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SAN DIEGO COUNTY, CA

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN DIEGO

10 UNLIMITED CIVIL JURISDICTION

11  
12  
13 EVELYN WIMBERLEY, )  
14 Plaintiff, )  
15 and )  
16 HONIG'S WHISTLE STOP, INC. )  
17 )  
18 DOES 1-25 INCLUSIVE )  
19 Defendants. )  
20 \_\_\_\_\_ )

CASE NO.: 37-2015-00008107-CU-NP-NC  
COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF  
(Cal. Health & Safety Code § 25249.6 et seq.)

21 NATURE OF THE ACTION

22 1. This Complaint is a representative action brought by plaintiff Evelyn Wimberley,  
23 in the public interest of the citizens of the State of California, to enforce the people's right to be  
24 informed of the presence of lead, a toxic chemical found in Honig's Whistle Stop, Inc.'s metal  
25 whistles, (hereafter "Whistles"), sold in California.

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

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

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

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

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

14 6. Lead and lead compounds shall hereinafter be referred to as the "LISTED  
15 CHEMICALS."

16 7. Defendants manufacture, distribute and/or sell Whistles A4-Honig Metal Finger  
17 Whistle containing excessive levels of the LISTED CHEMICALS. All such Whistles containing  
18 the LISTED CHEMICALS shall hereinafter be referred to as the "PRODUCTS."

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

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

27 10. Plaintiff also seeks civil penalties against defendants for their violations of  
28 Proposition 65, as provides for by California Health & Safety Code § 25249.7(b).

1 **PARTIES**

2 11. Plaintiff Evelyn Wimberley is a citizen of the City of Redondo Beach, County of  
3 Los Angeles, in the State of California, who is dedicated to protecting the health of California  
4 citizens through the elimination o reduction of toxic exposures from consumer products, and  
5 brings this action in the public interest pursuant to California Health & Safety Code § 25249.7.

6 12. Defendant Honig’s Whistle Stop, Inc. (“Honig”) is a person doing business within  
7 the meaning of California Health & Safety Code § 25249.11.

8 13. Defendant DOES 1-25 are persons doing business within the meaning of  
9 California Health & Safety Code § 25249.11

10 14. Defendant manufactures, distributes, and/or offers the PRODUCTS for sales or use  
11 in the State of California or implies by its conduct that it manufactures, distributes and/or offers  
12 the PRODUCTS for sale or use in the State of California.

13 **VENUE AND JURISDICTION**

14 15. Venue is proper in the San Diego County Superior Court, pursuant to Code of  
15 Civil Procedure § § 394, 495, 395.5, because this Court is a court of competent jurisdiction,  
16 because one or more instances of wrongful conduct occurred, and continues to occur, in the  
17 County of San Diego and/or because DEFENDANTS conducted, and continue to conduct,  
18 business in this County with respect to the PRODUCTS.

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

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

1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65 – Against Defendant)**

3 18. Plaintiff realleges and incorporates by reference, as if full reference, as if full set  
4 forth herein, Paragraphs 1 through 18, inclusive.

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

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

13 21. On June 23, 2014 a sixty-day notice violation, together with the requisite  
14 certificate of merit, was provided to DEFENDANTS, and various public enforcement agencies  
15 stating that as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and users in  
16 the State of California were being exposed to the LISTED CHEMICAL resulting from the  
17 reasonably foreseeable users of the PRODUCTS, without the individual purchasers and users  
18 first having been provided with a “clear and reasonable warning” regarding such toxic exposures.

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

25 23. After receipt of the claims asserted in the sixty-day notices of violation, the  
26 appropriate public enforcement agencies have failed to commence and diligently prosecute a  
27 cause of action against DEFENDANTS under Proposition 65.  
28

1           24. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
2 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state  
3 limits.

4           25. DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
5 distributed, and/or for sale or use by DEFENDANTS in California contained the LISTED  
6 CHEMICAL.

7           26. The LISTED CHEMICAL was present in or on the PRODUCTS in such away as  
8 to expose individuals to the LISTED CHEMICAL through dermal contact, hand to mouth  
9 contact, and/or ingestion etc. during the reasonably foreseeable use of the PRODUCTS.

10           27. The normal and reasonably foreseeable use of he PRODUCTS has caused and  
11 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined  
12 by 27 CCR§ 25602(b).

13           28. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
14 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact,  
15 hand to mouth contact and/or ingestion.

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

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

24           31. Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
25 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal  
26 contact, hand to mouth contact, and/or ingestion resulting from the reasonably foreseeable use of  
27 the PRODUCTS, sold by DEFENDENTS without a “clear and reasonable warning,” have  
28

1 suffered, and continue to suffer, irreparable harm, for which harm they have no plain, speedy or  
2 adequate remedy at law.

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

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

9 34. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth  
10 hereinafter.

11 **PRAYER FOR RELIEF**

12 Wherefore, plaintiff prays for judgment against DEFENDANT as follows:

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

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

21 3. That the Court grant plaintiff his reasonable attorneys’ fees and cost of suit; and

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

23 Respectfully Submitted,

24 Dated: November 19, 2014

Law Offices of Stephen Ure, PC.

25 By: 

26 Stephen Ure, Esq.

Attorney for Plaintiff

27 EVELYN WIMBERLEY