

FILED
San Francisco County Superior Court

MAY 26 2017

CLERK OF THE COURT

BY:  Deputy Clerk

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8 Counsel for Plaintiff,
9 ECOLOGICAL RIGHTS FOUNDATION

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 ECOLOGICAL RIGHTS FOUNDATION,

13 Plaintiff,

14 v.

15 ZHEJIANG YAYI METAL TECHNOLOGY CO.,
16 LTD.

17 Defendant.

Case No.

CGC-17-559190

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

OTHER

(Health & Safety Code §25249.5 et seq.)

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BY FAX
ONE LEGAL LLC

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 Zhejiang Yayi Metal
5 Technology Co., Ltd. (“Yayi” OR “Defendant”) to remedy Defendant’s 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 wood-burning outdoor heating products, such as fire pits, fire rings, fire tables
9 and chimeneas that Defendant manufactures, markets, distributes and/or sells in California
10 (“Products”). These Products are intended to be used with wood fuel and are primarily used for
11 heating, ambience, and cooking. The combustion of wood causes carbon monoxide to be released
12 into the air. People using wood-burning outdoor heating products, and those standing near the
13 Products when wood fuel is burning 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

1 products during the past three years and to provide to each such individual, as well as new purchasers
2 and Product users, a clear and reasonable warning that use of the Products causes exposures to a
3 chemical known to cause birth defects and other reproductive harm.

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

7 PARTIES

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

13 6. Defendant Zhejiang Yayi Metal Technology Co., Ltd. is a person in the course of doing
14 business within the meaning of Health & Safety Code §25249.11(b). Zhejiang Yayi Metal
15 Technology Co., Ltd. markets, distributes, and/or sells the Products for sale and use in the State of
16 California.

17 7. Defendant employs more than ten people.

18 JURISDICTION

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

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

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 December 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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3 **PRAYER FOR RELIEF**

4 Wherefore, Plaintiff prays for judgment against Defendant as follows:

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

21 Dated: May 24, 2017

22 ECOLOGY LAW CENTER

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24 Fredric Evenson, Attorney for Plaintiff
25 ECOLOGICAL RIGHTS FOUNDATION
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DECEMBER 12, 2016

NOTICE OF VIOLATIONS
CALIFORNIA SAFE DRINKING WATER AND
TOXIC ENFORCEMENT ACT

Zhejiang Yayi Metal Technology Co., Ltd. c/o Jodi Smith, Of Counsel, Jeffer Mangels Butler & Mitchell LLP Two Embarcadero Center, 5th Floor, San Francisco, California 94111	
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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
Wood-burning outdoor heating products, such as fire pits, fire rings, fire tables
and chimeneas**

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 wood-burning outdoor heating products, such as fire pits, fire rings, fire tables and chimeneas. These products are used primarily for heating, ambience and cooking. They are intended to be used with wood fuel. The combustion of wood produces and exposes people to carbon monoxide, a chemical known to the State of California to cause reproductive toxicity. Because the combustion of wood causes carbon monoxide to be released into the air, people using wood-burning outdoor heating products, and others standing near the products when wood fuel 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. This Notice pertains to all models, and all variations, of the specific type of product (wood-burning outdoor heating products, such as fire pits, fire rings, fire tables and chimeneas) of which the following is an example.

Mainstays brand fire pits

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 or sold (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, at parks and beaches, 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 have 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