

1 Stephen Ure, Esq., (CSB# 188244)
2 **LAW OFFICES OF STEPHEN URE, PC**
3 1518 Sixth Avenue
4 San Diego, CA 92101
5 Telephone: 619-235-5400
6 Facsimile: 619-235-5404

FILED
CIVIL BUSINESS OFFICE 13
CENTRAL DIVISION

2010 JAN 29 P 2:43

SUPERIOR COURT
SAN DIEGO COUNTY, CA

Attorneys for Plaintiff, Evelyn Wimberley

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**
10 **UNLIMITED CIVIL JURISDICTION**

13 **EVELYN WIMBERLEY,**)

14 **Plaintiff,**)

15 **and**)

16 **ONTEL PRODUCTS, INC.;**)
17 **CVS/Pharmacy; CVS Caremark**)
18 **Corporation; and DOES**)
19 **1-150, inclusive**)

20 **Defendants.**)

CASE NO.: 37-2010-00084587-CU-MC-CTL

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

21 **NATURE OF THE ACTION**

22
23 1. This Complaint is a representative action brought by plaintiff Evelyn Wimberley,
24 in the public interest of the citizens of the State of California, to enforce the people's right to be
25 informed of the presence of lead, a toxic chemical found in Battery Operated LED Lights sold in
26 California.

27 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to
28 warn California citizens about their exposure to lead present in or on certain Battery Operated

1 LED Lights that defendants manufacture, distribute and/or offer for sale to consumers
2 throughout the State of California.

3 3. High levels of lead are commonly found in Battery Operated LED Lights that
4 defendants manufacture, distribute and/or offer for sale to consumers throughout the State of
5 California.

6 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
7 California Health & Safety Code § 25249.6 et seq. (Proposition 65), "No person in the course of
8 doing business shall knowingly and intentionally expose any individual to a chemical known to
9 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
10 warning to such individual..." (*Cal. Health & Safety Code § 25249.6.*)

11 5. On October 3, 2009, California identified and listed Lead as a chemical known to
12 cause birth defects and other reproductive harm. Lead became subject to the warning
13 requirements of Proposition 65 for developmental toxicity beginning on February 27, 1987 and
14 for cancer toxicity on October 1, 1992. (*27 CCR § 27002; Cal. Health & Safety Code § 25249.6.*)

15 6. Lead shall hereinafter be referred to as the "LISTED CHEMICAL."

16 7. Defendants manufacture, distribute and/or sell Battery Operated LED Lights
17 containing excessive levels of the LISTED CHEMICAL including, but not limited to, the Stick
18 "N" Click (#6 77448004007 5). All such Battery Operated LED Lights containing the LISTED
19 CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

20 8. Defendants' failures to warn consumers and/or other individuals in the State of
21 California about their exposure to the LISTED CHEMICAL in conjunction with defendant's
22 sale of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of
23 such conduct as well as civil penalties for each such violation.

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

1 26. The citizens of the State of California have expressly stated in the Safe Drinking
2 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.5, et seq.
3 (Proposition 65) that they must be informed “about exposures to chemicals that cause cancer,
4 birth defects and order reproductive harm.” (*Cal. Health & Safety Code § 25249.6.*)

5 27. Proposition 65 states, “No person in the course of doing business shall knowingly
6 and intentionally expose any individual to a chemical known to the state to cause cancer or
7 productive toxicity without first giving clear and reasonable warning to such individual...
8 (*Id.*)”

9 28. On October 3, 2009 a sixty-day notice violation, together with the requisite
10 certificate of merit, was provided to ONTEL, CVS/Pharmacy, CVS Caremark Inc., and various
11 public enforcement agencies stating that as a result of the DEFENDANTS’ sales of the
12 PRODUCTS, purchasers and users in the State of California were being exposed to the LISTED
13 CHEMICAL resulting from the reasonably foreseeable users of the PRODUCTS, without the
14 individual purchasers and users first having been provided with a “clear and reasonable warning”
15 regarding such toxic exposures.

16 29. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
17 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
18 DEFENDANTS’ manufacture, distribution and/or offering of the PRODUCTS for sale or use in
19 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
20 DEFENDANTS’ receipt of plaintiff’s sixty-day notice of violation. Plaintiff further alleges and
21 believes that such violations will continue to occur into the future.

22 30. After receipt of the claims asserted in the sixty-day notices of violation, the
23 appropriate public enforcement agencies have failed to commence and diligently prosecute a
24 cause of action against DEFENDANTS under Proposition 65.

25 31. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
26 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
27 limits.
28

1 32. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
2 distributed, and/or for sale or use by DEFENDANTS in California contained the LISTED
3 CHEMICAL.

4 33. The LISTED CHEMICAL was present in or on the PRODUCTS in such away as
5 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
6 during the reasonably foreseeable use of the PRODUCTS.

7 34. The normal and reasonably foreseeable use of he PRODUCTS has caused and
8 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure s defined
9 by 27 CCR§ 25602(b).

10 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
11 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
12 and/or ingestion.

13 36. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
14 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
15 accidental participation in the manufacture, distribution and/or offer for sale or use of
16 PRODUCTS to individuals in the State of California.

17 37. DEFENDANTS failed to provide a “clear and reasonable warning” to those
18 consumers and/or other individuals in the State of California who were or who could become
19 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
20 reasonably foreseeable use of the PRODUCTS.

21 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
22 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
23 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold
24 by DEFENDENTS without a “clear and reasonable warning,” have suffered, and continue to
25 suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

26 39. As a consequence of the above-described acts, DEFENDANTS are liable for a
27 maximum civil penal of \$2,500 per day for each violation pursuant to California Health& Safety
28 Code § 25249.7(b).

