

1 David R. Bush, State Bar No. 154511
2 Law Offices of David R. Bush
3 6761 Sebastopol Avenue, Suite 111
4 Sebastopol, CA 95472
5 Telephone: (707) 827-3311
6 Facsimile: (707) 676-4301

7 Attorneys for Plaintiff
8 Michael DiPirro

ENDORSED
FILED
ALAMEDA COUNTY

FEB 11 2019

SUE PESKO

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION

12 MICHAEL DIPIRRO,

13 Plaintiff,

14 v.

15 LUCKY SUPERMARKETS dba LUCKY®;
16 SUPER STORE INDUSTRIES; THE SAVE
17 MART COMPANIES; and DOES 1-150,

18 Defendants.

Case No. _____

RG19006388

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to warn California citizens about the risk of exposure to PCBs present in the bath tissue and/or toilet paper products, manufactured, distributed, and offered for sale or use to consumers throughout the state of California.

4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[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 giving clear and reasonable warning to such individual” Health & Safety Code § 25249.6.

6. Defendants manufacture or otherwise process for sale, distribute, and sell bath tissue and/or toilet paper, including, but not limited to, *Market Essentials Soft & Strong Bathroom Tissue 150 Sheets (UPC # 0-98487-30102-4) (Distributed by Save Mart; sold by Lucky®)*, and

1 *Sunny Select Soft & Strong Bath Tissue Two-Ply (UPC # 7-17544-13021-5) (Distributed by Super*
2 *Store Industries; sold by Lucky®)*, the foreseeable use of which result in PCBs in exposure to
3 levels that require a warning under Proposition 65. All such bath tissue and/or toilet paper
4 products containing PCBs, are referred to collectively hereinafter as “PRODUCTS.”

5 7. Defendants’ failure to warn consumers and other individuals in the state of
6 California about their exposure to the LISTED CHEMICAL in conjunction with defendants’
7 sales of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder
8 of such conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a)
9 & (b)(1).

10 8. For defendants’ violations of Proposition 65, plaintiff seeks preliminary and
11 permanent injunctive relief to compel defendants to provide purchasers or users of the
12 PRODUCTS with the required warning regarding the health hazards of the LISTED
13 CHEMICAL. Health & Safety Code § 25249.7(a).

14 9. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
15 penalties against defendants for their violations of Proposition 65.

16 **PARTIES**

17 10. Plaintiff MICHAEL DIPIRRO is a citizen of the state of California who is
18 dedicated to protecting the health of California citizens through the elimination or reduction of
19 toxic exposures from consumer products; and he brings this action in the public interest
20 pursuant to Health and Safety Code section 25249.7(d).

21 11. Defendant LUCKY SUPERMARKETS dba LUCKY® (“LUCKY”) is a person in
22 the course of doing business within the meaning of Health and Safety Code section 25249.11.

23 12. LUCKY manufactures (or otherwise processes for sale), distributes, and/or offers
24 the PRODUCTS for sale or use in the state of California, or implies by its conduct that it
25 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California.

26 13. Defendant SUPER STORE INDUSTRIES (“SUPER STORE”) is a person in the
27 course of doing business within the meaning of Health and Safety Code section 25249.11.
28

1 14. SUPER STORE manufactures (or otherwise processes for sale), distributes, and/or
2 offers the PRODUCTS for sale or use in the state of California, or implies by its conduct that it
3 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California.

4 15. Defendant THE SAVE MART COMPANIES (“SAVE MART”) is a person in the
5 course of doing business within the meaning of Health and Safety Code section 25249.11.

6 16. SAVE MART manufactures (or otherwise processes for sale), distributes, and/or
7 offers the PRODUCTS for sale or use in the state of California, or implies by its conduct that it
8 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California.

9 17. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
10 person in the course of doing business within the meaning of Health and Safety Code section
11 25249.11.

12 18. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
13 and/or manufacture, or imply by their conduct that they research, test, design, assemble,
14 fabricate, and/or manufacture one or more of the PRODUCTS offered for sale or use in the state
15 of California.

16 19. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
17 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

18 20. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
19 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
20 in the state of California.

21 21. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
22 the course of doing business within the meaning of Health and Safety Code section 25249.11.

23 22. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
24 state of California.

25 23. At this time, the true names of defendants DOES 1 through 150, inclusive, are
26 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
27 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
28

1 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
2 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

3 24. LUCKY, SUPER STORE, SAVE MART, MANUFACTURER DEFENDANTS,
4 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,
5 collectively be referred to as “DEFENDANTS.”

6 **VENUE AND JURISDICTION**

7 25. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
8 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
9 because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda
10 County, and/or because DEFENDANTS conducted, and continue to conduct, business in this
11 county with respect to the PRODUCTS.

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

16 27. The California Superior Court has jurisdiction over DEFENDANTS based on
17 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
18 association that is a citizen of the state of California, has sufficient minimum contacts in the
19 state of California, and/or otherwise purposefully avails itself of the California market.
20 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
21 California courts consistent with traditional notions of fair play and substantial justice.

22 **FIRST CAUSE OF ACTION**

23 **(Violation of Proposition 65 - Against All Defendants)**

24 28. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
25 Paragraphs 1 through 27, inclusive.

26 29. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
27 Enforcement Act of 1986, the People of California expressly declare their right “[t]o be
28

1 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
2 harm.”

3 30. Proposition 65 states, “[n]o person in the course of doing business shall
4 knowingly and intentionally expose any individual to a chemical known to the state to cause
5 cancer or reproductive toxicity without first giving clear and reasonable warning to such
6 individual” Health & Safety Code § 25249.6.

7 31. On April 24, 2018, plaintiff’s sixty-day notice of violation, together with the
8 requisite certificate of merit, was provided to LUCKY, SUPER STORE, SAVE MART, and
9 certain public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
10 PRODUCTS containing the LISTED CHEMICAL, purchasers and users in the state of
11 California were being exposed to the LISTED CHEMICAL resulting from the reasonably
12 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having
13 been provided with a “clear and reasonable warning” regarding such toxic exposures, as
14 required by Proposition 65.

15 32. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
16 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
17 such violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s sixty-day
18 notice of violation. As such, DEFENDANTS’ violations are ongoing and continuous in nature,
19 and will continue to occur in the future.

20 33. After receiving the claims asserted in the sixty-day notice of violation, the
21 appropriate public enforcement agencies have failed to commence and diligently prosecute a
22 cause of action against DEFENDANTS under Proposition 65.

23 34. The PRODUCTS manufactured, distributed, and offered for sale or use in
24 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the
25 allowable state limits, such that they require a “clear and reasonable warning” under Proposition
26 65.

1 35. DEFENDANTS knew or should have known that the PRODUCTS they
2 manufacture, distribute, and offer for sale or use in California contain the LISTED
3 CHEMICAL.

4 36. The LISTED CHEMICAL is present in the PRODUCTS in such a way as to
5 expose individuals through dermal contact during reasonably foreseeable use.

6 37. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
7 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
8 defined by California Code of Regulations title 27, section 25602(b).

9 38. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
10 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact.

11 39. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
12 the reasonably foreseeable uses of the PRODUCTS would occur by their deliberate, non-
13 accidental participation in the manufacture, distribution, and offering of the PRODUCTS for
14 sale or use to individuals in the state of California.

15 40. DEFENDANTS failed to provide a “clear and reasonable warning” to those
16 consumers and other individuals in the state of California who were or who would become
17 exposed to the LISTED CHEMICAL through dermal contact during the reasonably foreseeable
18 uses of the PRODUCTS.

19 41. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
20 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
21 contact resulting from the reasonably foreseeable use of the PRODUCTS sold by
22 DEFENDANTS without a “clear and reasonable warning”, have suffered, and continue to
23 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

24 42. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
25 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
26 for each violation.

43. As a consequence of the above-described acts, Health and Safety Code section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

2. That the Court, pursuant to Health and Safety Code section 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California without first providing a “clear and reasonable warning” as defined by California Code of Regulations title 27, section 25601 *et seq.*, as to the harms associated with exposures to the LISTED CHEMICAL;

3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

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

Dated: January 21, 2019

Respectfully Submitted,
BUSH & HENRY

By:

David R. Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO