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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**
10 **UNLIMITED CIVIL JURISDICTION**
11

12
13 **EVELYN WIMBERLEY,**

14 **Plaintiff,**

15 **VS.**

16 **LOWE'S COMPANIES INC.,**
17 **LOWE'S HOME CENTERS, LLC**

18 **AND DOES 1-25 INCLUSIVE**

19
20 **DEFENDANTS.**
21

CASE NO.: 37-2018-00006049-CU-NP-NC

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

22 **NATURE OF THE ACTION**

23 1. This Complaint is a representative action brought by plaintiff Evelyn Wimberley,
24 in the public interest of the citizens of the State of California, to enforce the people's right to be
25 informed of the dangers from exposures to Carbon Monoxide and Soot (hereafter "Listed
26 Chemicals"), toxic chemicals when using Mountaineer All Natural Kindling sold in California.

27 2. By this Complaint, plaintiff seeks to remedy DEFENDANTS' continuing failures
28 to warn California citizens about their exposure to the Listed Chemicals produced as a result of

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

1 combustion during the normal and intended use of the Mountaineer All Natural Kindling (UPC
2 793573928993), (hereafter "PRODUCT(S)"), that the DEFENDANTS manufactured, distributed
3 and sold, in the State of California and PRODUCTS that DEFENDANTS continue to
4 manufacture, distribute and offer for sale in the State of California.

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

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

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

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

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

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

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. Defendants Lowe’s Companies Inc., and Lowe’s Home Centers, LLC
12 (collectively “Lowe’s” or “DEFENDANTS”) is a person doing business within the meaning of
13 California Health & Safety Code § 25249.11

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

17 **VENUE AND JURISDICTION**

18 13. Venue is proper in the San Diego County Superior Court, pursuant to Code of
19 Civil Procedure § 394, 495, 395.5, because this Court is a court of competent jurisdiction,
20 because one or more instances of wrongful conduct occurred, and continues to occur, in the
21 County of San Diego and/or because DEFENDANTS conducted, and continue to conduct,
22 business in this County with respect to the PRODUCTS.

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

27 15. The California Superior Court has jurisdiction over DEFENDANTS based on
28 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or

1 association that either are citizens of the State of California, have sufficient minimum contacts in
2 the State of California, or otherwise purposefully avail themselves of the California market.
3 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
4 courts consistent with traditional notions of fair play and substantial justice.

5 **FIRST CAUSE OF ACTION**

6 **(Violation of Proposition 65 – Against Defendants)**

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

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

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

17 19. On April 27, 2017 a sixty-day notice violation, together with the requisite
18 certificate of merit, was provided to Lowe's and various public enforcement agencies stating
19 that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in the
20 State of California were being exposed to the LISTED CHEMICAL resulting from the
21 reasonably foreseeable users of the PRODUCTS, without the individual purchasers and users
22 first having been provided with a “clear and reasonable warning” regarding such toxic exposures.

23 20. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
24 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and
25 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale or use in
26 violation of California Health & Safety Code § 25249.6 has continued to occur beyond
27 DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges and
28 believes that such violations will continue to occur into the future.

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

4 22. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
5 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
6 limits.

7 23. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
8 distributed, and/or for sale or use by DEFENDANTS in California contained the LISTED
9 CHEMICAL.

10 24. The PRODUCTS, through normal use produces the LISTED CHEMICALS in
11 such a way as to expose individuals to the LISTED CHEMICALS through inhalation, dermal
12 contact and/or ingestion during the reasonably foreseeable use of the PRODUCTS.

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

16 26. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
17 the PRODUCTS would expose individuals to the LISTED CHEMICAL..

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

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

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

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

6 31. As a consequence of the above-described acts, California Health & Safety Code §
7 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
8 DEFENDANTS.

9 32. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
10 hereinafter.

11 **PRAYER FOR RELIEF**

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

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

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

21 3. That the Court grant plaintiff his reasonable attorneys’ fees and cost of suit; and

22 4. That the Court grant such other and further relief as may be just and proper.

23 Respectfully Submitted,

24 Law Offices of Stephen Ure, PC.

24 Dated: February 5, 2018

25 By: 

26 Stephen Ure, Esq.
27 Attorney for Plaintiff
28 EVELYN WIMBERLEY