

FILED
NORTH COUNTY DIVISION
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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**

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13 **EVELYN WIMBERLEY,**)
14 **Plaintiff,**)
15 **and**)
16 **ROYAL OAK ENTERPRISES, LLC**)
17 **WINCO FOODS, LLC,**)
18 **SMART & FINAL,**)
19 **AMERIFOODS TRADING CO.,**)
20 **THE HOME DEPOT, INC,**)
21 **AND DOES 1-25 INCLUSIVE**)
DEFENDANTS.)

CASE NO.: 37-2017-00004680-CU-NP-NC
COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF
(Cal. Health & Safety Code § 25249.6 et seq.)

22 **NATURE OF THE ACTION**

23
24 1. This Complaint is a representative action brought by plaintiff Evelyn Wimberley,
25 in the public interest of the citizens of the State of California, to enforce the people's right to be
26 informed of the dangers from exposures to Carbon Monoxide and Soot (hereafter "Listed
27 Chemicals"), toxic chemicals when using Embers Fast Lighting Charcoal Starter, Charcoal
28 Lighter Fluid, First Street Charcoal Lighter Fluid, and other Lighter Fluids manufactured by
Royal Oak Enterprises, LLC sold in California.

1 2. By this Complaint, plaintiff seeks to remedy DEFENDANTS` continuing failures
2 to warn California citizens about their exposure to the Listed Chemicals produced as a result of
3 combustion during the normal and intended use of the Embers Fast Lighting Charcoal Starter
4 (UPC 016800355004), Charcoal Lighter Fluid (UPC 070552101005) First Street Charcoal
5 Lighter Fluid (UPC 041512081460) (hereafter "PRODUCTS(S)"), that the DEFENDANTS
6 manufactured, distributed and sold, in the State of California and PRODUCTS that
7 DEFENDANTS continue to manufacture, distribute and offer for sale in the State of California.

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

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

16 5. California identified and listed Carbon Monoxide as a chemical known to cause
17 birth defects and other reproductive harm. Carbon Monoxide became subject to the warning
18 requirements of Proposition 65 for developmental toxicity beginning on July 1, 1989 (*27 CCR §*
19 *27002; Cal. Health & Safety Code § 25249.6.*)

20 6. California identified and listed Soot as a chemical known to cause birth defects and
21 cancer. Soot became subject to the warning requirements of Proposition 65 for developmental
22 toxicity beginning on February 27, 1987. (*27 CCR Sec. 27002; Cal. Health & Safety Code Sec.*
23 *25249.6*)

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

1 County of San Diego and/or because DEFENDANTS conducted, and continue to conduct,
2 business in this County with respect to the PRODUCTS.

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

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

13 **FIRST CAUSE OF ACTION**

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

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

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

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

25 23. On April 11, 2016 a sixty-day notice violation, together with the requisite
26 certificate of merit, was provided to DEFENDANTS, and various public enforcement agencies
27 stating that as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and users in
28 the State of California were being exposed to the LISTED CHEMICAL resulting from the

1 reasonably foreseeable users of the PRODUCTS, without the individual purchasers and users
2 first having been provided with a “clear and reasonable warning” regarding such toxic exposures.

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

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

12 26. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
13 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
14 limits.

15 27. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
16 distributed, and/or for sale or use by DEFENDANTS in California contained the LISTED
17 CHEMICAL.

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

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

24 30. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
25 the PRODUCTS would expose individuals to the LISTED CHEMICAL..

26 31. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
27 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
28

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

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

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

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

14 35. As a consequence of the above-described acts, California Health & Safety Code §
15 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
16 DEFENDANTS.

17 36. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
18 hereinafter.

19 **PRAYER FOR RELIEF**

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

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

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

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

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4 Dated: February 7, 2017

Respectfully Submitted,

Law Offices of Stephen Ure, PC.

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6 By: 

Stephen Ure, Esq.

Attorney for Plaintiff

EVELYN WIMBERLEY