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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
UNLIMITED CIVIL JURISDICTION

EVELYN WIMBERLEY,)	CASE NO.: 37-2016-00011411-CU-NP-NC
)	
Plaintiff,)	COMPLAINT FOR CIVIL PENALTIES
)	AND INJUNCTIVE RELIEF
and)	
)	<i>(Cal. Health & Safety Code § 25249.6 et seq.)</i>
)	
THE HOME DEPOT INC., AND)	
DOES 1 -25 INCLUSIVE)	
)	
Defendant.)	

NATURE OF THE ACTION

1. This Complaint is a representative action brought by plaintiff Evelyn Wimberley, in the public interest of the citizens of the State of California, to enforce the people's right to be informed of the dangers from exposures to carbon monoxide , (hereafter "Listed Chemicals").

2. By this Complaint, plaintiff seeks to remedy DEFENDANTS continuing failures to warn California citizens about their exposure to the Listed Chemicals produced as a result of combustion during the normal and intended use of the Fleur di Lis 37" Clay Chiminea with Iron Stand (UPC816404010527), (hereafter "Product(s)"), that the DEFENDANTS manufactured,

distributed and sold, in the State of California and Products that DEFENDANTS continue to manufacture, distribute and offer for sale in the State of California.

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

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

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

6. California identified and listed Soot as a chemical known to cause birth cancer. Soot became subject to the warning requirements of Proposition 65 for developmental toxicity beginning on February 27, 1987. (*27 CCR § 27002; Cal. Health & Safety Code § 25249.6.*)

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

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

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

1 **PARTIES**

2 10. 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 and 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 11. Defendant The Home Depot ("Home Depot" or "DEFENDANTS") is a person
7 doing business within the meaning of California Health & Safety Code § 25249.11.

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

11 **VENUE AND JURISDICTION**

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

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

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

1 **FIRST CAUSE OF ACTION**

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

3 16. Plaintiff realleges and incorporates by reference, as if full reference, as if full set
4 forth herein, Paragraphs 1 through 19, inclusive.

5 17. 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 18. 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 (*Id.*)”

12 19. On or about June 30, 2015 , a sixty-day notice violation, together with the requisite
13 certificate of merit, was provided to DEFENDANTS and various public enforcement agencies
14 stating that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in
15 the State of California were being exposed to the LISTED CHEMICALS resulting from the
16 reasonably foreseeable use of the PRODUCTS, without the individual purchasers and users first
17 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

18 20. On or about September 11, 2015 the sixty-day notice violation was amended to
19 withdraw carbon black as a violating chemical.

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

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

1 23. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
2 California by DEFENDANTS expose users to the LISTED CHEMICALS above the allowable
3 state limits.

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

6 25. The PRODUCTS, through normal use produces the LISTED CHEMICALS in
7 such a way as to expose individuals to the LISTED CHEMICALS through inhalation, dermal
8 contact and/or ingestion during the reasonably foreseeable use of the PRODUCTS.

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

12 27. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
13 the PRODUCTS would expose individuals to the LISTED CHEMICALS.

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

18 29. DEFENDANTS failed and continue to fail to provide a “clear and reasonable
19 warning” to those consumers and/or other individuals in the State of California who were or who
20 could become exposed to the LISTED CHEMICALS during the reasonably foreseeable use of
21 the PRODUCTS.

22 30. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
23 directly by California voters, individuals exposed to the LISTED CHEMICALS resulting from
24 the reasonably foreseeable use of the PRODUCTS, sold by DEFENDENT without a “clear and
25 reasonable warning,” have suffered, and continue to suffer, irreparable harm, for which harm
26 they have no plain, speedy or adequate remedy at law.
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28

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

4 32. As a consequence of the above-described acts, California Health & Safety Code §
5 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
6 DEFENDANTS.

7 33. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
8 hereinafter.

9 **PRAYER FOR RELIEF**

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

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

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

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

20 4. That the Court grant such other and further relief as may be just and proper.
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22
23

24
25 Dated: 4/8/16

Respectfully Submitted,

Law Offices of Stephen Ure, PC.

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27 By: 
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Stephen Ure, Esq.

Attorney for Plaintiff