basis of the bargain,” and does not require reliance.¹⁰² Defendant’s practice of putting language on the back of their purchase orders referring to the Limited Warranty evidences an intent that the written warranty be conveyed to the consumer or that it be brought to the consumer’s attention in connection with the sale. Reliance is simply not an element of the Act’s “basis of the bargain” test.¹⁰³

Fourth, Defendant again asserts that no CARB violation occurred. As noted in § IV(A), *supra*, this argument is wrong. Fifth, Defendant makes the same notice argument as to the implied warranty claim. This argument is even weaker as to the Magnuson-Moss count. Most courts hold that the Act does not require pre-litigation notice and opportunity to cure *until* the court has determined that the named plaintiffs constitute adequate class representatives under Rule 23.¹⁰⁴ Regardless, Plaintiffs provided notice. *See* § IV(E), *supra*. At most, the adequacy of notice is a fact issue incapable of supporting dismissal at the pleadings stage.

¹⁰¹ This falls within the Magnuson-Moss Act’s definition of “written warranty.” *See*, 15 U.S.C. § 2301(6)(B).

¹⁰² *Id.*; *see also* Carter, *et al.*, NATIONAL CONSUMER LAW CENTER, *Consumer Warranty Law* § 2.2.3.5 (citing 16 C.F.R. §§ 700.3(c) & 700.11(b)).

¹⁰³ *See, e.g.,* *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 531 (N.Y. App. Div. 1992) (rejecting reliance requirement and holding warranty delivered to plaintiffs *after* they paid the purchase price constituted part of the basis of the bargain).

¹⁰⁴ *See, e.g.,* *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1004 (D.C. Cir. 1986); *Galitskie v. Samsung Telecomms. Am., LLC*, 2013 WL 6330645, at *12 (N.D. Tex. Dec. 5, 2013); *Hill v.*

G. Lumber Liquidators' Indoor Air Testing Program is Causing Injury to Class Members and Injunctive Relief is Appropriate under Rule 23(b)(2)

Plaintiffs allege that Defendant is continuing to mislead Plaintiffs and putative class members regarding risks they face from the formaldehyde-laden flooring. *See* ¶¶ 63, 65, 111-13. In an effort to cover up risks to which it exposed its customers, Defendant has been touting faulty air testing kits, telling putative class members that the sampled air is “normal,” and claiming the flooring in the homes is safe when, in fact, it poses acute health risks. Plaintiffs seek to enjoin Defendant from continuing to make these misleading representations.¹⁰⁵ This relief stands apart from the monetary relief Plaintiffs seek.

Defendant argues that because named Plaintiffs independently learned that Lumber Liquidators' safety assurances were false, and took independent measures not to harm themselves or their families, Plaintiffs were not actually deceived, suffered no injury, and do not have standing to enjoin these misleading communications. Taken to its logical conclusion, Defendant insists that to enjoin misleading communications from being sent to thousands of customers, a putative class representative would have to know enough to file suit, but still be deceived by Defendant's misrepresentations and expose herself or her family to harm. Fortunately, courts in this Circuit and elsewhere have rejected this contrivance.¹⁰⁶ That Plaintiffs

Hoover Co., 899 F. Supp. 2d 1259, 1266 (N.D. Fla. 2012); *In Re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 880 F. Supp. 2d 801, 804, 824-25 (S.D. Ohio 2012).

¹⁰⁵ Plaintiffs primarily seek an order enjoining Defendant's air testing campaign. While an order enjoining the continued sale of non-compliant goods in California would be appropriate, Plaintiffs recognize it may be unnecessary upon entry of a declaratory finding that the products at issue are not CARB compliant – as they could not legally be sold in California.

¹⁰⁶ *Gantt v. Clemson Agricultural College*, 320 F.2d 611, 614 (4th Cir. 1963); *see also Rackley v. Bd. of Trustees of Orangeburg Reg'l Hosp.*, 238 F. Supp. 512, 515 (D.S.C. 1965) (rejecting challenges to standing based on the claim that injuries were not likely to be repeated); *Moss v. Lane Co.*, 471 F.2d 853, 855 (4th Cir. 1973) (holding that mootness of an individual claim will not necessarily render moot the action of the class). *See also Shahinian v. Kimberly-Clark Corp.*, 2015 WL 4264638, at *8 (C.D. Cal. July 10, 2015) (finding surgeon had standing to

seek relief not only for themselves but for other persons similarly situated is significant in determining their standing to seek injunctive relief. Where a defendant's policies or actions affect a putative class with a common interest in these policies, plaintiffs are permitted to maintain this action on their own behalf and on behalf of all others similarly situated.¹⁰⁷

H. Declaratory Relief is Warranted

Plaintiffs allege that Defendant's products are not CARB-compliant and that its representations and labeling are therefore false or misleading. Defendant disagrees. Previously Defendant disputed its violations by challenging the testing used to reveal the formaldehyde emission levels. After abandoning that argument, it now advances a strained reading of the Regulation to claim compliance (*See* § IV(A), above). A clear declaratory order that the products indeed do not comply with CARB regulations and cannot be labeled as such is appropriate.

Plaintiffs do not seek to export CARB regulations throughout the country. Instead, they seek a declaratory order that the products do not comply with CARB regulations – not an order stating where they can or cannot be sold. Nor do Plaintiffs seek to address past rather than future conduct. Plaintiffs seek an order preventing Defendant from labeling its products as CARB compliant when they are not. That relief is purely prospective and is appropriate in this case.

V. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss should be denied. To the extent the Court is inclined to dismiss any claims alleged in the Complaint, Plaintiffs request leave to amend to cure any deficiencies in the pleadings.

enjoin defendant from misrepresenting the quality of its surgical gowns as other class members may not have learned of their deficiencies).

¹⁰⁷ *Id.*

DATED: October 23, 2015

Respectfully submitted,

/s/ Steve W. Berman

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, a true and correct copy of the foregoing was filed electronically with the Clerk of this Court using the CM/ECF system, in accordance with the Local Rules and the procedures adopted in the Initial Order and Pretrial Order No. 1A. This filing will cause a copy of the same to be served, via a Notice of Electronic Filing, upon counsel of record who have consented to electronic service in this matter. Additionally, a true and correct copy of the foregoing was served by U.S. Mail on the following:

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Loup v. Lumber Liquidators, Inc. et al., No. 1:15-cv-2733

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Parnella v. Lumber Liquidators, Inc. et al., No. 1:15-cv-2736

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/s/ Steve W. Berman

Steve W. Berman
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APPENDIX A



RYAN BRANDT,
4661 LONG LAKE DR
FORT MYERS, FL 33905

Thank you for installing Lumber Liquidators' floors in your home, and for taking a home formaldehyde test. We have received a copy of your test results from the lab, which you will receive separately via e-mail.

Your results show that formaldehyde levels in your home fall within the range of normal indoor conditions, as described in the National Academy of Sciences Review of the U.S. Environmental Protection Agency's formaldehyde risk assessment.¹ Your low level of formaldehyde is similar to the amounts measured in typical U.S. homes. For information on how to reduce formaldehyde levels in your home, please visit <http://www.cdc.gov/nceh/drywall/docs/whatyoushouldknowaboutformaldehyde.pdf>.

There are many formaldehyde sources in the home and it is difficult to measure how much formaldehyde any single item contributes to indoor air quality. It can be found in cabinets, paints, furniture, household cleaners, and even cosmetics. Many sources contribute to indoor air formaldehyde levels, including tobacco smoke, natural gas stoves, open fireplaces, floor furnaces, wood finishes and varnishes, car exhaust, and wrinkle-free clothes. Formaldehyde is a naturally occurring chemical that is exhaled by people and animals in small amounts. It breaks down in sunlight, and does not build up in the environment.

Based on your low test results, it does not appear that your floor is contributing to any abnormal exposure to formaldehyde in your home. These results are supported by Lumber Liquidators' quality control process that is designed to ensure that your laminate floor is safe and meets applicable government regulations. For additional information on our processes please visit <http://www.lumberliquidators.com/sustainability/health-and-safety>.

Lumber Liquidators is committed to providing our customers with safe, high-quality products. Millions of families have invited us into their homes and made us the largest specialty retailer of hardwood flooring in North America. We use our products in our own homes and will stand by *every single plank of wood and laminate we sell.*

Yours truly,

Lumber Liquidators

Review of the Environmental Protection Agency's Draft IRIS Assessment of Formaldehyde, National Academy Press (2011).

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cc Ari
Fsu

July 8, 2015

RECEIVED

JUL 13 2015

HAGENS BERMAN LLP

Via U.S. Mail

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Re: *Washington v. Lumber Liquidators, Inc.*, Case No. 1:15cv2720

Dear Mr. Berman:

I represent Lumber Liquidators, Inc. ("Lumber Liquidators") in the above-listed matter and am writing to follow up regarding your clients', Ryan and Kristin Brandt, home formaldehyde test. The company has forwarded me a copy of the Brandts' results from the lab, which the Brandts received separately via e-mail.

The Brandts' results show that formaldehyde levels in their home fall within the World Health Organization's (WHO) guidelines for acceptable indoor air formaldehyde concentrations.¹ For information on how to reduce formaldehyde levels in the home, please visit <http://www.cdc.gov/nceh/drywall/docs/whatyoushouldknowaboutformaldehyde.pdf>.

There are many formaldehyde sources in the home and it is difficult to measure how much formaldehyde any single item contributes to indoor air quality. It can be found in cabinets, paints, furniture, household cleaners, and even cosmetics. Many sources contribute to indoor air formaldehyde levels, including tobacco smoke, natural gas stoves, open fireplaces, floor furnaces, wood finishes and varnishes, car exhaust, and wrinkle-free clothes. Formaldehyde is a naturally occurring chemical that is exhaled by people and animals in small amounts. It breaks down in sunlight, and does not build up in the environment.

¹ Guidelines for Indoor Air Quality; ISBN 978 92 89002134, WHO 2010.

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Based on the Brandts' test results, it does not appear that their floor is contributing significantly to any abnormal exposure to formaldehyde in the home. These results are supported by Lumber Liquidators' quality control process that is designed to ensure that the laminate floor is safe and meets applicable government regulations. For additional information on Lumber Liquidators' processes please visit <http://www.lumberliquidators.com/sustainability/health-and-safety/>.

Lumber Liquidators is committed to providing its customers with safe, high-quality products. Millions of families have invited Lumber Liquidators into their homes and made the company the largest specialty retailer of hardwood flooring in North America. Lumber Liquidators stands by every single plank of wood and laminate it sells.

Please contact me if you have any remaining concerns at (415) 268-7000 or lwroblewski@mofa.com.

Regards,



Lauren Wroblewski

APPENDIX B

Final Regulation Order

AIRBORNE TOXIC CONTROL MEASURE TO REDUCE FORMALDEHYDE EMISSIONS FROM COMPOSITE WOOD PRODUCTS

All of the text shown below is new language to be added to the California Code of Regulations. Adopt new sections 93120-93120.12, title 17, California Code of Regulations, to read as follows:

§ 93120. *Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products.*

- (a) The Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products is contained in sections 93120 through 93120.12.
- (b) *Purpose.* The purpose of this airborne toxic control measure is to reduce formaldehyde emissions from composite wood products, and finished goods that contain composite wood products, that are sold, offered for sale, supplied, used, or manufactured for sale in California. The composite wood products covered by this regulation are hardwood plywood, particleboard, and medium density fiberboard.
- (c) *Applicability.* This airborne toxic control measure applies to:
 - (1) Manufacturers of hardwood plywood, particleboard, and medium density fiberboard that manufacture, sell, offer for sale, or supply these products for use in California;
 - (2) Distributors of hardwood plywood, particleboard, medium density fiberboard, and finished goods that contain composite wood products, that sell, offer for sale, or supply these products or goods for use in California;
 - (3) Importers of hardwood plywood, particleboard, and medium density fiberboard, and finished goods that contain composite wood products, that sell, offer for sale, or supply these products or goods for use in California;
 - (4) Fabricators that use hardwood plywood, particleboard, and medium density fiberboard to make other goods that are sold, offered for sale, or supplied for use in California;

- (5) Retailers of hardwood plywood, particleboard, medium density fiberboard, and finished goods that contain composite wood products, that sell, offer for sale, or supply these products or goods for use in California; and
- (6) Third party certifiers as defined in title 17, California Code of Regulations, section 93120.1.
- (d) This airborne toxic control measure does not apply to hardwood plywood, particleboard, medium density fiberboard, and finished goods that contain composite wood products that are manufactured, distributed, fabricated, imported, sold, offered for sale, or supplied for shipment and use outside of California.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, and 41712, Health and Safety Code.

§ 93120.1 Definitions.

- (a) For the purposes of this Airborne Toxic Control Measure, the following definitions shall apply:
 - (1) "ANSI" means the American National Standards Institute.
 - (2) "ARB" means the California Air Resources Board.
 - (3) "ASTM" means the American Society for Testing and Materials.
 - (4) "Batch" means the amount of composite wood product manufactured during a shift (8 or 12 hours, plus or minus one hour of production).
 - (5) "Combination core" means a platform for making hardwood plywood that consists of a combination of layers of veneer and particleboard or medium density fiberboard.
 - (6) "Component part" means a fabricated part that contains one or more composite wood products and is used in the assembly of finished goods.
 - (7) "Composite core" means a platform for making hardwood plywood or laminated products that consists of particleboard and/or medium density fiberboard, or combination core.

- (8) “Composite wood products” means hardwood plywood, particleboard, and medium density fiberboard. “Composite wood products” does not include hardboard, structural plywood as specified in the “Voluntary Product Standard - Structural Plywood” (PS 1-07), structural panels as specified in the “Voluntary Product Standard – Performance Standard for Wood-Based Structural-Use Panels” (PS 2-04), structural composite lumber as specified in “Standard Specification for Evaluation of Structural Composite Lumber Products” (ASTM D 5456-06), oriented strand board, glued laminated timber as specified in “Structural Glued Laminated Timber” (ANSI A190.1-2002), prefabricated wood I-joists as specified in “Standard Specification for Establishing and Monitoring Structural Capacities of Prefabricated Wood I-Joists” (ASTM D 5055-05), finger-jointed lumber, or “composite wood products” used inside of new vehicles as defined in section 430 of the California Vehicle Code (excluding recreational vehicles), rail cars, boats, aerospace craft, or aircraft.
- (9) “Distributor” means any person to whom a composite wood product or finished good is sold or supplied for the purposes of resale or distribution in commerce, except that manufacturers and retailers are not “distributors.”
- (10) “Door” means a finished good used to close off a room, closet, or entrance. A “door” moves on hinges, slides or rotates, and consists of a movable panel or combination of panels, and may include component parts.
- (11) “Executive Officer” means the “Executive Officer” of the California Air Resources Board, or his or her delegate.
- (12) “Fabricator” means any person that uses composite wood products to make finished goods. “Fabricator” includes producers of laminated products.
- (13) “Facility” means any site where composite wood products or finished goods are manufactured, tested, used, supplied or offered for sale, or sold in California. “Facility” includes, but is not limited to, manufacturing plants, testing laboratories, distribution centers, fabricator shops, warehouses, and retail stores.
- (14) “Fiber” means the slender threadlike elements of wood or similar cellulosic material, which can be separated by chemical and/or mechanical means, such as pulping, and can be formed into panels.
- (15) “Finished goods” means any good or product, other than a panel, containing hardwood plywood, particleboard, or medium density

fiberboard. Component parts are not “finished goods,” although they are used in the assembly of finished goods. “Finished goods” do not include used goods such as antiques or second-hand furniture. For the purposes of this subsection, a “used good” means a “finished good” that has previously been sold or supplied to the ultimate purchaser. “Ultimate purchaser” means the first person who in good faith purchases or acquires a “finished good” for purposes other than resale.

- (16) “Formaldehyde” means a colorless gas at room temperature that at elevated concentrations has a strong, pungent odor and can be irritating to the eyes, nose, and lungs (i.e., CAS No. 50-00-0).
- (17) “Hardboard” means a composite panel composed of cellulosic fibers, made by dry or wet forming and hot pressing of a fiber mat with or without resins, that complies with one of the following ANSI standards: “Basic Hardboard” (ANSI A135.4-2004), “Prefinished Hardboard Paneling” (ANSI A135.5-2004), or “Hardboard Siding” (ANSI A135.6-2006).
- (18) “Hardwood” means the wood of a deciduous broad-leafed tree. Examples of “hardwoods” include, but are not limited to, aspen, birch, and oak.
- (19) “Hardwood plywood” (HWPW) means a panel composed of an assembly of (A) hardwood layers or plies of veneer or (B) veneers in combination with a platform consisting of lumber core, composite core, a special core material, or special back material, joined with an adhesive. The face veneer may be composed of a hardwood or decorative softwood species (ANSI/HPVA HP-1-2004). “Hardwood plywood” includes wall paneling, industrial panels, and “hardwood plywood” panels used in making flooring. “Hardwood plywood” does not include laminated products, military specified plywood, or curved plywood.
- (20) “Hardwood plywood – composite core” (HWPW-CC) means hardwood plywood with a composite core.
- (21) “Hardwood plywood – veneer core” (HWPW-VC) means hardwood plywood with a core made of a sheet or sheets of veneer.
- (22) “HPVA” means the Hardwood Plywood and Veneer Association.
- (23) “Importer” means the person or entity as defined in the regulations of the Bureau of Customs and Border Protection, 19 Code of Federal Regulations, section 101.1.

- (24) "Laminate" means a veneer or other material affixed as a decorative surface to a platform.
- (25) "Laminated product" means a finished good or component part of a finished good made by a fabricator in which a laminate or laminates are affixed to a platform. If the platform consists of a composite wood product, the platform must comply with the applicable emission standards.
- (26) "Lot" means the volume of a product type produced either: (A) from the beginning of a production run until the first quality control test; or (B) between one quality control test and the next one; or (C) from the last quality control test to the end of a production run.
- (27) "Manufacturer" means any person who manufactures or produces a composite wood product.
- (28) "Medium density fiberboard" (MDF) means a panel composed of cellulosic fibers (usually wood) made by dry forming and pressing of a resinated fiber mat (ANSI A208.2-2002).
- (29) "No-added formaldehyde based resins" means resins formulated with no added formaldehyde as part of the resin cross linking structure for making hardwood plywood, particleboard, or medium density fiberboard. "No-added formaldehyde based resins" include, but are not limited to, resins made from soy, polyvinyl acetate, or methylene diisocyanate.
- (30) "Panel" means any particleboard, medium density fiberboard, or hardwood plywood board produced for sale, supply, or distribution by a composite wood product manufacturer.
- (31) "Particle" means a distinct fraction of wood or other cellulosic material produced mechanically and used along with resin to make particleboard. "Particles" are larger in size than fibers.
- (32) "Particleboard" means a panel composed of cellulosic material (usually wood) in the form of discrete particles (as distinguished from fibers, flakes, or strands) that are pressed together with resin (ANSI A208.1-1999).
- (33) "Person" shall have the same meaning as defined in Health and Safety Code section 39047.

- (34) "Platform" means the veneer core, composite core, combination core, lumber core, or special core material used in the manufacture of hardwood plywood or laminated products.
- (35) "Plywood" means a panel product consisting of layers of wood veneers in combination with a platform, pressed together with resin. "Plywood" includes panel products made by either hot or cold pressing (with resin) veneers to a platform.
- (36) "Product type" means a type of composite wood product that differs from another based on composition, thickness, number of plies (if hardwood plywood), and resin to distinguish one composite wood product from another made by the same manufacturer.
- (37) "Recreational vehicle" has the same meaning as defined in section 18010 of the California Health and Safety Code.
- (38) "Retailer" means any person or entity that sells, offers for sale, or supplies directly to consumers composite wood products or finished goods that contain composite wood products.
- (39) "Softwood" means wood produced from needle and/or cone bearing trees (ANSI/HPVA HP-1-2004).
- (40) "Thin MDF" means medium density fiberboard that has a maximum thickness of eight millimeters.
- (41) "Third party certifier" means an organization or entity approved by the Executive Officer that: (A) verifies the accuracy of the emission test procedures and facilities used by manufacturers to conduct formaldehyde emission tests, (B) monitors manufacturer quality assurance programs, and (C) provides independent audits and inspections.
- (42) "Ultra-low-emitting formaldehyde (ULEF) resins" means resins formulated such that average formaldehyde emissions are consistently below the Phase 2 emission standards in section 93120.2, as provided in section 93120.3(d).
- (43) "Veneer" means thin sheets of wood peeled or sliced from logs for use in the manufacture of wood products such as plywood, laminated veneer lumber, laminated products, or other products.
- (44) "Veneer core" means a core material for making plywood that consists of veneer.

- (45) “Window” means a finished good consisting of a frame in which are set panes of glass, for the admission of air or light, or both, into an opening in the wall of a building. The frame includes jambs, stiles, sashes, and rails, and excludes sills, window headers and window seats.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, and 41712, Health and Safety Code.

§ 93120.2 Formaldehyde Emission Standards for Hardwood Plywood (HWPW), Particleboard (PB), and Medium Density Fiberboard (MDF).

- (a) *Emission Standards.* The formaldehyde emission standards in Table 1 apply to hardwood plywood (HWPW), particleboard (PB), and medium density fiberboard (MDF) sold, supplied, offered for sale, or manufactured for sale in California.

Except as provided in section 93120.2(b), Exemptions, and the “sell-through” provisions of section 93120.12, Appendix 1, no person shall sell, supply, offer for sale, or manufacture for sale in California any composite wood product which, at the time of sale or manufacture, does not comply with the emission standards in Table 1 on or after the effective dates specified in Table 1.

Table 1 Phase 1 and Phase 2 Formaldehyde Emission Standards for Hardwood Plywood (HWPW), Particleboard (PB), and Medium Density Fiberboard (MDF) ¹					
Effective Date	---- Phase 1 (P1) and Phase 2 (P2) Emission Standards (ppm) ----				
	HWPW-VC	HWPW-CC	PB	MDF	Thin MDF
1-1-2009	P1: 0.08	-----	P1: 0.18	P1: 0.21	P1: 0.21
7-1-2009	-----	P1: 0.08	-----	-----	
1-1-2010	P2: 0.05	-----	-----	-----	-----
1-1-2011	-----	-----	P2: 0.09	P2: 0.11	-----
1-1-2012	-----	-----	-----	-----	P2: 0.13
7-1-2012	-----	P2: 0.05	-----	-----	

⁽¹⁾ Based on the primary test method [ASTM E 1333-96(2002)] in parts per million (ppm). HWPW-VC = veneer core; HWPW-CC = composite core.

A product “does not comply with the emission standards in Table 1” if:

- (1) The composite wood product was produced by a manufacturer without either: (A) a current third party certification program that complies with section 93120.3(b), (B) a current ARB approval to use no-added formaldehyde based resins as provided in section 93120.3(c), or (C) a current ARB approval to use a ULEF resin as provided in section 93120.3(d); or
 - (2) Records of testing conducted by the manufacturer or the third party certifier show that a particular composite wood product sold, supplied, or offered for sale in California exceeded the applicable emission standard specified in Table 1, based on: (A) the compliance testing procedure for hardwood plywood, particleboard, and medium density fiberboard specified in section 93120.9(a) or (B) the quality control testing method specified in 93120.9(d) (subject to permitted retesting, disposition or treatment); or
 - (3) A composite wood product produced by a manufacturer is tested at any time after it is manufactured, using either the compliance test method specified in section 93120.9(a) or the enforcement test method specified in section 93120.9(b), and is found to exceed the applicable emission standard specified in Table 1; or
 - (4) A finished good contains any composite wood product which does not comply with the emission standards in Table 1, based on the criteria set forth in paragraphs (1), (2), or (3) above; or
 - (5) A finished good is found to contain any composite wood product that does not comply with the applicable emission standards in Table 1 using the enforcement test method for finished goods specified in section 93120.9(c).
- (b) *Exemptions.*
- (1) The emission standards in section 93120.2(a) do not apply to composite wood products or finished goods containing these materials that are manufactured, sold, offered for sale, or supplied for shipment and use outside of California.
 - (2) The emission standards in section 93120.2(a) do not apply to hardwood plywood and particleboard materials manufactured, sold, supplied for installation, or installed in manufactured homes subject to the United States Department of Housing and Urban Development regulations (24 Code of Federal Regulations, section 3280.308).

- (3) To qualify for an exemption specified in section 93120.2(b)(1) or 93120.2(b)(2), the person claiming the exemption must maintain adequate documentation to demonstrate that the criteria of the exemption are met.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.3 Requirements for Manufacturers of Hardwood Plywood (HWPW), Particleboard (PB), and Medium Density Fiberboard (MDF).

- (a) *Emission Standards.* All manufacturers of HWPW, PB, and MDF must comply with the requirements of section 93120.2(a). Except as provided in the “sell-through” provisions in Appendix 1 of section 93120.12, all HWPW, PB, and MDF sold, supplied, or offered for sale on or after the effective dates specified in section 93120.2(a) must comply with the emission standards specified in section 93120.2(a).
- (b) *Third Party Certification.* For manufacturers of HWPW, PB, and MDF using resins that contain formaldehyde, compliance with the emission standards specified in section 93120.2(a) must be verified by using a third party certifier approved by ARB under section 93120.4. These manufacturers must also comply with the quality assurance requirements specified in Appendix 2 of section 93120.12.
- (c) *Special Provisions for Manufacturers of HWPW, PB, and MDF with No-Added Formaldehyde Based Resins.*
 - (1) Upon written approval of the Executive Officer, manufacturers of HWPW, PB, and MDF who plan to use no-added formaldehyde based resins are not required to comply with section 93120.3(b). To apply for ARB approval, manufacturers must submit the following information to the Executive Officer: (A) a statement indicating which product types will be manufactured using no-added formaldehyde based resins for sale in California; (B) the chemical formulation of the candidate no-added formaldehyde based resins, including base resins, catalysts, and other additives as used in manufacturing; (C) the name of the ARB approved third party certifier; and (D) data on the emissions performance of the candidate no-added formaldehyde based resins. These data must be obtained by working with an ARB approved third party certifier and must include three months of routine quality control testing data, the correlation of the routine quality control testing data to primary or secondary method testing data, and the results of one

primary or secondary method test, as required in Appendix 2 of section 93120.12. Ninety percent of the three months of routine quality control testing data and the results of the one primary or secondary method test must be shown to be no higher than 0.04 ppm. In addition, all data must be shown to be no higher than 0.05 ppm for HWPW and 0.06 ppm for PB, MDF, and thin MDF.

- (2) Within 45 days after receiving an application from a manufacturer, the Executive Officer shall inform the applicant, in writing, either that the application is complete and accepted for filing, or that the application is deficient and shall identify the specific information required to make the application complete.
- (3) Within 30 days of receiving additional information provided in response to a determination by the Executive Officer that an application is deficient, the Executive Officer shall inform the applicant, in writing, either that the new information is sufficient to make the application complete and that the application is accepted for filing, or that the application is deficient and shall identify the specific information required to make the application complete.
- (4) Within 90 days after an application has been deemed complete, the Executive Officer shall act to approve or disapprove the application. The Executive Officer shall issue an Executive Order approving the application if the evidence submitted by the applicant is sufficient to demonstrate that the applicant has met the requirements of section 93120.3(c)(1). The approval shall have a duration of two years, and the manufacturer may apply for re-approval as provided in this section. An application for re-approval must include results of at least one primary or secondary method test for each product type based on a panel or set of panels randomly selected and tested by an ARB approved third party certifier, and the chemical formulation of the no-added formaldehyde based resins.
- (5) The Executive Officer may, in the course of processing the application, request the applicant to clarify, amplify, correct, or otherwise supplement the information required for the application. The applicant and the Executive Officer may mutually agree to longer time periods for determining whether an application is complete, or for approving or disapproving an application.
- (6) If the manufacturer decides to change to formaldehyde based resins, ARB must be notified in advance and the manufacturer must comply with the requirements of section 93120.3(b) for that product type.

- (d) *Special Provisions for Manufacturers of HWPW, PB and MDF with Ultra-Low-Emitting Formaldehyde (ULEF) Resins.*
- (1) Upon written approval of the Executive Officer, manufacturers of HWPW, PB, and MDF who plan to use ultra-low-emitting formaldehyde (ULEF) resins may test their products less frequently than otherwise required. The testing frequency for manufacturers using ULEF resins is specified in Appendix 2 of section 93120.12. To apply for ARB approval, manufacturers must submit the following information to the Executive Officer: (A) a statement indicating which product types will be manufactured with ULEF resins for sale in California; (B) the chemical formulation of the candidate ULEF resins, including base resins, scavenger resins, scavenger additives, catalysts, and other additives as used in manufacturing; (C) the name of the ARB approved third party certifier; and (D) data on the emissions performance of the candidate ULEF resins to demonstrate that panels manufactured with these resins can consistently achieve the following: (1.) for HWPW, the Phase 2 emission standards specified in section 93120.2(a); or (2.) for PB and MDF, the emission values in Table 2. These data must be obtained by working with an ARB approved third party certifier and must include six months of routine quality control testing data, the correlation of the routine quality control testing data to primary or secondary method testing data, and the results of two quarterly primary or secondary method tests, as required by Appendix 2 of section 93120.12. For HWPW, in order to qualify for approval to test any product type less frequently, the results of the six months of routine quality control testing data and the two quarterly primary or secondary method tests must all be shown to be no higher than the Phase 2 emission standards. For PB and MDF, in order to qualify for approval to test any product type less frequently, ninety percent of the six months of routine quality control testing data and the results of the two quarterly primary or secondary method tests must be shown to be no higher than the ULEF-target value listed in Table 2, and all data must be shown to be no higher than the ULEF-cap value listed in Table 2.

Table 2
Ultra-Low-Emitting Formaldehyde (ULEF) Resin
Emission Target and Cap Values (in ppm) for
Particleboard (PB) and Medium Density Fiberboard (MDF)¹

	PB	MDF	Thin MDF
ULEF-target	0.05	0.06	0.08
ULEF-cap	0.08	0.09	0.11

⁽¹⁾ Concentrations must be based on correlations with the primary or secondary test method in parts per million (ppm).

- (2) Upon written approval of the Executive Officer, manufacturers of HWPW, PB, MDF, and thin MDF may qualify their product types for an exemption from third party certification. To qualify for an exemption from third party certification for a product type, ninety percent of six months of routine quality control testing data and the results of two quarterly primary or secondary method tests must be shown to be no higher than a ULEF-target value of 0.04 ppm. All data must be shown to be no higher than a ULEF-cap value of 0.05 ppm for HWPW and 0.06 ppm for PB, MDF, and thin MDF. All other requirements of section 93120.3(d)(1) apply. Manufacturers who have been exempted from third party certification do not need to comply with the requirements of Appendix 2 of section 93120.12.
- (3) Within 45 days after receiving an application from a manufacturer, the Executive Officer shall inform the applicant, in writing, either that the application is complete and accepted for filing, or that the application is deficient and shall identify the specific information required to make the application complete.
- (4) Within 30 days of receiving additional information provided in response to a determination by the Executive Officer that an application is deficient, the Executive Officer shall inform the applicant, in writing, either that the new information is sufficient to make the application complete and that the application is accepted for filing, or that the application is deficient and shall identify the specific information required to make the application complete.
- (5) Within 90 days after an application has been deemed complete, the Executive Officer shall act to approve or disapprove the application. The Executive Officer shall issue an Executive Order approving the application if the evidence submitted by the applicant is sufficient to demonstrate that the applicant has met the requirements specified in section 93120.3(d)(1) or (d)(2). The approval shall have a duration of

two years, and the manufacturer may apply for re-approval as provided in this section. An application for re-approval must include the results of at least two primary or secondary method tests for each product type based on panels randomly selected and tested by an ARB approved third party certifier, and the chemical formulation of the ULEF resins.

- (6) The Executive Officer may, in the course of processing the application, request the applicant to clarify, amplify, correct, or otherwise supplement the information required for the application. The applicant and the Executive Officer may mutually agree to longer time periods for determining whether an application is complete, or for approving or disapproving an application.
- (7) If the manufacturer decides to change resin systems, ARB must be notified in advance and the manufacturer must comply with the requirements of section 93120.3(b) for that product type.
- (e) *Product Labeling Requirements.* Each panel or bundle of composite wood products must be clearly labeled to indicate compliance with the emission standards specified in section 93120.2(a). The label shall include, at a minimum, all of the following information:
 - (1) Manufacturer name;
 - (2) Product lot number or batch produced;
 - (3) A marking to denote that the composite wood product complies with the applicable Phase 1 or 2 emission standards specified in section 93120.2(a) or was made using ULEF resins or no-added formaldehyde based resins; and
 - (4) The ARB assigned number of the approved third party certifier. This requirement does not apply to manufacturers using no-added formaldehyde based resins that have obtained ARB approval as provided in section 93120.3(c) or products manufactured using ULEF resins as provided in section 93120.3(d)(2).
- (f) *Statement of compliance.* For each composite wood product, the manufacturer must include on the bill of lading or invoice: (1) the ARB assigned number of the approved third party certifier, if applicable; and (2) a statement that the composite wood products comply with the applicable Phase 1 or Phase 2 emission standard specified in section 93120.2(a) and, if applicable, were made using ULEF resins or no-added formaldehyde based resins.

- (g) *Recordkeeping Requirements for Manufacturers of Hardwood Plywood (HWPW), Particleboard (PB), and Medium Density Fiberboard (MDF).*
- (1) Beginning January 1, 2009 for manufacturers of HWPW-VC, PB, MDF, and thin MDF and July 1, 2009 for manufacturers of HWPW-CC, manufacturers must keep records of their quality assurance emissions test data for each product as provided in Appendix 2 of section 93120.12. Manufacturers using no-added formaldehyde based resins that have obtained ARB approval under section 93120.3(c) must keep documentation to demonstrate ARB approval to use no-added formaldehyde based resins. Manufacturers that have obtained ARB approval under section 93120.3(d) to use ULEF resins must keep documentation to demonstrate that ARB approval has been obtained. Records must be kept in either electronic or hard copy form for a period of two years.
- (2) For every composite wood product produced for sale in California, manufacturers must maintain records at their production facilities for a period of two years, including:
- (A) Tracking information to allow each composite wood product produced to be traced to a specific lot number or batch produced;
 - (B) Product information (including description of the composite wood product, date of manufacture, and lot/batch number);
 - (C) Purchaser information (including purchaser's name, contact person, address, phone number, purchase order or invoice number, and amount purchased), if applicable;
 - (D) Product transporter information (including delivery company name, contact person, address, phone number, and shipping invoice number), if applicable;
 - (E) Identification of the ARB approved third party certifier (including company name, contact person, phone number, mailing and email address); this subsection (E) does not apply to products manufactured with no-added formaldehyde based resins as specified under section 93120.3(c)(1) or products manufactured with ULEF resins as specified under section 93120.3(d)(2); and
 - (F) Manufacturers of HWPW, PB, and MDF using no-added formaldehyde based resins or ULEF resins must maintain records on an ongoing basis for each composite wood product produced, including:

1. The ARB approval letter as specified in section 93120.3(c) or (d);
 2. Amount of resin use reported by volume and weight;
 3. Production volume reported as square feet per product type;
 4. Resin trade name, resin manufacturer contact information, and resin supplier contact information;
 5. Changes in press time by more than 20 percent for any product type; and
 6. Changes in the formulation of the no-added formaldehyde based resins or ULEF resins.
- (3) Records must be kept on the disposition of non-complying lots or batches of composite wood products. These records shall include: product type and amount of composite wood products affected, lot or batch numbers, measures taken to mitigate the non-complying composite wood products, results of retesting, and final disposition of the lots or batches of composite wood products.
- (4) All records required by this section shall be made available to ARB or local air district personnel upon request.
- (h) *Facility inspections.* Each manufacturing plant may be inspected by third party certifiers as provided in Appendices 2 and 3 of section 93120.12. In addition, manufacturers may also be inspected by ARB or local air district personnel. In the course of an inspection, ARB or local air district personnel may request to audit records or secure samples for testing. Composite wood products secured during an inspection are subject to testing using the enforcement test method specified in section 93120.9(b), to determine compliance with the applicable emission standards.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.4 *Third Party Certifiers.*

- (a) All third party certifiers must be approved in writing by the ARB Executive Officer as provided in subsection (b). The Executive Officer will issue a number to each approved third party certifier.

- (b) *ARB Approval of Third Party Certifiers.*
- (1) Applications to become an ARB-approved third party certifier must be submitted in writing to the Executive Officer and must contain the following:
 - (A) Evidence of actual field experience in the verification of laboratories and wood products, to demonstrate how applicants will be able to competently perform the requirements of Appendix 3;
 - (B) Evidence of the ability to properly train and supervise inspectors;
 - (C) Evidence of a current “product certification agency” accreditation issued by a signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement (ILAC, 2000); and
 - (D) List of the composite wood products that the applicant is applying to verify and evidence that the applicant is qualified to verify these products.
 - (2) Within 45 days of receiving an application to become an ARB-approved third party certifier, the Executive Officer shall inform the applicant, in writing, either that the application is complete and accepted for filing, or that the application is deficient and shall identify the specific information required to make the application complete.
 - (3) Within 30 days of receiving additional information provided in response to a determination by the Executive Officer that an application is deficient, the Executive Officer shall inform the applicant, in writing, either that the new information is sufficient to make the application complete and that the application is accepted for filing, or that the application is deficient and shall identify the specific information required to make the application complete.
 - (4) Within 90 days after an application has been deemed complete, the Executive Officer shall act to approve or disapprove the application. The Executive Officer shall issue an Executive Order approving the application if the evidence submitted by the applicant is sufficient to demonstrate that the applicant can competently perform the tasks described in subsection (c). The Executive Order shall have a duration of two years. Within 120 days of the expiration date of the Executive Order, a third party certifier may apply for re-approval by submitting an updated application to the Executive Officer to demonstrate the continued ability to comply with section 93120.4(b)(1).

- (5) The Executive Officer may, in the course of processing the application, request the applicant to clarify, amplify, correct, or otherwise supplement the information required for the application. The applicant and the Executive Officer may mutually agree to longer time periods for determining whether an application is complete, or for approving or disapproving an application.
- (c) *Requirements for Third Party Certifiers.* Requirements for ARB approved third party certifiers are contained in section 93120.12, Appendix 3.
- (d) *Modification or Revocation of an Executive Order Approving a Third Party Certifier.* The Executive Officer may review and, for good cause, modify or revoke an Executive Order approving a third party certifier. The Executive Officer shall not modify or revoke an Executive Order without affording the third party certifier the opportunity for a hearing in accordance with the procedures specified in Article 2 (commencing with section 60055.1) of Subchapter 1.25 of Chapter 1 of Division 3 of Title 17, California Code of Regulations.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, and 41712, Health and Safety Code.

§ 93120.5 *Requirements for Distributors of Hardwood Plywood (HWPW), Particleboard (PB), Medium Density Fiberboard (MDF), and Finished Goods Containing Those Materials.*

- (a) *Emission Standards.* Except as provided in the “sell-through” provisions of section 93120.12, Appendix 1, all distributors must comply with the requirements of section 93120.2(a) for all composite wood products and finished goods containing these materials that are sold, supplied, offered for sale, or purchased for sale in California.
- (b) *Additional Requirements to Help Ensure that Complying Composite Wood Products and Finished Goods are Purchased.* Distributors must take reasonable prudent precautions to ensure that the composite wood products and composite wood products contained in finished goods that they purchase comply with the emission standards specified in section 93120.2(a). “Reasonable prudent precautions” include, at a minimum, instructing each supplier that the composite wood products and finished goods they supply to a distributor must comply with the applicable emission standards, and obtaining written documentation from each supplier that this is so.

In addition, distributors must keep records showing the date of purchase and the supplier of the composite wood products and finished goods, and document the precautions taken to ensure that the composite wood products and composite wood products contained in finished goods comply with applicable emission standards. These records must be kept in electronic or hard copy form for a minimum of two years and provided to ARB or local air district personnel upon request. This section does not affect the liability of any person for any violation of section 93120.2(a).

- (c) *Product Labeling Requirements for Composite Wood Products and Finished Goods.*
 - (1) *Composite Wood Products.* If the composite wood products procured by a distributor are not modified by the distributor, no additional labeling is required. If the composite wood products are modified, distributors are subject to the labeling requirements specified for fabricators in section 93120.7(d).
 - (2) *Finished goods containing HWPW, PB, or MDF.* If the finished goods purchased by a distributor are not modified by the distributor, no additional labeling is required. If the finished goods are modified, the distributor must label the modified goods as specified for fabricators in section 93120.7(d).
- (d) *Statement of compliance.* For each composite wood product or finished good made with these materials, the distributor must state on the bill of lading or invoice, that the composite wood products or composite wood products contained in finished goods comply with the applicable Phase 1 or Phase 2 emission standard specified in section 93120.2(a).
- (e) *Facility inspections.* Distributors may be inspected by ARB or local air district personnel. In the course of an inspection, ARB or local air district personnel may request to audit records or secure samples for testing. Composite wood products or finished goods secured during an inspection are subject to testing, using the applicable enforcement test method specified in section 93120.9, to determine compliance with the applicable emission standards.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.6 Requirements for Importers of Hardwood Plywood (HWPW), Particleboard (PB), Medium Density Fiberboard (MDF), and Finished Goods Containing Those Materials.

- (a) *Emission Standards.* Except as provided in the “sell-through” provisions of section 93120.12, Appendix 1, all importers must comply with the requirements of section 93120.2(a) for all composite wood products and finished goods containing these materials that are sold, supplied, offered for sale, or purchased for sale in California.
- (b) *Additional Requirements to Help Ensure that Complying Composite Wood Products and Finished Goods are Purchased.* Importers must take reasonable prudent precautions to ensure that the composite wood products and composite wood products contained in finished goods that they purchase comply with the emission standards specified in section 93120.2(a). “Reasonable prudent precautions” include, at a minimum, instructing each supplier that the goods they supply to an importer must comply with the applicable emission standards, and obtaining written documentation from each supplier that this is so.

In addition, importers must keep records showing the date of purchase and the supplier of the composite wood products and finished goods, and document the precautions taken to ensure that the composite wood products and composite wood products contained in finished goods comply with applicable emission standards. These records must be kept in electronic or hard copy form for a minimum of two years and provided to ARB or local air district personnel upon request. This section does not affect the liability of any person for any violation of section 93120.2(a).

- (c) *Product Labeling Requirements for Composite Wood Products and Finished Goods.*
 - (1) *Composite Wood Products.* If the composite wood products procured by an importer are not modified by the importer, no additional labeling is required. If the composite wood products are modified, importers are subject to the labeling requirements specified for fabricators in section 93120.7(d).
 - (2) *Finished goods containing HWPW, PB, or MDF.* If the finished goods purchased by an importer are not modified by the importer, no additional labeling is required. If the finished goods are modified, the importer must label the modified goods as specified for fabricators in section 93120.7(d).

- (d) *Statement of compliance.* For each composite wood product or finished good made with these materials, the importer must state on the bill of lading or invoice, that the composite wood products or composite wood products contained in finished goods comply with the applicable Phase 1 or Phase 2 emission standard specified in section 93120.2(a).
- (e) *Facility inspections.* Importers may be inspected by ARB or local air district personnel. In the course of an inspection, ARB or local air district personnel may request to audit records or secure samples for testing. Composite wood products or finished goods secured during an inspection are subject to testing, using the applicable enforcement test method specified in section 93120.9, to determine compliance with the applicable emission standards.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.7 Requirements for Fabricators that use Hardwood Plywood (HWPW), Particleboard (PB), Medium Density Fiberboard (MDF), and Finished Goods Containing Those Materials.

- (a) *Emission Standards.*
 - (1) Except as provided in the “sell-through” provisions of section 93120.12, Appendix 1, all fabricators must comply with the requirements of section 93120.2(a) for all composite wood products and finished goods containing these materials that are sold, supplied, offered for sale, or purchased for sale in California.
 - (2) Fabricators that produce laminated products, and do not manufacture composite wood products, do not need to comply with the manufacturer requirements regarding third party certification in section 93120.3(b).
 - (3) If the platform used by a fabricator to produce a laminated product consists of a composite wood product, the platform must comply with the applicable emission standards specified in section 93120.2(a).
 - (4) Fabricators manufacturing composite wood products exclusively for use by the fabricator in making finished goods must comply with all requirements of section 93120.3, except the product labeling requirements contained in section 93120.3(e).

- (b) *Exemptions.*
- (1) Windows that contain composite wood products are exempt from the requirements of this section if the window product contains less than five percent by volume of HWPW, PB, or MDF combined in relation to the total volume of the finished window product.
 - (2) Exterior doors and garage doors that contain composite wood products are exempt from the requirements of this section if either: (A) the doors are made from composite wood products manufactured with no-added formaldehyde based resins or ULEF resins; or (B) the doors contain less than three percent by volume of HWPW, PB, or MDF combined in relation to the total volume of the finished exterior door or garage door.
 - (3) Local government agencies and school districts do not need to comply with recordkeeping or product labeling requirements of section 93120.7 unless finished goods are being sold, offered for sale, or manufactured for sale in California.
- (c) *Additional Requirements to Help Ensure that Complying Composite Wood Products and Finished Goods are Purchased.* Fabricators must take reasonable prudent precautions to ensure that the composite wood products and composite wood products contained in finished goods that they purchase are in compliance with the applicable emission standards specified in section 93120.2(a), and are labeled as complying with the applicable Phase 1 or Phase 2 standards in section 93120.2(a). "Reasonable prudent precautions" include, at a minimum, instructing each supplier that the goods they supply to the fabricator must comply with the applicable emission standards, and obtaining written documentation from each supplier that this is so.

In addition, fabricators must keep records showing the date of purchase and the supplier of the composite wood products and finished goods, and document the precautions taken to ensure that the composite wood products and composite wood products contained in finished goods comply with applicable emission standards. These records must be kept in electronic or hard copy form for a minimum of two years and provided to ARB or local air district personnel upon request. This section does not affect the liability of any person for any violation of section 93120.2(a).

- (d) *Product Labeling Requirements.* Fabricators must:

- (1) Label their finished goods containing HWPW, PB, or MDF destined for sale or supply in California. The label shall be applied as a stamp, tag, sticker, or bar code on every finished good produced, or on every box containing finished goods. The label shall include, at a minimum, the fabricator's name, the date the finished good was produced and a marking to denote that the product was made with HWPW, PB, or MDF that complies with the applicable Phase 1 or Phase 2 emission standards in section 93120.2(a). Finished goods shall be labeled as having been made with no-added formaldehyde based resins or ULEF resins if this is so for all HWPW, PB, or MDF used in fabricating the finished goods.
- (2) Designate their goods as being made with HWPW, PB, or MDF that complies with the applicable emission standards specified in section 93120.2(a) on the bill of lading or invoice provided to distributors, importers, other fabricators, or retailers.
- (e) *Facility inspections.* Fabricators are subject to periodic inspection by ARB or local air district personnel. In the course of an inspection, ARB or local air district personnel may request to audit records or secure samples for testing. Composite wood products or finished goods secured during an inspection are subject to testing, using the applicable enforcement test method specified in section 93120.9, to determine compliance with the applicable emission standards.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.8 *Requirements for Retailers that Sell, Supply, or Offer for Sale Hardwood Plywood (HWPW), Particleboard (PB), Medium Density Fiberboard (MDF), and Finished Goods Containing Those Materials.*

- (a) *Emission Standards.* Except as provided in the "sell-through" provisions of section 93120.12, Appendix 1, all retailers must comply with the requirements of section 93120.2(a) for all composite wood products and finished goods containing these materials that are sold, supplied, offered for sale, or purchased for sale in California.
- (b) *Additional Requirements to Help Ensure that Complying Composite Wood Products and Finished Goods are Purchased.* Retailers must take reasonable prudent precautions to ensure that the composite wood products and composite wood products contained in finished goods that they purchase comply with the emission standards

specified in section 93120.2(a). "Reasonable prudent precautions" include, at a minimum, instructing each supplier that the goods they supply to the retailer must comply with the applicable emission standards, and obtaining written documentation from each supplier that this is so.

In addition, retailers must keep records showing the date of purchase and the supplier of the composite wood products and finished goods, and document the precautions taken to ensure that the composite wood products and composite wood products contained in finished goods comply with applicable emission standards. These records must be kept in electronic or hard copy form for a minimum of two years and provided to ARB or local air district personnel upon request. This section does not affect the liability of any person for any violation of section 93120.2(a).

- (c) *Facility inspections.* Retailers may be inspected by ARB or local air district personnel. In the course of an inspection, ARB or local air district personnel may request to audit records or secure samples for testing. Composite wood products or finished goods secured during an inspection are subject to testing, using the applicable enforcement test method specified in section 93120.9, to determine compliance with the applicable emission standards.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.9 Test Methods.

- (a) *Compliance Test Methods for HWPW, PB, and MDF.* Compliance with the emission standards for HWPW, PB, and MDF in section 93120.2(a) and, if applicable, section 93120.3(c) or (d) shall be demonstrated by conducting product emissions tests, verified by third party certification as specified in section 93120.4 and conducted using one of the following:
 - (1) The primary method, defined as ASTM E 1333-96(2002) (large chamber test method).
 - (2) A secondary method, defined as specified in ASTM D 6007-02, with the additional conditions specified below:

- (A) The secondary method shall be operated using the testing conditions and loading rates specified in ASTM D 6007-02, and the conditioning time used to establish equivalence in section 93120.9(a)(2)(B). In addition, when testing panels the secondary method shall be operated by testing nine specimens representing evenly distributed portions of an entire panel. The nine specimens shall be tested in groups of three specimens, resulting in three test results, which shall be averaged to represent one data point for the panel.
- (B) Equivalence between the secondary method and the primary method must be established, at least once each year, by the third party certifier for each testing laboratory used by the third party certifier. Minimum requirements for an equivalence demonstration shall include at least ten comparison sample sets, which compare the results of the primary and secondary methods. The following parameters must be met in the comparison:
1. For the primary method, each comparison sample shall consist of the result of simultaneously testing an appropriate number of panels (factoring in the loading rate) from the same batch of panels tested by the secondary method.
 2. For the secondary method, each comparison sample shall consist of testing nine specimens representing evenly distributed portions of an entire panel. The nine specimens shall be tested in groups of three specimens (factoring in the loading rate), resulting in three test results, which shall be averaged to represent one data point for the panel, and matched to their respective primary method comparison sample result.
 3. The ten comparison sample sets shall consist of testing a minimum of five sample sets in each of at least two of the following ranges of formaldehyde concentrations, as measured by the primary method:
 - a. Lower range: less than 0.07 ppm
 - b. Intermediate range: 0.07 to less than 0.15 ppm
 - c. Upper range: 0.15 to 0.25 ppm
 4. The average and standard deviation of the difference of all comparison sets shall be calculated as follows. For each of the two ranges used for testing, the following computations shall be performed:

- a. Denote the number of sets in the given range by n .
- b. Compute the difference between the primary and secondary method value. Denote the difference for the i^{th} set by D_i , where i ranges from 1 to n .
- c. Compute the average, \bar{X} , and standard deviation, S , of the differences according to the following formulas:

$$\bar{X} = \sum_{i=1}^n D_i / n$$

$$S = \sqrt{\sum_{i=1}^n (D_i - \bar{X})^2 / (n - 1)}$$

5. The secondary method shall be considered equivalent to the primary method if the following condition is met for both tested ranges:

$$|\bar{X}| + 0.88S \leq C$$

where C is equal to:

0.026 for the lower range;
 0.038 for the intermediate range; and
 0.052 for the upper range.

6. Equivalence must be established between the primary and secondary method to represent the range in emissions based on the emission standards specified in section 93120.2(a) for composite wood products that a third party certifier is approved to verify under section 93120.4 and, if applicable, the range in emissions for no-added formaldehyde based resins or ULEF resins.
- (3) An alternate secondary test procedure may also be used as specified in sections 93120.9(a)(3)(A) through 93120.9(a)(3)(C).
 - (A) Chamber test methods other than ASTM E 1333-96(2002) (large chamber test method) may be used if they are demonstrated, following the minimum requirements specified in section 93120.9(a)(2)(B), to provide equivalent results to those obtained using ASTM E 1333-96(2002). All alternative secondary test

methods must be approved in writing by the Executive Officer prior to use as specified below.

- (B) An application to use an alternative secondary test method must be submitted to the ARB in writing, and must include, at a minimum, the following information and data:
1. A complete description of the test method used to quantify product emissions, including all procedures used, precision and reproducibility, and the criteria used to demonstrate the validity of the test method.
 2. Results collected using the alternate secondary test method and corresponding equivalent emissions.
- (C) Within 45 days of receipt of an application, the Executive Officer shall notify the applicant in writing that the application is complete, or if additional information or testing is required to complete the application. If the Executive Officer finds that an application complies with the requirements of this section, then he or she may issue an Executive Order certifying that the alternate secondary test procedure provides equivalent results to ASTM E 1333-96 (2002), and authorize its use for compliance testing.
- (b) *Enforcement Test Method for HWPW, PB, and MDF Samples.* Emission testing of samples of HWPW, PB, and MDF shall be conducted by ARB or local air district personnel using a secondary method, a large chamber [ASTM E 1333-96(2002)], or an alternate secondary test procedure as specified in section 93120.9(a). Sample handling procedures shall be followed as specified in the applicable ASTM method or alternate secondary test procedures.
- (c) *Enforcement Test Method for Finished Goods Containing HWPW, PB, and MDF.* Emission testing of samples of HWPW, PB, and MDF contained in finished goods shall be conducted by ARB or local air district personnel using a secondary method, or an alternate secondary test procedure as specified in section 93120.9(a). Sample handling procedures shall be followed that are consistent with those specified in ASTM D 6007-02 or alternate secondary test procedures.
- (d) *Quality Control Test Method.* A test method correlated to either the primary or secondary methods for performing routine quality control tests as required by section 93120.3. A correlation must be established between the quality control test method and the primary, secondary, or alternate secondary test method. The correlation must be based on a minimum sample size of five data pairs.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.10 *Incorporation by Reference.*

The following documents are incorporated by reference in this airborne toxic control measure:

- (a) ANSI A135.4-2004. American National Standard – Basic Hardboard, 2004.
- (b) ANSI A135.5-2004. American National Standard – Prefinished Hardboard Paneling, 2004.
- (c) ANSI A135.6-2006. American National Standard – Hardboard Siding, 2006.
- (d) ANSI A190.1-2002. American National Standard – Structural Glued Laminated Timber, 2002.
- (e) ANSI A208.1-1999. American National Standard – Particleboard, 1999.
- (f) ANSI A208.2-2002. American National Standard – Medium Density Fiberboard, 2002.
- (g) ANSI/HPVA HP-1-2004. American National Standard for Hardwood and Decorative Plywood, 2004.
- (h) ASTM D 5055-05. Standard Specification for Establishing and Monitoring Structural Capacities of Prefabricated Wood I-Joists, 2005.
- (i) ASTM D 5456-06. Standard Specification for Evaluation of Structural Composite Lumber Products, 2006.
- (j) ASTM D 5582-00. Standard Test Method for Determining Formaldehyde Levels from Wood Products Using a Desiccator, 2000.
- (k) ASTM D 6007-02. Standard Test Method for Determining Formaldehyde Concentration in Air from Wood Products Using a Small Scale Chamber, 2002.
- (l) ASTM E 1333-96(2002). Standard Test Method for Determining Formaldehyde Concentrations in Air and Emission Rates from Wood Products Using a Large Chamber, 2002.
- (m) ILAC. International Laboratory Accreditation Cooperation Mutual Recognition Arrangement, 2000.
- (n) PS 1-07. Voluntary Product Standard – Structural Plywood. National Institute of Standards and Technology, 2007.
- (o) PS 2-04. Voluntary Product Standard – Performance Standard for Wood-Based Structural-Use Panels. National Institute of Standards and Technology, 2004.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.

§ 93120.11 Severability.

Each part of this airborne toxic control measure (ATCM) shall be deemed severable, and in the event that any part of this ATCM is held to be invalid, the remainder of this ATCM shall continue in full force and effect.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, and 41712, Health and Safety Code.

§ 93120.12 Appendices.

This section contains Appendices 1 - 3 to the Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products.

Appendix 1. *Sell-through Provisions and Dates that Apply to Manufacturers, Distributors, Importers, Fabricators, and Retailers.*

(a) *Sell-through Dates that Apply to Manufacturers of Hardwood Plywood (HWPW), Particleboard (PB), and Medium Density Fiberboard (MDF).*

(1) *Sell-through by Manufacturers of Hardwood Plywood, Particleboard, and Medium Density Fiberboard Manufactured Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Hardwood plywood, particleboard, and medium density fiberboard manufactured before the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be sold, supplied, or offered for sale by the product manufacturer for up to three months after each of the specified effective dates. The specific sell-through dates for the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

(A) Hardwood plywood made with a veneer core (HWPW-VC).

1. Panels of HWPW-VC manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, or offered for sale by the product manufacturer until March 31, 2009. Beginning April 1, 2009, all HWPW-VC subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
2. Panels of HWPW-VC manufactured before January 1, 2010, that comply with the Phase 1 standard, but do not comply with the Phase 2 standard, may be sold, supplied, or offered for sale by the product manufacturer until March 31, 2010. Beginning April 1, 2010, all HWPW-VC subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

(B) Hardwood plywood made with a composite core (HWPW-CC).

1. Panels of HWPW-CC manufactured before July 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, or offered for sale by the product manufacturer until September 30, 2009. Beginning October 1, 2009, all HWPW-CC subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.

2. Panels of HWPW-CC manufactured before July 1, 2012, that comply with the Phase 1 standard, but do not comply with the Phase 2 standard, may be sold, supplied, or offered for sale by the product manufacturer until September 30, 2012. Beginning October 1, 2012, all HWPW-CC subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

(C) Particleboard (PB), medium density fiberboard (MDF), and thin MDF.

1. Panels of PB, MDF, and thin MDF manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, or offered for sale by the product manufacturer until March 31, 2009. Beginning April 1, 2009, all PB, MDF, and thin MDF subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
2. Panels of PB and MDF manufactured before January 1, 2011, that comply with the Phase 1 standard, but do not comply with the Phase 2 standard, may be sold, supplied, or offered for sale by the product manufacturer until March 31, 2011. Beginning April 1, 2011, all PB and MDF subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.
3. Panels of thin MDF manufactured before January 1, 2012, that comply with the Phase 1 standard, but do not comply with the Phase 2 standard, may be sold, supplied, or offered for sale by the product manufacturer until March 31, 2012. Beginning April 1, 2012, all thin MDF subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

(b) *Sell-through Dates that Apply to Distributors of HWPW, PB, and MDF.*

- (1) *Sell-through by Distributors of Hardwood Plywood, Particleboard, and Medium Density Fiberboard Manufactured Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Hardwood plywood, particleboard, or medium density fiberboard manufactured before the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be sold, supplied, or offered for sale by distributors for up to five months after each of the specified effective dates. The specific sell-

through dates for each of the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

- (A) Hardwood plywood made with a veneer core (HWPW-VC).
 - 1. Panels of HWPW-VC manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by distributors until May 31, 2009. Beginning June 1, 2009, all HWPW-VC subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
 - 2. Panels of HWPW-VC manufactured before January 1, 2010, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by distributors until May 31, 2010. Beginning June 1, 2010, all HWPW-VC subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

- (B) Hardwood plywood made with a composite core (HWPW-CC).
 - 1. Panels of HWPW-CC manufactured before July 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by distributors until November 30, 2009. Beginning December 1, 2009, all HWPW-CC subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
 - 2. Panels of HWPW-CC manufactured before July 1, 2012, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by distributors until November 30, 2012. Beginning December 1, 2012, all HWPW-CC subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

- (C) Particleboard (PB) and medium density fiberboard (MDF).
 - 1. Panels of PB and MDF manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by distributors until May 31, 2009. Beginning June 1, 2009, all PB and MDF subject to the Phase 1 standard must comply with this standard,

regardless of the date on which the products were manufactured.

2. Panels of PB and MDF manufactured before January 1, 2011, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by distributors until May 31, 2011. Beginning June 1, 2011, all PB and MDF subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

(D) Thin MDF.

1. Panels of thin MDF manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by distributors until May 31, 2009. Beginning June 1, 2009, all thin MDF subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
2. Panels of thin MDF manufactured before January 1, 2012, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by distributors until May 31, 2012. Beginning June 1, 2012, all thin MDF subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

(2) *Sell-through by Distributors of Finished Goods Containing Hardwood Plywood made with a Veneer Core (HWPW-VC), Hardwood Plywood made with a Composite Core (HWPW-CC), Particleboard (PB), Medium Density Fiberboard (MDF), or thin MDF Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Finished goods containing HWPW-VC, HWPW-CC, PB, MDF, or thin MDF manufactured before the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be sold, supplied, offered for sale by distributors for up to eighteen months after each of the specified effective dates. The specific sell-through dates for the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

(A) Finished goods containing hardwood plywood made with a veneer core (HWPW-VC).

1. Finished goods containing HWPW-VC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by distributors until June 30, 2010. Beginning July 1, 2010,

finished goods containing HWPW-VC, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.

2. Finished goods containing HWPW-VC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by distributors until June 30, 2011. Beginning July 1, 2011, finished goods containing HWPW-VC, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.
- (B) Finished goods containing hardwood plywood made with a composite core (HWPW-CC).
1. Finished goods containing HWPW-CC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by distributors until December 31, 2010. Beginning January 1, 2011, finished goods containing HWPW-CC, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 2. Finished goods containing HWPW-CC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by distributors until December 31, 2013. Beginning January 1, 2014, finished goods containing HWPW-CC, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.
- (C) Finished goods containing particleboard (PB) and/or medium density fiberboard (MDF).
1. Finished goods containing PB and/or MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by distributors until June 30, 2010. Beginning July 1, 2010, finished goods containing PB and/or MDF, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 2. Finished goods containing PB and/or MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by distributors until June 30, 2012. Beginning July 1, 2012, finished goods containing PB and/or MDF, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.

(D) Finished goods containing thin MDF.

1. Finished goods containing thin MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by distributors until June 30, 2010. Beginning July 1, 2010, finished goods containing thin MDF, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
2. Finished goods containing thin MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by distributors until June 30, 2013. Beginning July 1, 2013, finished goods containing thin MDF, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.

(c) ***Sell-through Dates that Apply to Importers of HWPW, PB, and MDF.***

- (1) *Sell-through by Importers of Hardwood Plywood (HWPW), Particleboard (PB), and Medium Density Fiberboard (MDF) Manufactured Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Hardwood plywood, particleboard, or medium density fiberboard manufactured before the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be sold, supplied, offered for sale, or used by importers for up to three months after each of the specified effective dates. The specific sell-through dates for the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

(A) Hardwood plywood made with a veneer core (HWPW-VC).

1. Panels of HWPW-VC manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by importers until March 31, 2009. Beginning April 1, 2009, all HWPW-VC subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
2. Panels of HWPW-VC manufactured before January 1, 2010, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by importers until March 31, 2010. Beginning April 1, 2010, all HWPW-VC subject to the Phase 2 standard must comply with this standard,

regardless of the date on which the products were manufactured.

- (B) Hardwood plywood made with a composite core (HWPW-CC).
 - 1. Panels of HWPW-CC manufactured before July 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by importers until September 30, 2009. Beginning October 1, 2009, all HWPW-CC subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
 - 2. Panels of HWPW-CC manufactured before July 1, 2012, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by importers until September 30, 2012. Beginning October 1, 2012, all HWPW-CC subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.
- (C) Particleboard (PB) and medium density fiberboard (MDF).
 - 1. Panels of PB and MDF manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by importers until March 31, 2009. Beginning April 1, 2009, all PB and MDF subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.
 - 2. Panels of PB and MDF manufactured before January 1, 2011, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by importers until March 31, 2011. Beginning April 1, 2011, all PB and MDF subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.
- (D) Thin MDF.
 - 1. Panels of thin MDF manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, offered for sale, or used by importers until March 31, 2009. Beginning April 1, 2009, all thin MDF subject to the Phase 1 standard must comply with this standard, regardless of the date on which the products were manufactured.

2. Panels of thin MDF manufactured before January 1, 2012, that do not comply with the Phase 2 standard may be sold, supplied, offered for sale, or used by importers until March 31, 2012. Beginning April 1, 2012, all thin MDF subject to the Phase 2 standard must comply with this standard, regardless of the date on which the products were manufactured.

(2) *Sell-through by Importers of Finished Goods Containing Hardwood Plywood made with a Veneer Core (HWPW-VC), Hardwood Plywood made with a Composite Core (HWPW-CC), Particleboard (PB), Medium Density Fiberboard (MDF), or thin MDF Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Finished goods containing HWPW-VC, HWPW-CC, PB, MDF, or thin MDF manufactured before the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be sold, supplied, offered for sale by importers for up to eighteen months after each of the specified effective dates. The specific sell-through dates for the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

- (A) Finished goods containing hardwood plywood made with a veneer core (HWPW-VC).
 1. Finished goods containing HWPW-VC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by importers until June 30, 2010. Beginning July 1, 2010, finished goods containing HWPW-VC, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 2. Finished goods containing HWPW-VC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by importers until June 30, 2011. Beginning July 1, 2011, finished goods containing HWPW-VC, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.
- (B) Finished goods containing hardwood plywood made with a composite core (HWPW-CC).
 1. Finished goods containing HWPW-CC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by importers until December 31, 2010. Beginning January 1, 2011, finished goods containing HWPW-CC, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.

2. Finished goods containing HWPW-CC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by importers until December 31, 2013. Beginning January 1, 2014, finished goods containing HWPW-CC, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.
- (C) Finished goods containing particleboard (PB) and/or medium density fiberboard (MDF).
1. Finished goods containing PB and/or MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by importers until June 30, 2010. Beginning July 1, 2010, finished goods containing PB and/or MDF, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 2. Finished goods containing PB and/or MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by importers until June 30, 2012. Beginning July 1, 2012, finished goods containing PB and/or MDF, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.
- (D) Finished goods containing thin MDF.
1. Finished goods containing thin MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by importers until June 30, 2010. Beginning July 1, 2010, finished goods containing thin MDF, sold, supplied, or offered for sale must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 2. Finished goods containing thin MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by importers until June 30, 2013. Beginning July 1, 2013, finished goods containing thin MDF, sold, supplied, or offered for sale must comply with the Phase 2 standard, regardless of the date that the product was fabricated.

(d) *Sell-through Dates that Apply to Fabricators Using HWPW, PB, and MDF.*

(1) *Sell-through by Fabricators of Finished Goods Produced Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Finished goods containing HWPW-VC, HWPW-CC, PB, MDF, or thin MDF that does not comply with the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be used, sold, supplied, offered for sale by fabricators for up to eighteen months after each of the specified effective dates. The specific sell-through dates for the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

(A) Finished goods containing hardwood plywood made with a veneer core (HWPW-VC).

1. Finished goods made with HWPW-VC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by fabricators until June 30, 2010. Beginning July 1, 2010, all finished goods sold, supplied, or offered for sale must be made with HWPW-VC that complies with the Phase 1 standard, regardless of the date that the finished good was fabricated.
2. Finished goods made with HWPW-VC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by fabricators until June 30, 2011. Beginning July 1, 2011, all finished goods sold, supplied, or offered for sale must be made with HWPW-VC that complies with the Phase 2 standard, regardless of the date that the finished good was fabricated.

(B) Finished goods containing hardwood plywood made with a composite core (HWPW-CC).

1. Finished goods made with HWPW-CC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by fabricators until December 31, 2010. Beginning January 1, 2011, all finished goods sold, supplied, or offered for sale must be made with HWPW-CC that complies with the Phase 1 standard, regardless of the date that the finished good was fabricated.
2. Finished goods made with HWPW-CC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by fabricators until December 31, 2013. Beginning January 1, 2014, all finished goods sold, supplied, or offered for sale must be made with HWPW-CC that complies with the

Phase 2 standard, regardless of the date that the finished good was fabricated.

- (C) Finished goods containing particleboard (PB) and/or medium density fiberboard (MDF).
 - 1. Finished goods made with PB and/or MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by fabricators until June 30, 2010. Beginning July 1, 2010, all finished goods sold, supplied, or offered for sale must be made with PB and/or MDF that complies with the Phase 1 standard, regardless of the date that the finished good was fabricated.
 - 2. Finished goods made with PB and/or MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by fabricators until June 30, 2012. Beginning July 1, 2012, all finished goods sold, supplied, or offered for sale must be made with PB and/or MDF that complies with the Phase 2 standard, regardless of the date that the finished good was fabricated.

- (D) Finished goods containing thin MDF.
 - 1. Finished goods made with thin MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by fabricators until June 30, 2010. Beginning July 1, 2010, all finished goods sold, supplied, or offered for sale must be made with thin MDF that complies with the Phase 1 standard, regardless of the date that the finished good was fabricated.
 - 2. Finished goods made with thin MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by fabricators until June 30, 2013. Beginning July 1, 2013, all finished goods sold, supplied, or offered for sale must be made with thin MDF that complies with the Phase 2 standard, regardless of the date that the finished good was fabricated.

(e) *Sell-through Dates that Apply to Retailers of HWPW, PB, and MDF.*

- (1) *Sell-through by Retailers of Hardwood Plywood made with a Veneer Core (HWPW-VC), Hardwood Plywood made with a Composite Core (HWPW-CC), Particleboard (PB), Medium Density Fiberboard (MDF), or thin MDF Panels Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Hardwood plywood, particleboard, or

medium density fiberboard panels manufactured before the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be sold, supplied, or offered for sale by retailers for up to twelve months after each of the specified effective dates. The specific sell-through dates for the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

- (A) Hardwood plywood made with a veneer core (HWPW-VC).
 - 1. Panels of HWPW-VC manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until December 31, 2009. Beginning January 1, 2010, all HWPW-VC, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date on which the products were manufactured.
 - 2. Panels of HWPW-VC manufactured before January 1, 2010, that do not comply with the Phase 2 standard may be sold, supplied, or offered for sale by retailers until December 31, 2010. Beginning January 1, 2011, all HWPW-VC, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date on which the products were manufactured.

- (B) Hardwood plywood made with a composite core (HWPW-CC).
 - 1. Panels of HWPW-CC manufactured before July 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until June 30, 2010. Beginning July 1, 2010, all HWPW-CC, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date on which the products were manufactured.
 - 2. Panels of HWPW-CC manufactured before July 1, 2012, that do not comply with the Phase 2 standard may be sold, supplied, or offered for sale by retailers until June 30, 2013. Beginning July 1, 2013, all HWPW-CC, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date on which the products were manufactured.

- (C) Particleboard (PB) and/or medium density fiberboard (MDF).
 - 1. Panels of PB or MDF manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until

December 31, 2009. Beginning January 1, 2010, all PB or MDF, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date on which the products were manufactured.

2. Panels of PB or MDF manufactured before January 1, 2011, that do not comply with the Phase 2 standard may be sold, supplied, or offered for sale by retailers until December 31, 2011. Beginning January 1, 2012, all PB or MDF, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date on which the products were manufactured.

(D) Thin MDF.

1. Panels of thin MDF manufactured before January 1, 2009, that do not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until December 31, 2009. Beginning January 1, 2010, all thin MDF, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date on which the products were manufactured.
2. Panels of thin MDF manufactured before January 1, 2012, that do not comply with the Phase 2 standard may be sold, supplied, or offered for sale by retailers until December 31, 2012. Beginning January 1, 2013, all thin MDF, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date on which the products were manufactured.

- (2) *Sell-through by Retailers of Finished Goods Containing Hardwood Plywood made with a Veneer Core (HWPW-VC), Hardwood Plywood made with a Composite Core (HWPW-CC), Particleboard (PB), Medium Density Fiberboard (MDF), or thin MDF Before the Effective Dates of the Phase 1 and Phase 2 Emission Standards.* Finished goods containing HWPW-VC, HWPW-CC, PB, MDF, or thin MDF manufactured before the Phase 1 and Phase 2 effective dates specified in section 93120.2(a) may be sold, supplied, offered for sale, or used by retailers for up to eighteen months after each of the specified effective dates. The specific sell-through dates for the Phase 1 and Phase 2 emission standards specified in section 93120.2(a) are as follows:

- (A) Finished goods containing hardwood plywood made with a veneer core (HWPW-VC).
 - 1. Finished goods containing HWPW-VC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until June 30, 2010. Beginning July 1, 2010, finished goods containing HWPW-VC, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 - 2. Finished goods containing HWPW-VC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by retailers until June 30, 2011. Beginning July 1, 2011, finished goods containing HWPW-VC, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date that the product was fabricated.

- (B) Finished goods containing hardwood plywood made with a composite core (HWPW-CC).
 - 1. Finished goods containing HWPW-CC that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until December 31, 2010. Beginning January 1, 2011, finished goods containing HWPW-CC, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 - 2. Finished goods containing HWPW-CC that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by retailers until December 31, 2013. Beginning January 1, 2014, finished goods containing HWPW-CC, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date that the product was fabricated.

- (C) Finished goods containing particleboard (PB) and/or medium density fiberboard (MDF).
 - 1. Finished goods containing PB and/or MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until June 30, 2010. Beginning July 1, 2010, finished goods containing PB and/or MDF, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
 - 2. Finished goods containing PB and/or MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for

sale by retailers until June 30, 2012. Beginning July 1, 2012, finished goods containing PB and/or MDF, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date that the product was fabricated.

(D) Finished goods containing thin MDF.

1. Finished goods containing thin MDF that does not comply with the Phase 1 standard may be sold, supplied, or offered for sale by retailers until June 30, 2010. Beginning July 1, 2010, finished goods containing thin MDF, sold, supplied, or offered for sale, must comply with the Phase 1 standard, regardless of the date that the product was fabricated.
2. Finished goods containing thin MDF that does not comply with the Phase 2 standard may be sold, supplied, or offered for sale by retailers until June 30, 2013. Beginning July 1, 2013, finished goods containing thin MDF, sold, supplied, or offered for sale, must comply with the Phase 2 standard, regardless of the date that the product was fabricated.

Appendix 2. Quality Assurance Requirements for Manufacturers of Composite Wood Products.

(a) *Purpose.*

The purpose of Appendix 2 of section 93120.12 is to provide quality assurance requirements for manufacturers of composite wood products to ensure compliance with the applicable formaldehyde emission standards in section 93120.2(a). Manufacturers must demonstrate compliance with the emission standards by way of third party certification, and must comply with the quality assurance requirements contained in Appendix 2. The requirements of Appendix 2 do not apply to product types for manufacturers who have received ARB approval to use no-added formaldehyde based resins or ULEF resins that have been exempted from third party certification requirements for those product types, except for the purpose of applying for re-approval to continue to use no-added formaldehyde based resins as specified in section 93120.3(c) or ULEF resins as specified in section 93120.3(d).

Requirements are specified for: preparation of a quality control manual, establishment of a quality control function at the manufacturing plant (including testing equipment and designated quality control personnel), routine quality control procedures conducted at the plant, participation in periodic inspections and product testing by the third party certifying organization, and recordkeeping. These requirements are designed to ensure that certified unfinished (including sanded) composite wood products meet the applicable emission standards. Note: All panels must be tested in an unfinished condition, prior to application of a finishing or topcoat.

(b) *Responsibility for Product Performance.*

The manufacturer is responsible for the performance of all certified products, including meeting the applicable standard(s) in section 93120.2(a) against which its products are certified.

(c) *Quality Control Manual.*

Each manufacturing plant must have a written quality control manual, which shall, at a minimum, contain the following:

- (1) organizational structure of the quality control department;
- (2) sampling procedures;
- (3) method of handling samples;
- (4) frequency of small scale quality control testing;

- (5) procedures to identify changes in formaldehyde emissions resulting from production changes (e.g., increase in percentage of resin, increase in formaldehyde/urea molar ratio in the resin, or decrease in press time);
 - (6) provisions for additional testing;
 - (7) recordkeeping requirements; and
 - (8) average percentage of resin and press time for each product type.
- (d) *Quality Control Facilities.*

At each manufacturing plant or location designated by manufacturers with more than one manufacturing plant, laboratory facilities and equipment shall be provided and properly maintained as a quality control facility for conducting such tests as are required by Appendix 2. Alternatively, the quality control facility may be a contract laboratory or a laboratory operated by an approved third party certifier. Equipment shall be calibrated in accordance with the equipment manufacturer's instructions. The original and any subsequent equipment calibration records shall be maintained.

- (e) *Quality Control Personnel.*

- (1) Quality Control Manager

Each plant shall have a person with adequate experience and/or training to be responsible for formaldehyde emission quality control. This person shall report to the plant manager and shall be identified to the third party certifier. The third party certifier shall be informed in writing within ten days of any change in his or her identity. The quality control manager shall review and approve all reports of routine small scale testing conducted on the plant's production. If a manufacturer with one or more manufacturing plants uses a testing facility to test routine quality control production samples, the quality control manager shall be responsible for ensuring that the samples are collected, packaged, and shipped according to the procedures specified in the quality control manual. The plant quality control manager shall be responsible for working with the company's testing facility to monitor results, and shall immediately inform the third party certifier by telephone, email, or FAX and by letter of any changes in production that require re-inspections as set forth in section 93120.12, Appendix 3.

- (2) Quality Control Employee

Quality control employees shall have adequate experience and/or training to conduct accurate chemical quantitative analytical tests. The

Quality Control Manager shall identify each person conducting routine small scale tests to the third party certifier. All quality control employees must be certified annually by the third party certifier for operation of the quality control test method.

(3) Chemical Analysis Tests

(A) Duplicate Analysis

The manufacturer will contact the third party certifier to request certification of any quality control employee identified by the Quality Control Manager. The third party certifier or plant Quality Control Manager shall test one portion of a formaldehyde solution based on the manufacturer's range in expected formaldehyde emissions; the employee to be certified shall test another portion of the same solution. The results of each test must be within a range of concentrations established by the third party certifier, to verify the correlation of the quality control test method.

(B) Blind Samples

The employee to be certified must determine the formaldehyde content of four sample solutions submitted to them by the third party certifier or plant Quality Control Manager. The formaldehyde content of the four sample solutions must be determined to be within a range of concentrations established by the third party certifier, to verify the correlation of the quality control test method.

(f) *Primary or Secondary Method Tests.*

(1) Initial (Qualifying) Primary or Secondary Method Test

Each product type, from each production line of each plant must be tested in a primary or secondary method testing chamber. The laboratory operating the chamber must be accredited by an accreditation body that is a signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement (ILAC, 2000). The formaldehyde test methods used by the laboratory must be stated in its scope of accreditation. For the purpose of a qualifying test and with approval of the third party certifier, a manufacturer may group two or more product types together if they have similar emission characteristics. If a plant elects to have all or multiple products represented by a single product type, an initial qualification test failure by that representative product will cause certification to lapse on all other products represented. The emissions from each product type from each production line must not exceed the applicable standard.

(2) Correlation of Primary or Secondary Method and Small Scale Test Values

In order to qualify for certification, the manufacturer must establish a statistical correlation between values obtained from the primary or secondary test method and the values from the small scale tests for each product type and production line. For purposes of establishing this correlation, data for products from the manufacturer's plant or data obtained by a third party certifier must be used. The correlation must be based on a minimum sample size of five data pairs.

(3) Subsequent (Verifying) Primary or Secondary Method Tests

(A) Quarterly Chamber Test

1. Particleboard (PB) and Medium Density Fiberboard (MDF)

At least quarterly, a primary or secondary method test shall be conducted on randomly selected samples of each product type, as determined by the third party certifier. Manufacturers that use ULEF resins and have received ARB approval under section 93120.3(d)(1) need only have primary or secondary method tests conducted every six months. For the purpose of a verifying primary or secondary method test, a manufacturer may group two or more product types together if they have similar emission characteristics. If a plant elects to have all or multiple products represented by a single product type, a quarterly qualification test failure by that representative product will cause certification to lapse on all other products represented. The emissions from each product type must not exceed the applicable standard.

2. Hardwood Plywood (HWPW)

At least quarterly, a primary or secondary method test shall be conducted on randomly selected samples of the HWPW product determined by the third party certifier, after review of routine weekly quality control data, to have the highest potential to emit formaldehyde. Manufacturers that use ULEF resins and have received ARB approval under section 93120.3(d)(1) need only have primary or secondary method tests conducted every six months. For the purpose of a verifying primary or secondary method test, a manufacturer may choose to group two or more product types together if they have similar emission characteristics. If a plant elects to have all or multiple products

represented by a single product type, a quarterly qualification test failure by that representative product will cause certification to lapse on all other products represented. The emissions from each product type must not exceed the applicable standard.

(B) Failure of a Primary or Secondary Method Test

1. Exceedance of standards

If the emission value obtained during a subsequent (verifying) primary or secondary method test exceeds the applicable standard, the tested product will be in violation of section 93120.2(a) and certification of that product type will be suspended until re-qualification. In such an event, the third party certifier is required to notify the manufacturer and ARB. If primary or secondary method and small scale test results on the same product differ, the primary or secondary method result shall be considered the benchmark value.

Manufacturers must submit the last month of quality control testing data to the third party certifier, for verification that the quality control limit (QCL) or shipping QCL (if applicable) reflects an accurate correlation between the primary or secondary method and the plant's quality control tests.

2. Re-qualification

Should an exceedance occur, plant production of that product type may be reinstated only upon successful completion of another primary or secondary method test. The re-qualification primary or secondary method test must be conducted on the same product type as that which failed during the verifying test.

3. Disposition of Failed Lot

The manufacturer may obtain certification of a lot which has failed the primary or secondary method test if the manufacturer can demonstrate to the satisfaction of third party certifier that: (1) each panel is treated with a scavenger or handled by other means of reducing formaldehyde emissions (e.g., aging); and (2) panels randomly selected from the treated panels are tested under and pass the primary or secondary method test within six weeks of the initial determination of a failed lot.

(g) *Small Scale Quality Control Tests at Plant.*

Each manufacturing plant shall conduct small scale quality control tests for each product type and production line to ascertain that its certified panels do not exceed the applicable emission standard. Alternatively, the quality control tests may be conducted by a contract laboratory or a laboratory operated by an approved third party certifier. Unless prior notice is given, all lots of each product type being certified for compliance at each plant will be tested, with each lot's small scale quality control tests reported to the certifier.

(1) Approved Small Scale Test Methods

The following small scale tests may be used as quality control test methods:

- (A) ASTM D 5582-00 (desiccator);
- (B) ASTM D 6007-02 (small chamber); and
- (C) alternative small scale tests that can be shown to correlate to the primary or secondary method tests as specified in subsection (g)(2) and are approved by the Executive Officer.

(2) Correlation of Quality Control Tests with Primary or Secondary Method Tests

Each plant's quality control test results must be shown to correlate to primary or secondary method test results. The correlation must be based on a minimum sample size of five data pairs. If data shows variation from the previously used correlation, the manufacturer shall work with the certifier to evaluate the data to determine if a statistically significant change has occurred. If a change is noted, a new correlation curve will be established for the manufacturer by the certifier.

(3) Quality Control Limit

Manufacturers will work with their third party certifier to establish a Quality Control Limit (QCL) at each manufacturer's plant for each product type and production line. The QCL is the value for any approved small scale quality control test which is based on the correlative equivalent to the value in a primary or secondary method test permitted by the applicable standard. In addition to the QCL, an excursion limit shall be established to account for process and testing variation to keep the product's emissions from exceeding the

applicable standard. In the event that a manufacturer produces product lots that consistently exceed the applicable QCL, based on exceedance criteria established by the third party certifier, the certifier shall be notified promptly.

(4) Basic Testing Frequency

(A) PB and MDF

Manufacturers of PB and MDF must conduct routine small scale quality control tests at least once per shift (8 or 12 hours, plus or minus one hour of production) for each production line for each product type. Manufacturers of PB and MDF that use ULEF resins and have received ARB approval under section 93120.3(d) must conduct routine quality control tests at least weekly for each production line for each product type. Quality control samples shall be analyzed within a period of time specified in the manufacturer's quality control manual to avoid distribution of non-complying lots. In addition, quality control tests must be performed whenever a product type production ends without reaching eight hours of production or whenever one of the following occurs:

1. the resin formulation is changed so that the formaldehyde to urea ratio is increased;
2. an increase by more than ten percent in the amount of formaldehyde resin used;
3. a decrease in the designated press time by more than 20 percent; or
4. when the Quality Control Manager or Quality Control Employee has reason to believe that the panel being produced may not meet the requirements of the applicable standards.

(B) Reduction in Testing Frequency for PB and MDF

Testing frequency may be reduced to no less frequently than one test per 48-hour production period when the plant or production line demonstrates consistent operations and low variability of test values to the satisfaction of the third party certifier, based on criteria established by the certifier. Manufacturers must obtain advance written approval from the third party certifier and keep this written approval as part of the manufacturer record keeping requirements.

(C) HWPW

Manufacturers of HWPW must conduct routine small scale quality control tests on each product type and product line based on

production at the plant. Quality control samples shall be analyzed within a period of time specified in the manufacturer's quality control manual to avoid distribution of non-complying lots. Testing frequency shall be as follows:

Weekly HWPW Production (sq. ft.)	Minimum Number of Routine Tests/Week Per Product Type and Product Line
Less than 200,000	1
200,000 – 400,000	2
Greater than 400,000	4

(5) Non-complying Lots

A “non-complying lot” is any lot that has a test value in excess of the applicable standard. Test results from all non-complying lots shall be maintained as required by the manufacturer's recordkeeping requirements. For a non-complying lot to be certified, it must meet the requirements of subsections (g)(6) and (g)(7) below.

(6) Disposition of Non-complying Lots

A non-complying lot must be isolated from certified lots and the third party certifier must be notified. The non-complying lot cannot be certified unless it is determined to be in compliance by treating pursuant to subsection (g)(7) below and retesting pursuant to subsection (g)(8). If the manufacturer chooses not to certify, or is not able to certify a non-complying lot, the lot must not be labeled for sale in California. If the lot had already been labeled for sale in California, the label must be removed or obliterated. The original test value of that lot shall be maintained in the certification calculations for standard deviation and consecutive lots. Such lots shall be identified in the quality control chart.

(7) Treatment of Non-complying Product

Production which has failed the small scale test may be retested for certification if each panel is treated with a scavenger or handled by other means of reducing formaldehyde emissions (e.g., aging).

(8) Small Scale Retesting

The manufacturer may choose to retest a non-complying lot. When retesting a non-complying lot, the following criteria apply:

- (A) At least three test panels shall be selected from three separate bundles. They should be selected in such a manner that is representative of the entire lot. Each panel shall be tested by the plant's small scale quality control test.
- (B) Test samples shall not be selected from the top or bottom panels of a bundle.
- (C) The average of three representative samples must test at or below the QCL or shipping QCL.
- (D) In the event that a non-complying lot cannot be certified, the certifier shall be informed promptly in writing.

(9) Shipping QCL

A manufacturer may choose to establish a Shipping QCL, defined the same way as is the QCL above in subsection (g)(3), but based on panels prior to shipment rather than immediately after manufacturing. If a manufacturer chooses to establish a Shipping QCL that is distinct from the QCL, the manufacturer shall work with their third party certifier to establish this limit. The procedures for handling lots that do not comply with the Shipping QCL, and the procedures for retesting of such lots, are identical to the procedures for lots that do not comply with the QCL, as described above in subsections (g)(5) through (g)(8).

(10) Plant Reporting

Each manufacturer shall maintain for a minimum of two years the product data reports for each plant, production line and product type, and shall submit copies to the certifier at least monthly. The reports shall include a data sheet for each specific product with test and production information, and a quality control graph containing:

- (A) QCL;
- (B) excursion limit;
- (C) shipping QCL (if applicable);
- (D) results of quality control tests; and
- (E) retest values.

(h) *Recordkeeping.*

Manufacturers shall maintain complete records documenting the following:

- (1) small scale test results, including testing frequency;
- (2) production sequence;
- (3) changes in the resin percentage for any product type, from levels set by the quality control manual, by more than ten percent (calculated on the basis of resin solids and oven dry wood weight of the face and core furnish, adjusted proportionately);
- (4) increases in the formaldehyde/urea mole ratio of the resin;
- (5) changes in press time by more than 20 percent for any product from the levels set in the plant quality control manual;
- (6) testing of Quality Control Employees;
- (7) disposition of non-conforming products;
- (8) calibration of on-site primary or secondary test methods (if any); and
- (9) other records requested by the certifier under its discretion relating to section 93120.12, Appendix 3.

These records shall be made readily available to the certifier. Records shall be retained for a minimum of 2 years in electronic or hard copy form. Records shall also be provided to ARB upon request.

Appendix 3. Requirements for Third Party Certifiers of Composite Wood Products.

(a) *Purpose.*

The purpose of Appendix 3 of section 93120.12 is to specify requirements for ARB-approved third party certifiers for their certification of composite wood products with regard to the formaldehyde emission standards specified in section 93120.2(a), and when applicable, product types for manufacturers who are applying for re-approval to continue to use no-added formaldehyde based resins as specified in section 93120.3(c) or ULEF resins as specified in section 93120.3(d).

(b) *Overview of Third Party Certifier Requirements.*

(1) ARB-approved third party certifiers shall do the following:

- (A) Verify that manufacturers are complying with the quality assurance requirements specified in section 93120.12, Appendix 2.
- (B) Verify manufacturer small scale test results compared to primary or secondary method results.
- (C) Work with manufacturers to establish quality control, excursion, and, if applicable, shipping quality control limits for each product type and production line. In addition, certifiers will inform manufacturers of criteria that will be used to determine if product lots are consistently exceeding the applicable QCL, as specified in section 93120.12, Appendix 2, subsection (g)(3); and criteria the certifier will use to allow a reduction in testing frequency for PB and MDF, as specified in section 93120.12, Appendix 2, subsection (g)(4)(B).
- (D) Provide independent inspections and audits of manufacturers and records.
- (E) Provide manufacturers with their ARB-approved third party certifier number.
- (F) Use laboratories and primary or secondary methods for conducting testing that are certified by an accreditation body that is a signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement (ILAC, 2000). The formaldehyde test methods used by the laboratory shall appear in its scope of accreditation. Each laboratory must be re-certified annually. Each

laboratory must also participate in an interlaboratory testing comparison with laboratories using similar primary or secondary methods for the same composite wood products. Laboratories must participate in an interlaboratory comparison during the first year the laboratory is used by a third party certifier, followed by participation in interlaboratory comparisons every two years.

- (G) Maintain records in electronic or hard copy form for two years, for review by ARB upon request, on:
1. manufacturers that have been certified, with designated identification codes (if any);
 2. results of inspections and tests conducted for each manufacturer;
 3. list of certified laboratories and primary or secondary test methods utilized by the third party certifier, including the test conditions, conditioning time, test results, and the types of composite wood products used to establish equivalence of a secondary method;
 4. correlations between small scale test results and primary or secondary method results by manufacturer;
 5. manufacturers of PB and MDF that were allowed to reduce their testing frequency, as specified in section 93120.12, Appendix 2, subsection (g)(4)(B); and
 6. the ARB Executive Order approving the third party certifier.
- (H) On or before March 1 of each year, provide an annual report to ARB for the previous calendar year that includes:
1. manufacturers certified during the previous calendar year, including resins used by manufacturers, and the average and range in formaldehyde emissions by resin and product type;
 2. list of non-complying events by manufacturer as specified in section 93120.12, Appendix 2;
 3. certified laboratories and primary or secondary test methods utilized by the third party certifier; and
 4. results of interlaboratory testing comparisons for laboratories used by the third party certifier.

(c) *Initial Plant Qualification.*

Upon completion of a contract between a third party certifier and a manufacturer, a third party certifier shall conduct one or more inspections of each manufacturer's plant. The cost of such inspections shall be borne by the manufacturer. The purpose of the inspection shall be to determine that the procedures and processes of each plant conform, or can be made to conform, to the requirements of section 93120.12, Appendix 2. Initial plant qualification requirements include:

- (1) a written quality control manual approved by the third party certifier;
- (2) quality control facilities and personnel approved by the third party certifier;
- (3) passage of a primary or secondary method qualifying test(s);
- (4) routine small scale quality control test(s), approved by the third party certifier;
- (5) a procedure for selecting samples, approved by the third party certifier; and
- (6) correlation values between the routine small scale quality control test(s) and the primary or secondary method test(s) that are approved by the third party certifier.

(d) *Primary or Secondary Method Tests.*

Third party certifiers shall work with manufacturers to ensure that the requirements of section 93120.12, Appendix 2, subsection (f), are complied with.

(1) Sample Selection, Handling, and Shipping

Primary or secondary method samples shall be randomly chosen from a single lot that is ready for shipment. Neither the top nor bottom composite wood products of a bundle shall be selected. The composite wood products must be dead-stacked or air tight wrapped between the time of sample selection and the start of test conditioning. Samples shall be promptly labeled, signed by the third party certifier, bundled air tight, wrapped in polyethylene, protected by cover sheets, and promptly shipped to the primary or secondary method testing facility. Conditioning shall begin as soon as possible, but not in excess of 30 days after production. At the plant's option, a second sample set (a reserve set) may be selected, handled and shipped in the same manner as the original.

(2) Additional (Verifying) Primary or Secondary Method Tests

Additional primary or secondary method tests shall be conducted as soon as possible if the third party certifier determines that an additional primary or secondary method test is necessary to ensure compliance with the relevant standard.

(3) Witnessing of Primary or Secondary Method Tests

The third party certifier may, in its discretion, agree to witness primary or secondary method testing at a certified laboratory rather than performing the test at its laboratory.

(A) Conditioning

The third party certifier shall review the records of temperature, humidity, and ambient formaldehyde concentration in the conditioning area to verify that these conditions did not exceed the limits specified in the primary or secondary method during the conditioning period.

(B) Testing

The third party certifier or the primary or secondary method operator under the certifier's supervision shall take air samples and analyze them for formaldehyde according to the primary or secondary method. The results will be reported to the manufacturer and to the certifier.

The primary or secondary method operator or certifier shall have the option of testing a second set of air samples to confirm a questionable test value. If a second set of air samples is taken, it must be taken within the time parameters defined in the primary or secondary method.

If the second sample set of air specimens falls within a range of concentrations, established by the third party certifier, of the test values from the first sample set, the two values shall be averaged. If the test value from the second set of air samples varies more than the range of concentrations, established by the third party certifier, from the first, the primary or secondary method test shall be null and void.

(C) Identification

Upon completion of the test, the chamber used in the primary or secondary method test shall be opened and the certifier shall verify that the panels or samples inside are the proper test specimens.

(e) *Inspections by Third Party Certifier.*

(1) Purpose

After a manufacturer has been verified by an ARB-approved third party certifier to report their products as being certified with the certifier's ARB-assigned number, the certifier shall conduct periodic on-site inspections of the plant and production line where each certified product type is produced to ensure full compliance with the provisions of section 93120.12, Appendix 2, and the plant's quality control manual and practices. ARB or local air district personnel may also conduct on-site inspections at the manufacturer to ensure compliance with the standards in section 93120.2(a).

(2) Frequency

Inspections shall occur at least once per quarter.

(3) Inspection Procedures

The certifier shall be given full cooperation by the composite wood manufacturer in all aspects of the inspection including, but not limited to, the following:

- (A) reviewing formaldehyde emission quality control records;
- (B) reviewing production records for press times and urea-formaldehyde resin usage;
- (C) examining formaldehyde emission quality control procedures;
- (D) selection of sample panels for emission testing;
- (E) interviewing and testing of quality control employees; and
- (F) complete access to the Quality Control Manager and any quality control employee involved with formaldehyde certification. The certifier may be excluded from plant areas considered confidential, providing such exclusion does not prevent or hinder the certifier from performing the required duties.

(4) Sample Selection and Testing Procedures

The certifier may conduct a small scale test during his visit. One panel of a composite wood product to be certified shall be selected for a

single test. The result of this test shall be entered into the record of test values maintained by the manufacturer. If the addition of this test value to the record causes the tested lot to be a non-complying lot, the lot shall be isolated and handled following the procedures for non-complying lots in section 93120.12, Appendix 2.

(5) Report of Findings

Upon completion of the inspection, the certifier shall prepare findings in writing and review them with the Quality Control Manager or plant manager, if available. As soon as complete test data are available, the certifier shall provide a written report to the plant stating the test results and advising the plant of any deficiencies that must be corrected to maintain certification.

(f) *Re-Inspections.*

In the event that a manufacturer produces product lots that consistently exceed the applicable QCL, the certifier shall be notified promptly. The certifier may re-inspect or audit the plant at least once per month for a period of three months, before returning to the prior inspection frequency. The certifier may also require the manufacturer to demonstrate conformance to the requirements of initial plant qualification.

(g) *Confidentiality.*

All information and documentation supplied by the manufacturer to the certifier pursuant to section 93120.12, Appendix 3, shall be considered confidential and shall not be disclosed by the certifier except as may be required by ARB.

The certifier shall consider confidential any observations of equipment, process, techniques, or other matters known by the certifier to be considered proprietary by the manufacturer.

Note: Authority cited: Sections 39600, 39601, 39650, 39658, 39659, 39666, 41511, and 41712, Health and Safety Code. Reference: Sections 39650, 39658, 39659, 39665, 39666, 41511, and 41712, Health and Safety Code.