

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

5 *Attorneys for Plaintiff, Evelyn Wimberley*

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SAN DIEGO COUNTY, CA

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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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12
13 **EVELYN WIMBERLEY,**)

14 **Plaintiff,**)

15 **and**)

16 **SMART & FINAL, INC.**)
17 **THE KROGER COMPANY,**)
18 **SALCO INC.,**)
19 **TWO TREES PRODUCTS**)
20 **AND DOES 1-25 INCLUSIVE**)

21 **DEFENDANTS.**)

CASE NO.: 37-2017-00004684-CU-NP-NC

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

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23 **NATURE OF THE ACTION**

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 Best of the West Mesquite Charcoal sold in California.

28 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

1 combustion during the normal and intended use of the Best of the West Mesquite Charcoal
2 (UPC's 085394100406 and 085394072574), (hereafter "PRODUCTS(S)"), that the
3 DEFENDANTS manufactured, distributed and sold, in the State of California and PRODUCTS
4 that DEFENDANTS continue to manufacture, distribute and offer for sale in the State of
5 California.

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

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

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

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

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

27 8. For DEFENDANTS' violations of Proposition 65, plaintiff seeks preliminary
28 injunctive and permanent injunctive relief to compel DEFENDANTS to provide purchasers or

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 9. 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 10. 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,
9 and brings this action in the public interest pursuant to California Health & Safety Code §
10 25249.7.

11 11. Defendant Smart & Final, Inc. (“Smart & Final” or “DEFENDANTS”) is a person
12 doing business within the meaning of California Health & Safety Code § 25249.11.

13 12. Defendant The Kroger Company (“Kroger” or “DEFENDANTS”) is a person
14 doing business within the meaning of California Health & Safety Code § 25249.11.

15 13. Defendant Salco Inc. (“Salco” or “DEFENDANTS”) is a person doing business
16 within the meaning of California Health & Safety Code § 25249.11.

17 14. Defendant Two Trees Products (“Two Trees” or “DEFENDANTS”) is a person
18 doing business within the meaning of California Health & Safety Code § 25249.11.

19 15. DEFENDANTS manufacture, distribute, and/or offers the PRODUCTS for sale or
20 use in the State of California or implies by its conduct that it manufactures, distributes and/or
21 offers the PRODUCTS for sale or use in the State of California.

22 **VENUE AND JURISDICTION**

23 16. 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.
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1 17. 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 18. 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 19. Plaintiff realleges and incorporates by reference, as if full reference, as if fully set
14 forth herein, Paragraphs 1 through 16, inclusive.

15 20. 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 21. 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...
22 (*Id.*)”

23 22. On April 22, 2016 a sixty-day notice violation, together with the requisite
24 certificate of merit, was provided to DEFENDANTS, and various public enforcement agencies
25 stating that as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and users in
26 the State of California were being exposed to the LISTED CHEMICAL resulting from the
27 reasonably foreseeable users of the PRODUCTS, without the individual purchasers and users
28 first having been provided with a “clear and reasonable warning” regarding such toxic exposures.

1 23. 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 continued to occur beyond
5 DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and
6 believes that such violations will continue to occur into the future.

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

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

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

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

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

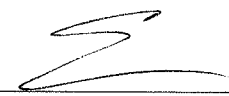
22 29. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
23 the PRODUCTS would expose individuals to the LISTED CHEMICAL..

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

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Dated: January 30, 2017

Respectfully Submitted,
Law Offices of Stephen Ure, PC.

By: 

Stephen Ure, Esq.
Attorney for Plaintiff
EVELYN WIMBERLEY