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SAN DIEGO COUNTY, CA

1 Stephen Ure, Esq., (CSB# 188244)  
2 11622 El Camino Real, Ste. 100  
3 San Diego, CA 92130  
4 Telephone: 619-235-540

Attorneys for Plaintiff, Evelyn Wimberley

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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 THE HOME DEPOT, INC., )  
17 ESCOGO, LLC. AND )  
18 DOES 1-25 INCLUSIVE )  
19 DEFENDANTS. )  
20 )

CASE NO. **2016-00038137-CU-NP-NC**  
COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF  
*(Cal. Health & Safety Code § 25249.6 et seq.)*

21  
22 NATURE OF THE ACTION

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 dangers from exposures to Carbon Monoxide and Soot (hereafter "Listed  
26 Chemicals"), toxic chemicals found in Escogo LLC's "Smarter Starter Fluid" sold in California.

27 2. By this Complaint, plaintiff seeks to remedy DEFENDANTS' continuing failures  
28 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 Smarter Starter Fluid (UPC

1 860849000001), (hereafter “PRODUCTS(S)”), that the DEFENDANTS manufactured,  
2 distributed and sold, in the State of California and PRODUCTS that DEFENDANTS continue to  
3 manufacture, distribute and offer for sale in the State of California.

4 3. High levels of the 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 Soot as a chemical known to cause birth defects and  
17 cancer. Soot became subject to the warning requirements of Proposition 65 for developmental  
18 toxicity beginning on February 27, 1987. (*27 CCR Sec. 27002; Cal. Health & Safety Code Sec.*  
19 *25249.6*)

20 7. DEFENDANTS’ past and continuing failures to warn consumers and/or other  
21 individuals in the State of California about their exposure to the LISTED CHEMICALS in  
22 conjunction with defendant’s sale of the PRODUCTS is a violation of Proposition 65 and  
23 subjects DEFENDANTS to enjoinder of such conduct as well as civil penalties for each such  
24 violation.

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

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

3 **PARTIES**

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

8 11. Defendant The Home Depot Inc. (“Home Depot” or “DEFENDANTS”) is a  
9 person doing business within the meaning of California Health & Safety Code § 25249.11.

10 12. Defendant Escogo, LLC. (“ESCOGO” or “DEFENDANTS”) is a person doing  
11 business within the meaning of California Health & Safety Code § 25249.11

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

15 **VENUE AND JURISDICTION**

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

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

25 16. The California Superior Court has jurisdiction over DEFENDANTS based on  
26 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or  
27 association that either are citizens of the State of California, have sufficient minimum contacts in  
28 the State of California, or otherwise purposefully avail themselves of the California market.

1 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California  
2 courts consistent with traditional notions of fair play and substantial justice.

3 **FIRST CAUSE OF ACTION**

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

5 17. Plaintiff realleges and incorporates by reference, as if full reference, as if fully set  
6 forth herein, Paragraphs 1 through 16, inclusive.

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

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

15 20. On March 30, 2016 a sixty-day notice violation, together with the requisite  
16 certificate of merit, was provided to DEFENDANTS, and various public enforcement agencies  
17 stating that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in  
18 the State of California were being exposed to the LISTED CHEMICAL resulting from the  
19 reasonably foreseeable users of the PRODUCTS, without the individual purchasers and users  
20 first having been provided with a “clear and reasonable warning” regarding such toxic exposures.

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

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

4           23. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
5 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state  
6 limits.

7           24. DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
8 distributed, and/or for sale or use by DEFENDANTS in California contained the LISTED  
9 CHEMICAL.

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

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

16           27. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
17 the PRODUCTS would expose individuals to the LISTED CHEMICAL.

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

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

25           30. Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
26 directly by California voters, individuals exposed to the LISTED CHEMICAL resulting from the  
27 reasonably foreseeable use of the PRODUCTS, sold by DEFENDENTS without a “clear and  
28

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

3 31. 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 32. 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 33. 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: October 10, 2016

Law Offices of Stephen Ure, PC.

25  
26 By: 

Stephen Ure, Esq.

Attorney for Plaintiff

EVELYN WIMBERLEY