

FILED
San Francisco County Superior Court

JUN 01 2017

CLERK OF THE COURT

BY: 

Deputy Clerk

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14 Counsel for Plaintiff, ECOLOGICAL RIGHTS FOUNDATION

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 COUNTY OF SAN FRANCISCO

17 ECOLOGICAL RIGHTS FOUNDATION,

18 Plaintiff,

19 v.

20 WEBER-STEPHEN PRODUCTS, LLC and
21 ROSLE USA CORPORATION,

22 Defendants.

Case No.

CGC-17-559276

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

Health & Safety Code § 25249.5 et seq.

(Other: Proposition 65)

BY FAX
ONE LEGAL LLC

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

3 **INTRODUCTION**

4 1. This Complaint seeks civil penalties and an injunction against Weber-Stephen Products, LLC
5 and Rosle USA Corporation (“Defendants”) to remedy Defendants’ continuing failure to warn
6 individuals in California about exposures to carbon monoxide, a chemical known to the State of
7 California to cause reproductive toxicity. Such exposures have occurred and continue to occur,
8 through the use of charcoal starters that Defendants manufacture, distribute and/or sell in the State
9 of California (“Products”). These Products are intended to be used with lighting (igniting) charcoal
10 in preparation for use in grills or other charcoal appliances. The combustion of charcoal in the starters
11 causes carbon monoxide to be released into the air. People using charcoal starters and those standing
12 near the Products when they are in use, inhale the released carbon monoxide.

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

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

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

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

6 **PARTIES**

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

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

16 7. Defendant Weber-Stephens Products, LLC is a person in the course of doing business within
17 the meaning of Health & Safety Code §25249.11(b). Weber-Stephens Products, LLC markets,
18 distributes, and/or sells the Products for sale and use in the State of California.

19 8. Defendants each employ more than ten people.

20 **JURISDICTION**

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

26 10. This Court also has jurisdiction over Defendants because they are businesses that have
27 sufficient minimum contacts in California and within the County of San Francisco. Defendants
28 intentionally avail themselves of the California and San Francisco County markets. It is thus

1 consistent with traditional notions of fair play and substantial justice for the San Francisco County
2 Superior Court to exercise jurisdiction over Defendants.

3 11. Venue is proper in San Francisco County Superior Court because one or more of the
4 violations arise in the County of San Francisco.

5 **BACKGROUND**

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

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

15 13. 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 14. Plaintiff brings this enforcement action against Defendants pursuant to Health & Safety
21 Code Section 25249.7(d). Attached hereto and incorporated by reference are copies of the Notices
22 of Violation, dated December 12, 2016, which on that date EcoRights sent to California's Attorney
23 General, every county District Attorney in California, and to the City Attorneys of every California
24 City with a population greater than 750,000. On the same day, Plaintiff sent substantively identical
25 letters to Defendants. In compliance with Health & Safety Code § 25249.7(d) and 27 C.C.R. §
26 25903(b), the Notices included the following information: (1) the name and address of each violator;
27 (2) the statute violated; (3) the time period during which violations occurred; (4) specific descriptions
28 of the violations, including (a) the routes of exposure to carbon monoxide from the Products, and (b)

1 the specific type of Products sold and used in violation of Proposition 65; and (5) the name of the
2 specific Proposition 65-listed chemical that is the subject of the violations described in each Notice.

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

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

14 17. Defendants both know and intend that individuals, including pregnant women, will use the
15 Products for starting (igniting) charcoal, thus exposing them to carbon monoxide. Under Proposition
16 65, an exposure is "knowing" where the party responsible for such exposure has "knowledge of the
17 fact that a[n] . . . exposure to a chemical listed pursuant to [Health & Safety Code § 25249.8(a)] is
18 occurring. No knowledge that . . . exposure is unlawful is required." 27 C.C.R. § 25102(n). This
19 knowledge may be either actual or constructive. *See, e.g.*, Final Statement of Reasons Revised
20 (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, § 12201). Defendants have been
21 informed of the carbon monoxide exposures caused by the use of Products by the 60-Day Notices of
22 Violation, and the accompanying Certificates of Merit served on them by EcoRights. Defendants
23 also have constructive knowledge of the carbon monoxide exposures caused by Products. As
24 companies that manufacture, market, distribute and/or sell the Products for use in the State of
25 California, Defendants know or should know that carbon monoxide exposures to users of the
26 Products are a natural and foreseeable consequence of Defendants' placing the Products into the
27 stream of commerce.

1 18. Any person “violating or threatening to violate” Proposition 65 may be enjoined in any
2 court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to violate” is defined to
3 mean “to create a condition in which there is a substantial probability that a violation will occur.”
4 Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not to exceed \$2,500
5 per day for each violation of the statute.

6 19. EcoRights has engaged in good faith efforts to resolve the claims alleged herein prior to
7 filing this complaint.

8 **FIRST CAUSE OF ACTION**

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

10 20. EcoRights realleges and incorporates the facts and allegations contained in the above
11 paragraphs as though specifically set forth herein.

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

15 22. Carbon monoxide is a chemical listed by the State of California as known to cause
16 developmental reproductive toxicity.

17 23. Defendants know that the average use of the Products will expose users of the Products to
18 carbon monoxide. Defendants intend that the Products be used in a manner that results in exposures
19 to carbon monoxide.

20 24. Defendants have failed and continue to fail, to provide clear and reasonable warnings
21 regarding the reproductive toxicity of carbon monoxide to users of the Products.

22 25. Since at least three years prior to the Notice of Violation Letters, Defendants have violated
23 Proposition 65 by knowingly and intentionally exposing individuals to carbon monoxide without
24 first giving clear and reasonable warnings to such individuals regarding the reproductive toxicity of
25 carbon monoxide.

1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiff prays for judgment against Defendants as follows:

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

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20 Dated: May 31, 2017

ECOLOGY LAW CENTER

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23 _____
24 Fredric Evenson, Attorney for Plaintiff
25 ECOLOGICAL RIGHTS FOUNDATION
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ECOLOGY LAW CENTER
P.O. Box 1000
SANTA CRUZ, CALIFORNIA 95061
TELEPHONE: (831) 454-8216
EMAIL: EVENSON@ECOLOGYLAW.COM

DATE DECEMBER 12, 2016

NOTICE OF VIOLATIONS
CALIFORNIA SAFE DRINKING WATER AND
TOXIC ENFORCEMENT ACT

Current President/CEO Weber-Stephen Products, LLC. 200 E. Daniels Road Palatine, IL 60067	
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AND THE PUBLIC PROSECUTORS LISTED ON THE DISTRIBUTION LIST
ACCOMPANYING THE ATTACHED CERTIFICATE OF SERVICE

Re: Violations of Proposition 65 Concerning Carbon Monoxide Exposures from
Charcoal Starter

In accord with California Health & Safety Code § 25249.7, Ecological Rights Foundation ("ERF") hereby gives you notice that the above companies have violated and are in ongoing violation of California Health & Safety Code § 25249.6, which provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first providing a clear and reasonable warning to such individual."

Pursuant to California Health & Safety Code § 25249.7, ERF intends to bring an enforcement action 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify the violations discussed in this notice letter. The public enforcement agencies that have been served with copies of this notice of violations are identified in the attached Certificate of Service.

This Notice of Violations ("Notice") is provided to you pursuant to and in compliance with California Health and Safety Code Section 25249.7(d). Attached for your reference is a summary, "Appendix A: The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary" prepared by the California Office of Environmental Health Hazard Assessment ("OEHHA"). Pursuant to Title 11, C.C.R. § 3100, a Certificate of Merit is also attached.

The above-referenced violations occur when California residents use charcoal starters. These products are used primarily for lighting charcoal. Combustion of charcoal produces and exposes people to **carbon monoxide**, a chemical known to the State of California to cause reproductive toxicity. Because the combustion of charcoal causes carbon monoxide to be released into the air, people using charcoal starters, and others standing near the products when charcoal is burning in or on the products, inhale carbon monoxide. Exposure to carbon monoxide is via the inhalation route.

Below is a non-exclusive list of examples of these types of products. Though specific models or SKU or product numbers are given as examples, this Notice pertains to all models, and all

variations, of the specific type of product of which the named model is an example.

Compact Rapidfire Chimney Starter

This non-exclusive list of examples of the type of products that are subject to this Notice is for the recipient's benefit and is not meant to be an exhaustive or comprehensive identification of each specific offending product. It is ERF's position that the alleged Violator is obligated to conduct a good faith investigation into other specific products within the identified category or type that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the notice recipient's custody or control) during the past three years, to ensure that clear and reasonable warnings are provided to California citizens prior to purchase, or retroactively if necessary.

These products cause carbon monoxide exposures to occur in peoples yards and everywhere else throughout California where these products are used. These violations are alleged for consumer and environmental exposures.

The noticed parties did not and do not provide people with clear and reasonable warnings before they expose them in California to carbon monoxide. The above-referenced violations have occurred every day since at least December 12, 2013 and will continue every day until clear and reasonable warnings are given.

ERF is a California non-profit corporation dedicated to protecting human and environmental health, including raising awareness of, and reducing exposures to, toxic chemicals. The following individual is the responsible individual within ERF for purposes of this Notice:

James Lamport, Executive Director
Ecological Rights Foundation
867 B Redwood Drive
Garberville, California 95542
Telephone: (707) 923-4372

ERF has retained the following counsel to represent them in this matter (please direct communications to counsel):

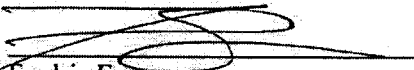
Fredric Evenson
Ecology Law Center
P.O. Box 1000
Santa Cruz, California 95061
Telephone: (831) 454-8216
Email: evenson@ecologylaw.com

Resolution of Noticed Claims:

ERF is interested in seeking a constructive resolution of this matter that advances the public interest without engaging in costly and protracted litigation. ERF is willing to settle this matter to the extent legally possible prior to the commencement of any enforcement action. Settlement terms would require that the unwarned exposures described in this Notice of Violation be stopped. That would require at least the following: 1) a potential recall of products already sold; 2) that either warnings be given to all future purchasers in California of the products subject to this Notice, that the products be reformulated to eliminate the exposures described in the Notice; or that you stop marketing, distributing or selling the products in California; 3) that you locate

and provide a warning compliant with 27 Cal. Code Regs Section 25601 to each person who has been subject to the unwarned exposures described in the Notice to the extent those exposures are caused by products that were sold in California during the past three years; and 4) that you pay an appropriate civil penalty based on the factors enumerated in California Health and Safety Code Section 25249(b). It should be noted that ERF cannot finalize any settlement of this matter until 70 days has elapsed since the sending of the Notice and unless no public enforcer has begun an enforcement action concerning the violations described in the Notice. Any settlement on behalf of the public interest must be approved by the California Superior Court on noticed motion with 45 days' notice to the California Attorney General. The Attorney General may appear at any approval hearing and oppose a settlement if he or she believes the proposed settlement is not in the public interest. If you wish to discuss settlement of this matter before ERF files suit, please promptly contact ERF's counsel.

Sincerely,



Fredric Evenson

ECOLOGY LAW CENTER
P.O. Box 1000
SANTA CRUZ, CALIFORNIA 95061
TELEPHONE: (831) 454-8216
EMAIL: EVENSON@ECOLOGYLAW.COM

DECEMBER 12, 2016

NOTICE OF VIOLATIONS
CALIFORNIA SAFE DRINKING WATER AND
TOXIC ENFORCEMENT ACT

Alan Senior, President Rosle USA Corp. 802 Centerpoint Boulevard New Castle, DE 19720	
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AND THE PUBLIC PROSECUTORS LISTED ON THE DISTRIBUTION LIST
ACCOMPANYING THE ATTACHED CERTIFICATE OF SERVICE

Re: Violations of Proposition 65 Concerning Carbon Monoxide Exposures from
Rosle Charcoal Starter

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Below is a non-exclusive list of examples of these types of products. Though specific models or SKU or product numbers are given as examples, this Notice pertains to all models, and all

variations, of the specific type of product of which the named model is an example.

Item # 4-004293-250391 or ROS-021, Rosle Charcoal Starter – Stainless Steel

This non-exclusive list of examples of the type of products that are subject to this Notice is for the recipient's benefit and is not meant to be an exhaustive or comprehensive identification of each specific offending product. It is ERF's position that the alleged Violator is obligated to conduct a good faith investigation into other specific products within the identified category or type that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the notice recipient's custody or control) during the past three years, to ensure that clear and reasonable warnings are provided to California citizens prior to purchase, or retroactively if necessary.

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ERF is a California non-profit corporation dedicated to protecting human and environmental health, including raising awareness of, and reducing exposures to, toxic chemicals. The following individual is the responsible individual within ERF for purposes of this Notice:

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867 B Redwood Drive
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Sincerely,

A handwritten signature in black ink, appearing to read "Fredric Evenson", written over a horizontal line.

Fredric Evenson