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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

ENDORSED  
FILED  
Superior Court of California  
County of San Francisco

NOV 17 2016

CLERK OF THE COURT  
BY: KAENE APOLONIO  
Deputy Clerk

BY FAX

ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

v.

FRONTGATE MARKETING INC.,

Defendants.

Case No. **GGC-16-555419**

COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES

OTHER

(Health & Safety Code §25249.5 et seq.)

1 Plaintiff, Ecological Rights Foundation, in the public interest, based on information and belief, and  
2 knowledge and investigation of counsel alleges as follows:

### 3 INTRODUCTION

4 1. This Complaint seeks civil penalties and an injunction against Frontgate Marketing, Inc.  
5 (“Frontgate” OR “Defendant”) to remedy Defendant’s continuing failure to warn individuals in  
6 California about exposures to carbon monoxide, a chemical known to the State of California to cause  
7 reproductive toxicity. Such exposures have occurred and continue to occur, through the use of wood-  
8 burning outdoor heating products, such as fire pits, fire rings, fire tables and chimeneas that  
9 Defendant manufactures, markets, distributes and/or sells in California (“Products”). These Products  
10 are intended to be used with wood fuel and are primarily used for heating, ambience, and cooking.  
11 The combustion of wood causes carbon monoxide to be released into the air. People using wood-  
12 burning outdoor heating products, and those standing near the Products when wood fuel is burning  
13 in or on them, inhale the released carbon monoxide.

14 2. Under California’s Proposition 65, California Health & Safety Code § 25249.5, *et seq.*, it is  
15 unlawful for businesses to knowingly and intentionally expose individuals in California to chemicals  
16 known to the State to cause cancer, birth defects, or other reproductive harm without providing clear  
17 and reasonable warnings to individuals prior to their exposure. Defendant introduces wood-burning  
18 outdoor heating products into the California marketplace, exposing users of the Products, including  
19 pregnant women, to carbon monoxide. Despite the fact that Defendant exposes pregnant women and  
20 other consumers and individuals to carbon monoxide, Defendant provides no warnings about the  
21 reproductive hazards associated with such exposures. Defendant’s conduct thus violates the warning  
22 provision of Proposition 65. Health & Safety Code § 25249.6.

23 3. Plaintiff seeks injunctive relief pursuant to Health & Safety Code Section 25249.7 to compel  
24 Defendant to bring its business practices into compliance with Proposition 65 by providing a clear  
25 and reasonable warning to each individual who has been and who in the future may be exposed to  
26 carbon monoxide in the ways set forth above. Plaintiff seeks an order that Defendant identify and  
27 locate each individual person to whom the Defendant conveyed wood-burning outdoor heating  
28 products during the past three years and to provide to each such individual, as well as new purchasers

1 and Product users, a clear and reasonable warning that use of the Products causes exposures to a  
2 chemical known to cause birth defects and other reproductive harm.

3 4. In addition to injunctive relief, Plaintiff seeks civil penalties to remedy the failure of  
4 Defendant to provide clear and reasonable warnings regarding exposure to a chemical known to  
5 cause birth defects and other reproductive harm.

### 6 PARTIES

7 5. Plaintiff, Ecological Rights Foundation ("ERF") is a non-profit public benefit organization  
8 dedicated to, among other causes, protecting California residents from toxic exposures,  
9 environmental and human health education, and consumer rights. ERF is incorporated under the laws  
10 of the State of California and is a "person" pursuant to Health & Safety Code §25249.11(a). ERF  
11 brings this enforcement action in the public interest pursuant to Health & Safety Code §25249.7(d).

12 6. Defendant Frontgate Marketing, Inc. is a person in the course of doing business within the  
13 meaning of Health & Safety Code §25249.11(b). Frontgate Marketing, Inc. markets, distributes,  
14 and/or sells the Products for sale and use in the State of California.

15 7. Defendant employs more than ten people.

### 16 JURISDICTION

17 8. The Court has jurisdiction over this action pursuant to California Health & Safety Code  
18 Section 25249.7. California Constitution Article VI, Section 10 grants the Superior Court "original  
19 jurisdiction in all causes except those given by statute to other trial courts." Chapter 6.6 of the  
20 Health & Safety Code, which contains the statutes under which this action is brought, does not  
21 grant jurisdiction to any other trial court.

22 9. This Court also has jurisdiction over Defendant because it is a business that has sufficient  
23 minimum contacts in California and within the County of San Francisco. Defendant intentionally  
24 availed itself of the California and San Francisco County markets. It is thus consistent with  
25 traditional notions of fair play and substantial justice for the San Francisco County Superior Court  
26 to exercise jurisdiction over Defendant.

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1 10. Venue is proper in San Francisco County Superior Court because one or more of the  
2 violations arise in the County of San Francisco.

3 **BACKGROUND FACTS**

4 11. The People of the State of California have declared by initiative under Proposition 65 their  
5 right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other  
6 reproductive harm.” Proposition 65, § 1(b). To effectuate this goal, Proposition 65 prohibits exposing  
7 people to chemicals listed by the State of California as known to cause cancer, birth defects, or other  
8 reproductive harm without a “clear and reasonable warning” unless the business responsible for the  
9 exposure can prove that it fits within a statutory exemption. Health & Safety Code Section 25249.6  
10 states, in pertinent part:

11 No person in the course of doing business shall knowingly and  
12 intentionally expose any individual to a chemical known to the state to cause  
13 cancer or reproductive toxicity without first giving clear and reasonable warning  
14 to such individual . . .

15 12. On July 1, 1989, the State of California officially listed carbon monoxide as a chemical  
16 known to cause developmental reproductive toxicity, which means harm to the developing fetus. On  
17 July 1, 1990, carbon monoxide exposures became subject to the clear and reasonable warning  
18 requirements under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code Section  
19 25249.10(b).

20 13. Plaintiff brings this enforcement action against Defendant pursuant to Health & Safety Code  
21 Section 25249.7(d). Attached hereto and incorporated by reference is a copy of a Notice of Violation  
22 dated September 12, 2016, which on that date ERF sent to California's Attorney General, every  
23 county District Attorney in California, and to the City Attorneys of every California City with a  
24 population greater than 750,000. On the same day, Plaintiff sent substantively identical letters to  
25 Defendant. In compliance with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each  
26 Notice included the following information: (1) the name and address of each violator; (2) the statute  
27 violated; (3) the time period during which violations occurred; (4) specific descriptions of the  
28 violations, including (a) the routes of exposure to carbon monoxide from the Products, and (b) the  
Proposition 65-listed chemical that is the subject of the violations described in each Notice.

1 14. Attached to the Notice of Violation sent to Defendant was a summary of Proposition 65 that  
2 was prepared by California's Office of Environmental Health Hazard Assessment. In addition, the  
3 Notice of Violation was accompanied by a Certificate of Service attesting to the service of the Notice  
4 of Violation on each entity which received it. Pursuant to Health & Safety Code Section 25249.7(d)  
5 and 11 C.C.R. § 3101, Plaintiff also sent a Certificate of Merit with the Notice of Violation attesting  
6 to the reasonable and meritorious basis for the action. Plaintiff enclosed factual information sufficient  
7 to establish the basis of the Certificate of Merit with the Notice of Violation letters sent to the  
8 Attorney General.

9 15. None of the public prosecutors with the authority to prosecute violations of Proposition 65  
10 has commenced and/or is diligently prosecuting a cause of action against Defendant under Health &  
11 Safety Code Section 25249.5 *et seq.*, based on the claims asserted in ERF's Notices.

12 16. Defendant both knows and intends that individuals, including pregnant women, will use the  
13 products for heating, ambience and/or cooking, thus exposing them to carbon monoxide. Under  
14 Proposition 65, an exposure is "knowing" where the party responsible for such exposure has  
15 "knowledge of the fact that a[n] . . . exposure to a chemical listed pursuant to [Health & Safety Code  
16 § 25249.8(a)] is occurring. No knowledge that . . . exposure is unlawful is required." 27 C.C.R. §  
17 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final Statement of Reasons  
18 Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, § 12201). Defendant has  
19 been informed of the carbon monoxide exposures caused by the use of Products by the 60-Day Notice  
20 of Violation, and the accompanying Certificate of Merit served on it by ERF. Defendant also has  
21 constructive knowledge of the carbon monoxide exposures caused by Products. As a company that  
22 manufactures, markets, distributes and/or sells the Products for use in the State of California,  
23 Defendant knows or should know that carbon monoxide exposures to users of the Products are a  
24 natural and foreseeable consequence of Defendant's placing the Products into the stream of  
25 commerce.

26 17. Any person "violating or threatening to violate" Proposition 65 may be enjoined in any  
27 court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is defined to  
28 mean "to create a condition in which there is a substantial probability that a violation will occur."

1 Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not to exceed \$2,500  
2 per day for each violation of the statute.

3 18. ERF has engaged in good faith efforts to resolve the claims alleged herein prior to filing  
4 this complaint.

5 **FIRST CAUSE OF ACTION**

6 **(Violations of Health & Safety Code §25249.6)**

7 1. ERF realleges and incorporates the facts and allegations contained in the above paragraphs  
8 as though specifically set forth herein.

9 2. Defendant is a person in the course of doing business within the meaning of Health & Safety  
10 Code § 25249.11(b) who, by manufacturing, marketing, distribution, sale or otherwise placing the  
11 Products into the stream of commerce, violated, violates or threatens to violate Proposition 65.

12 3. Carbon monoxide is a chemical listed by the State of California as known to cause  
13 developmental reproductive toxicity.

14 4. Defendant knows that the average use of the Products will expose users of the Products to  
15 carbon monoxide. Defendant intends that the Products be used in a manner that results in exposures  
16 to carbon monoxide.

17 5. Defendant has failed and continues to fail, to provide clear and reasonable warnings  
18 regarding the reproductive toxicity of carbon monoxide to users of the Products.

19 6. Since at least three years prior to the Notice of Violation Letters, Defendant has violated  
20 Proposition 65 by knowingly and intentionally exposing individuals to carbon monoxide without  
21 first giving clear and reasonable warnings to such individuals regarding the reproductive toxicity of  
22 carbon monoxide.

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**PRAYER FOR RELIEF**

Wherefore, Plaintiff prays for judgment against Defendant as follows:

1. Pursuant to the First Cause of Action, that Defendant be enjoined, restrained, and ordered to comply with the provisions of Section 25249.6 of the California Health & Safety Code;
2. That Defendant be ordered to make best efforts to identify and locate each individual in California to whom it, or its customers or agents, distributed or sold Products during the past three years, and to provide a warning to each such person that use of the Product will expose that person to a chemical known to cause birth defects and other reproductive harm;
3. That Defendant be assessed a civil penalty in an amount equal to \$2,500.00 per day per individual exposed to carbon monoxide in violation of Section 25249.6 of the California Health & Safety Code, as the result of Defendant's marketing, distributing, and/or selling the Products for use in California.
4. That, pursuant to Civil Procedure Code § 1021.5, Defendant be ordered to pay to Plaintiff the attorneys' fees and costs it incurred in bringing this enforcement action; and
5. For such other relief as this court deems just and proper.

Dated: November 15, 2016

ECOLOGY LAW CENTER

  
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Fredric Evenson, Attorney for Plaintiff  
ECOLOGICAL RIGHTS FOUNDATION