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

REFLACORETA CIAISION

7018 FEB - 5 P 12: 48

Attorneys for Plaintiff, Evelyn Wimberley

 $15 || \mathbf{V}$

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

UNLIMITED CIVIL JURISDICTION

EVELYN WIMBERLEY,) CASE NO.: 37-2018-00006045-CU-NP-NO
Plaintiff, VS.	COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF
UST BRANDS WALMART STORES, INC AND DOES 1-25 INCLUSIVE	(Cal. Health & Safety Code § 25249.6 et seq.))))
DEFENDANTS.))

NATURE OF THE ACTION

1. This Complaint is a representative action brought by plaintiff Evelyn Wimberley, in the public interest of the citizens of the State of California, to enforce the people's right to be informed of the dangers from exposures to Carbon Monoxide and Soot (hereafter "Listed Chemicals") toxic chemicals when using Wetfire Fire Starting Tinder sold by DEFENDANTS in California.

- 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 combustion during the normal and intended use of the Wetfire Fire Starting Tinder (UPC 812713019480) (hereafter "PRODUCT(S)"), that the DEFENDANTS manufactured, distributed and sold, in the State of California and PRODUCTS that DEFENDANTS continue to manufacture, distribute and offer for sale in the State of California.
- 3. High levels of the Listed Chemicals are common combustion byproducts produced during the normal and intended use of the PRODUCT that DEFENDANTS manufacture, distribute and/or offer for sale to consumers throughout the State of California.
- 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 et seq. (Proposition 65), "No 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 giving clear and reasonable warning to such individual..." (Cal. Health & Safety Code § 25249.6.)
- 5. California identified and listed Carbon Monoxide as a chemical known to cause birth defects and other reproductive harm. Carbon Monoxide became subject to the warning requirements of Proposition 65 for developmental toxicity beginning on July 1, 1989 (27 CCR § 27002; Cal. Health & Safety Code § 25249.6.)
- 6. California identified and listed Soot as a chemical known to cause birth defects and cancer. Soot became subject to the warning requirements of Proposition 65 for developmental toxicity beginning on February 27, 1987. (27 CCR Sec. 27002; Cal. Health & Safety Code Sec. 25249.6)
- 7. DEFENDANTS' past and continuing failures to warn consumers and/or other individuals in the State of California about their exposure to the LISTED CHEMICALS in conjunction with defendant's sale of the PRODUCTS is a violation of Proposition 65 and subjects DEFENDANTS to enjoinment of such conduct as well as civil penalties for each such violation.

- 8. For DEFENDANTS' violations of Proposition 65, plaintiff seeks preliminary injunctive and permanent injunctive relief to compel DEFENDANTS to provide purchasers or users of the PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL. (Cal. Health & Safety Code § 25249.7(a).)
- 9. Plaintiff also seeks civil penalties against DEFENDANTS for their violations of Proposition 65, as provides for by California Health & Safety Code § 25249.7(b).

PARTIES

- 10. Plaintiff Evelyn Wimberley is a citizen of the City of Redondo Beach, County of Los Angeles, in the State of California, who is dedicated to protecting the health of California citizens through the elimination and reduction of toxic exposures from consumer PRODUCTS, and brings this action in the public interest pursuant to California Health & Safety Code § 25249.7.
- 11. Defendant UST Brands (hereinafter referred to as "UST" or "DEFENDANTS") is a person doing business within the meaning of California Health & Safety Code § 25249.11.
- 12. Defendant Walmart Stores, Inc. (hereinafter referred to as "Walmart" or "DEFENDANTS") is a person doing business within the meaning of California Health & Safety Code § 25249.11.
- 13. DEFENDANTS manufacture, distribute, and/or offers the PRODUCTS for sale or use in the State of California or implies by its conduct that it manufactures, distributes and/or offers the PRODUCTS for sale or use in the State of California.

VENUE AND JURISDICTION

- 14. Venue is proper in the San Diego County Superior Court, pursuant to Code of Civil Procedure § 394, 495, 395.5, because this Court is a court of competent jurisdiction, because one or more instances of wrongful conduct occurred, and continues to occur, in the County of San Diego and/or because DEFENDANTS conducted, and continue to conduct, business in this County with respect to the PRODUCTS.
- 15. The California Superior Court has jurisdiction over this action pursuant to California Constitution Article VI, § 10, which grants the Superior Court "original jurisdiction in

all causes except those given by statute to other trial courts." The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.

16. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that either are citizens of the State of California, have sufficient minimum contacts in the State of California, or otherwise purposefully avail themselves of the California market.

DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

FIRST CAUSE OF ACTION

(Violation of Proposition 65 - Against Defendant)

- 17. Plaintiff realleges and incorporates by reference, as if full reference, as if fully set forth herein, Paragraphs 1 through 16, inclusive.
- 18. The citizens of the State of California have expressly stated in the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.5, et seq. (Proposition 65) that they must be informed "about exposures to chemicals that cause cancer, birth defects and order reproductive harm." (Cal. Health & Safety Code § 25249.6.)
- 19. Proposition 65 states, "No 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 productive toxicity without first giving clear and reasonable warning to such individual... (*Id.*)"
- 20. On May 8, 2017 a sixty-day notice violation, together with the requisite certificate of merit, was provided to DEFENDANTS, and various public enforcement agencies stating that as a result of the DEFENDANTS' sales of the PRODUCTS, purchasers and users in the State of California were being exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable users of the PRODUCTS, without the individual purchasers and users first having been provided with a "clear and reasonable warning" regarding such toxic exposures.
- 21. DEFENDANTS have engaged in the manufacture, distribution and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and

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

- 22. After receipt of the claims asserted in the sixty-day notices of violation, the appropriate public enforcement agencies have failed to commence and diligently prosecute a cause of action against DEFENDANTS under Proposition 65.
- 23. The PRODUCTS manufactured, distributed, and/or offered for sale or use in California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state limits.
- 24. DEFENDANTS knew or should have known that the PRODUCTS manufactured, distributed, and/or for sale or use by DEFENDANTS in California contained the LISTED CHEMICAL.
- 25. The PRODUCTS, through normal use produces the LISTED CHEMICALS in such a way as to expose individuals to the LISTED CHEMICALS through inhalation, dermal contact and/or ingestion during the reasonably foreseeable use of the PRODUCTS.
- 26. The normal and reasonably foreseeable use of the PRODUCTS has caused and continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined by 27 CCR§ 25602(b).
- 27. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of the PRODUCTS would expose individuals to the LISTED CHEMICAL..
- 28. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture, distribution and/or offer for sale or use of PRODUCTS to individuals in the State of California.
- 29. DEFENDANTS failed to provide a "clear and reasonable warning" to those consumers and/or other individuals in the State of California who were or who could become exposed to the LISTED CHEMICAL during the reasonably foreseeable use of the PRODUCTS.

///

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

- 31. As a consequence of the above-described acts, DEFENDANTS are liable for a maximum civil penal of \$2,500 per day for each violation pursuant to California Health& Safety Code § 25249.7(b).
- 32. As a consequence of the above-described acts, California Health & Safety Code § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.
- 33. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth hereinafter.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANT as follows:

- 1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess civil penalties against DEFENDANTS, in the amount of \$2,500 per day for each violation alleged herein;
- 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or offering the PRODUCTS for sale or use in California, without providing "clear and reasonable warnings" as detailed by 27 CCR § 25601, as to the harms associated with exposures to the LISTED CHEMICAL;

- 3. That the Court grant plaintiff his reasonable attorneys' fees and cost of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: February 05, 2018

Respectfully Submitted,

Law Offices of Stephen Ure, PC.

By:

Stephen Ure, Esq. Attorney for Plaintiff EVELYN WIMBERLEY