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F I L E D
Clerk of the Superior Court
JUN 23 2015

By: L. URIARTE, Deputy

FILED JUN 23 2015

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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 **SUNJOY INDUSTRIES GROUP LTD;**)
17 **THE HOME DEPOT INC; AND**)
18 **DOES 1 -25 INCLUSIVE**)
19 **Defendant.**)
20 _____)

CASE NO.: 37-2015-00021026-CU-NP-CTL
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 dangers from exposures to carbon monoxide and carbon black, (hereafter
25 "Listed Chemicals").

26 2. By this Complaint, plaintiff seeks to remedy DEFENDANTS continuing failures to
27 warn California citizens about their exposure to the Listed Chemicals produced as a result of
28 combustion during the normal and intended use of the Hampton Bay Collette Fire Pit Model #

1 LHFT629PSTHA (UPC846822007588), (hereafter “Product(s)”), that the DEFENDANTS
2 manufactured, distributed and sold, in the State of California and Products that DEFENDANTS
3 continue to manufacture, distribute and offer for sale in the State of California.

4 3. High levels of Listed Chemicals are common combustion byproducts produced
5 during the normal and intended use of the PRODUCT that DEFENDANTS manufacture,
6 distribute and/or offer for sale to consumers throughout the State of California.

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

12 5. California identified and listed Carbon Monoxide as a chemical known to cause
13 birth defects and other reproductive harm. Carbon monoxide became subject to the warning
14 requirements of Proposition 65 for developmental toxicity beginning on July 1, 1989 . (*27 CCR §*
15 *27002; Cal. Health & Safety Code § 25249.6.*)

16 6. California identified and listed Carbon Black as a chemical known to cause birth
17 cancer. Carbon Black became subject to the warning requirements of Proposition 65 for
18 developmental toxicity beginning on February 21, 2003. (*27 CCR § 27002; Cal. Health & Safety*
19 *Code § 25249.6.*)

20 7.

21 8. DEFENDANT’S past and continuing failure to warn consumers and/or other
22 individuals in the State of California about their exposure to the LISTED CHEMICAL in
23 conjunction with DEFENDANT’S sale of the PRODUCTS is a violation of Proposition 65 and
24 subjects DEFENDANTS to enjoinder of such conduct as well as civil penalties for each such
25 violation.

26 9. For DEFENDANT’S violations of Proposition 65, Plaintiff seeks preliminary
27 injunctive and permanent injunctive relief to compel DEFENDANTS to provide purchasers or
28

1 users of the PRODUCTS with the required warning regarding the health hazards of the LISTED
2 CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

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

5 **PARTIES**

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

10 12. Defendant Sunjoy Industries Group Limited ("Sunjoy" or "DEFENDANTS") is a
11 person doing business within the meaning of California Health & Safety Code § 25249.11.

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

15 14. Defendant The Home Depot ("Home Depot" or "DEFENDANTS") is a person
16 doing business within the meaning of California Health & Safety Code § 25249.11.

17 15. Defendant Home Depot manufactures, distributes, and/or offers the PRODUCTS
18 for sales or use in the State of California or implies by its conduct that it manufactures,
19 distributes and/or offers the PRODUCTS for sale or use in the State of California.

20 16. Sunjoy and Home Depot shall, where appropriate, be collectively referred to
21 hereinafter as "DEFENDANTS."

22 **VENUE AND JURISDICTION**

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

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

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

11 **FIRST CAUSE OF ACTION**

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

13 20. Plaintiff realleges and incorporates by reference, as if full reference, as if full set
14 forth herein, Paragraphs 1 through 19, inclusive.

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

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

22 23. On or about October 13, 2014 , a sixty-day notice violation, together with the
23 requisite certificate of merit, was provided to DEFENDANTS and various public enforcement
24 agencies stating that as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and
25 users in the State of California were being exposed to the LISTED CHEMICALS resulting from
26 the reasonably foreseeable use of the PRODUCTS, without the individual purchasers and users
27 first having been provided with a “clear and reasonable warning” regarding such toxic exposures.
28

1 24. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
2 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
3 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale or use in
4 violation of California Health & Safety Code § 25249.6 has intentionally continued to occur
5 beyond DEFENDANTS' receipt of Plaintiff's sixty-day notice of violation. Plaintiff further
6 alleges and believes that such violations will continue to occur into the future.

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

10 26. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
11 California by DEFENDANTS expose users to the LISTED CHEMICALS above the allowable
12 state limits.

13 27. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
14 distributed, and/or for sale or use in California would expose users to the LISTED CHEMICALS.

15 28. The PRODUCTS, through normal use produces the LISTED CHEMICALS in
16 such a way as to expose individuals to the LISTED CHEMICALS through inhalation, dermal
17 contact and/or ingestion during the reasonably foreseeable use of the PRODUCTS.

18 29. The normal and reasonably foreseeable use of the PRODUCTS has caused and
19 continues to cause consumer exposures to the LISTED CHEMICALS, as such exposure is
20 defined by 27 CCR§ 25602(b).

21 30. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
22 the PRODUCTS would expose individuals to the LISTED CHEMICALS.

23 31. DEFENDANTS intended that such exposures to the LISTED CHEMICALS from
24 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
25 accidental participation in the manufacture, distribution and/or offer for sale or use of
26 PRODUCTS to individuals in the State of California.

27 32. DEFENDANTS failed and continue to fail to provide a "clear and reasonable
28 warning" to those consumers and/or other individuals in the State of California who were or who

1 could become exposed to the LISTED CHEMICALS during the reasonably foreseeable use of
2 the PRODUCTS.

3 33. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
4 directly by California voters, individuals exposed to the LISTED CHEMICALS resulting from
5 the reasonably foreseeable use of the PRODUCTS, sold by DEFENDENT without a “clear and
6 reasonable warning,” have suffered, and continue to suffer, irreparable harm, for which harm
7 they have no plain, speedy or adequate remedy at law.

8 34. As a consequence of the above-described acts, each DEFENDANTS is liable for a
9 maximum civil penal of \$2,500 per day for each violation pursuant to California Health& Safety
10 Code § 25249.7(b).

11 35. As a consequence of the above-described acts, California Health & Safety Code §
12 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
13 DEFENDANTS.

14 36. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
15 hereinafter.

16 **PRAYER FOR RELIEF**

17 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

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

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

27 4. That the Court grant such other and further relief as may be just and proper.
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Dated: 6-23-15

Respectfully Submitted,
Law Offices of Stephen Ure, PC.

By: 
Stephen Ure, Esq.
Attorney for Plaintiff