

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

**ENDORSED
FILED
ALAMEDA COUNTY
MAR - 8 2019**

CLERK OF THE SUPERIOR COURT
By Lanette Buffin, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

Case No.

19010174

10 DONNY MACIAS,

11 Plaintiff,

12 vs.

13 FIRE LITERS, INC.,

14 Defendant.

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

(Violation of Health & Safety Code § 25249.5 et seq.)

15 Plaintiff Donny Macias ("Plaintiff"), by and through his attorneys, alleges the following
16 cause of action in the public interest of the citizens of the State of California.

17 **BACKGROUND OF THE CASE**

18 1. Plaintiff brings this representative action on behalf of all California citizens to
19 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
20 at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
21 "[n]o person in the course of doing business shall knowingly and intentionally expose any
22 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
23 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

24 2. This complaint is a representative action brought by Plaintiff in the public interest
25 of the citizens of the State of California to enforce the People's right to be informed of the health
26 hazards caused by exposure CARBON MONOXIDE, a toxic chemical combustion byproduct
27 from use of Fire Liters sold and/or distributed by defendant Fire Liters, Inc. ("Fire Liters" or
28 "Defendant") in California.

- 1 -

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF
HEALTH & SAFETY CODE §25249.5

BY FAX

1 3. CARBON MONOXIDE is a harmful chemical known to the State of California to
2 cause reproductive toxicity. On July 1, 1989, the State of California listed CARBON
3 MONOXIDE as a chemical known to the State to cause reproductive toxicity and it has come
4 under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, §
5 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

6 4. Proposition 65 requires all businesses with ten (10) or more employees that
7 operate within California or sell products therein to comply with Proposition 65 regulations.
8 Included in such regulations is the requirement that businesses must label any product containing
9 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and
10 intentionally” exposing any person to it.

11 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
12 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety
13 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
14 the actions of a defendant which “violate or threaten to violate” the statute. Health & Safety
15 Code § 25249.7.

16 6. Plaintiff alleges that Defendant manufactures, distributes and/or offers for sale in
17 California, without a requisite exposure warning, Fire Liters (the “Products”) that expose persons
18 to CARBON MONOXIDE.

19 7. Defendant’s failure to warn consumers and other individuals in California of the
20 health hazards associated with exposure to CARBON MONOXIDE in conjunction with the sale
21 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendant to the
22 enjoinder and civil penalties described herein.

23 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
24 65 in accordance with Health and Safety Code § 25249.7(b).

25 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
26 Defendant to provide purchasers or users of the Products with required warnings related to the
27 dangers and health hazards associated with exposure to CARBON MONOXIDE pursuant to
28 Health and Safety Code § 25249.7(a).

1 **PARTIES**

2 10. Plaintiff is a citizen of the State of California acting in the interest of the general
3 public to promote awareness of exposures to toxic chemicals in products sold in California and
4 to improve human health by reducing hazardous substances contained in such items. He brings
5 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

6 11. Defendant Fire Liters, through its business, effectively manufactures, imports,
7 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
8 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale
9 or use in the State of California.

10 12. Plaintiff alleges that defendant Fire Liters is a “person” in the course of doing
11 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

12 **VENUE AND JURISDICTION**

13 13. Venue is proper in the County of Alameda because one or more of the instances
14 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
15 conducted, and continues to conduct, business in the County of Alameda with respect to the
16 Products.

17 14. This Court has jurisdiction over this action pursuant to California Constitution
18 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
19 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
20 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
21 this Court has jurisdiction over this lawsuit.

22 15. This Court has jurisdiction over Defendant because Defendant is either a citizen
23 of the State of California, has sufficient minimum contacts with the State of California, is
24 registered with the California Secretary of State as foreign corporations authorized to do business
25 in the State of California, and/or has otherwise purposefully availed itself of the California
26 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
27 consistent and permissible with traditional notions of fair play and substantial justice.

28 **SATISFACTION OF NOTICE REQUIREMENTS**

1 16. On March 8, 2018, Plaintiff gave notice of alleged violation of Health and Safety
2 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to
3 CARBON MONOXIDE contained in the Products without proper warning, subject to a private
4 action to Defendant and to the California Attorney General’s office and the offices of the County
5 District attorneys and City Attorneys for each city with a population greater than 750,000
6 persons wherein the herein violations allegedly occurred.

7 17. The Notice complied with all procedural requirements of Proposition 65 including
8 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
9 least one person with relevant and appropriate expertise who reviewed relevant data regarding
10 CARBON MONOXIDE exposure, and that counsel believed there was meritorious and
11 reasonable cause for a private action.

12 18. After receiving the Notice, and to Plaintiff’s best information and belief, none of
13 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
14 a cause of action against Defendant under Proposition 65 to enforce the alleged violations which
15 are the subject of Plaintiff’s notice of violation.

16 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
17 Notice to Defendant, as required by law.

18 **FIRST CAUSE OF ACTION**

19 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

20 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
21 this complaint as though fully set forth herein.

22 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
23 and/or retailer of the Product.

24 22. The Products contain CARBON MONOXIDE, a hazardous chemical found on
25 the Proposition 65 list of chemicals known to be hazardous to human health.

26 23. The Product does not comply with the Proposition 65 warning requirements.

27 24. Plaintiff, based on his best information and belief, avers that at all relevant times
28 herein, and at least since January 19, 2018, continuing until the present, that Defendant has

1 continued to knowingly and intentionally expose California users and consumers of the Product
2 to CARBON MONOXIDE without providing required warnings under Proposition 65.

3 25. The exposures that are the subject of this notice result from the combustion and
4 inhalation of the Products. The Products are used primarily for cooking, in order to promote fast
5 and easy charcoal ignition. Combustion of charcoal produces and exposes people to carbon
6 monoxide. Because the combustion of charcoal causes carbon monoxide to be released in the
7 air, people using charcoal-burning grills, and others standing near the products when charcoal is
8 burning in or on the products, inhale carbon monoxide. Consequently, a primary route of
9 exposure to the chemicals contained in these Products is through inhalation. Inhalation exposure
10 occur when persons using these products, or persons nearby when the products are being used,
11 inhale that which is emitted during its use. These Products cause carbon monoxide exposures to
12 occur in people's yards and everywhere else throughout California where these Products are
13 used. These violations occur during the foreseeable use of the products and when the Products is
14 used as intended. These violations are alleged for consumer and environmental exposures.

15 26. Plaintiff, based on his best information and belief, avers that such exposures will
16 continue every day until clear and reasonable warnings are provided to Product purchasers and
17 users or until this known toxic chemical is removed from the Product.

18 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
19 Product exposes individuals to CARBON MONOXIDE, and Defendant intends that exposures to
20 CARBON MONOXIDE will occur by its deliberate, non-accidental participation in the
21 manufacture, importation, distribution, sale and offering of the Products to consumers in
22 California

23 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
24 Complaint.

25 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
26 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

27 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
28 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendant and requests the following relief:

- A. That the court assess civil penalties against Defendant in the amount of \$2,500 per day for each violation in accordance with Health and Safety Code § 25249.7(b);
- B. That the court preliminarily and permanently enjoin Defendant mandating Proposition 65 compliant warnings on the Product;
- C. That the court grant Plaintiff reasonable attorney’s fees and costs of suit.
- D. That the court grant any further relief as may be just and proper.

Dated: March 7, 2019

BRODSKY & SMITH, LLC

By: 
Evan J. Smith (SBN242352)
Ryan P. Cardona (SBN302113)
9595 Wilshire Boulevard, Suite 900
Beverly Hills, CA 90212
Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff