

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

David R. Bush, State Bar No. 154511
Jennifer Henry, State Bar No. 208221
Bush & Henry, Attorneys at Law, PC
3270 Mendocino Ave. #2E
Santa Rosa, CA 95403
Telephone: (707) 541-6255
Facsimile: (707) 676-4301

Attorneys for Plaintiff
Michael DiPirro

**ENDORSED
FILED
ALAMEDA COUNTY**

JUN 09 2016

CLERK OF THE SUPERIOR COURT
By Xian Yit Bowie

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

MICHAEL DIPIRRO,

Plaintiff,

v.

GOURMET INNOVATIONS INC., dba BEST
WHIP INC.; and DOES 1-150, inclusive,

Defendants.

Case No. RG 16818835

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff MICHAEL
3 DIPIRRO in the public interest of the citizens of the State of California to enforce the People’s
4 right to be informed of the presence of Nitrous Oxide (“N2O”), a toxic chemical found in nitrous
5 oxide chargers sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
7 warn California citizens about the risk of exposure to N2O present in the nitrous oxide chargers
8 manufactured, distributed, and offered for sale or use to consumers throughout the state of
9 California.

10 3. High levels of N2O are commonly found in, and consumed or ingested through
11 the foreseeable use of, the nitrous oxide chargers that defendants manufacture, distribute, and
12 offer for sale to consumers throughout the state of California.

13 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
14 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to
16 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual” Health & Safety Code § 25249.6.

18 5. Pursuant to Proposition 65, on August 1, 2008, California identified and listed
19 N2O as a chemical known to cause birth defects or other reproductive harm. N2O became
20 subject to the “clear and reasonable warning” requirements of the act one year later on August
21 1, 2009. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
22 N2O is referred to hereinafter as the “LISTED CHEMICAL.”

23 6. Defendants manufacture, distribute, and sell nitrous oxide chargers, including, but
24 not limited to, the *Barista Professional Series Cream Chargers, Profi-Serie, 8g 24-Pack*, that
25 contain N2O, the consumption, ingestion or other foreseeable use of which require a warning
26 under Proposition 65. All such nitrous oxide chargers containing N2O are referred to collectively
27 hereinafter as “PRODUCTS.”
28

1 and manufacture one or more of the PRODUCTS offered for sale or use in the state of
2 California.

3 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
4 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

5 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
6 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
7 in the state of California.

8 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
9 the course of doing business within the meaning of Health and Safety Code section 25249.11.

10 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
11 state of California.

12 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are
13 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
14 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
15 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
16 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

17 20. BEST WHIP, MANUFACTURER DEFENDANTS, DISTRIBUTOR
18 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
19 referred to as “DEFENDANTS.”

20 **VENUE AND JURISDICTION**

21 21. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
22 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
23 because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda
24 County, and/or because DEFENDANTS conducted, and continue to conduct, business in this
25 county with respect to the PRODUCTS.

26 22. The California Superior Court has jurisdiction over this action pursuant to
27 California Constitution Article VI, section 10, which grants the Superior Court “original
28

1 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
2 which this action is brought does not specify any other basis of subject matter jurisdiction.

3 23. The California Superior Court has jurisdiction over DEFENDANTS based on
4 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
5 association that is a citizen of the state of California, has sufficient minimum contacts in the
6 state of California, and/or otherwise purposefully avails itself of the California market.
7 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
8 California courts consistent with traditional notions of fair play and substantial justice.

9 **FIRST CAUSE OF ACTION**

10 **(Violation of Proposition 65 - Against All Defendants)**

11 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 23, inclusive.

13 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
14 Enforcement Act of 1986, the People of California expressly declare their right “[t]o be
15 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
16 harm.”

17 26. Proposition 65 states, “[n]o person in the course of doing business shall
18 knowingly and intentionally expose any individual to a chemical known to the state to cause
19 cancer or reproductive toxicity without first giving clear and reasonable warning to such
20 individual” (Health & Safety Code § 25249.6.)

21 27. On October 1, 2015, plaintiff’s sixty-day notice of violation, together with the
22 requisite certificate of merit, was provided to BEST WHIP, and certain public enforcement
23 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing the
24 LISTED CHEMICAL, purchasers and users in the state of California were being exposed to the
25 LISTED CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS,
26 without the individual purchasers and users first having been provided with a “clear and
27 reasonable warning” regarding such toxic exposures, as required by Proposition 65.
28

1 28. DEFENDANTS have engaged in the manufacture, distribution, and offering of
2 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
3 such violations have continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day
4 notice of violation. As such, DEFENDANTS' violations are ongoing and continuous in nature,
5 and will continue to occur in the future.

6 29. After receiving the claims asserted in the sixty-day notice of violation, the
7 appropriate public enforcement agencies have failed to commence and diligently prosecute a
8 cause of action against DEFENDANTS under Proposition 65.

9 30. The PRODUCTS manufactured, distributed, and offered for sale or use in
10 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the
11 allowable state limits, such that they require a "clear and reasonable" warning under Proposition
12 65.

13 31. DEFENDANTS knew or should have known that the PRODUCTS they
14 manufacture, distribute, and offer for sale or use in California contain the LISTED
15 CHEMICAL.

16 32. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
17 expose individuals through dermal contact, inhalation and/or ingestion during reasonably
18 foreseeable use.

19 33. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
20 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
21 defined by California Code of Regulations title 27, section 25602(b).

22 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
23 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact,
24 inhalation and/or ingestion.

25 35. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
26 the reasonably foreseeable uses of the PRODUCTS would occur by their deliberate, non-

27
28

1 accidental participation in the manufacture, distribution, and offering of the PRODUCTS for
2 sale or use to individuals in the state of California.

3 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
4 consumers and other individuals in the state of California who were or who would become
5 exposed to the LISTED CHEMICAL through dermal contact, inhalation and/or ingestion during
6 the reasonably foreseeable uses of the PRODUCTS.

7 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
8 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
9 contact, inhalation and/or ingestion resulting from the reasonably foreseeable use of the
10 PRODUCTS sold by DEFENDANTS without a “clear and reasonable warning”, have suffered,
11 and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate
12 remedy at law.

13 38. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
14 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
15 for each violation.

16 39. As a consequence of the above-described acts, Health and Safety Code
17 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
18 DEFENDANTS.

19 **PRAYER FOR RELIEF**

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

21 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
22 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

23 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
24 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
25 offering the PRODUCTS for sale or use in California without first providing a “clear and
26 reasonable warning” as defined by California Code of Regulations title 27, section 25601 *et*
27 *seq.*, as to the harms associated with exposures the LISTED CHEMICAL;

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: June 8, 2016

Respectfully Submitted,
BUSH & HENRY

By: 

Jennifer Henry
Attorneys for Plaintiff
MICHAEL DIPIRRO