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ENDORSED
FILED
ALAMEDA COUNTY
JAN 22 2019
CLERK OF THE SUPERIOR COURT
By Lanette Buffin, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 UNLIMITED CIVIL JURISDICTION

12 MICHAEL DIPIRRO,

13 Plaintiff,

14 v.

15 SMART & FINAL STORES, INC.;
16 AMERIFOODS TRADING COMPANY LLC;
17 and DOES 1-150,

18 Defendants.

Case No. 19003382

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff MICHAEL
3 DIPIRRO in the public interest of the citizens of the State of California to enforce the People's
4 right to be informed of the presence of polychlorinated biphenyls (containing 60 or more
5 percent chlorine by molecular weight) ("PCBs"), a toxic chemical found in bath tissue/toilet
6 paper products sold in California.

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

11 3. High levels of PCBs are commonly found in the bath tissue and/or toilet paper
12 products that defendants manufacture, distribute, and offer for sale to consumers throughout the
13 state of California.

14 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
15 Health and Safety Code section 25249.6 *et seq.* ("Proposition 65"), "[n]o person in the course of
16 doing business shall knowingly and intentionally expose any individual to a chemical known to
17 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
18 warning to such individual" Health & Safety Code § 25249.6.

19 5. Pursuant to Proposition 65, on January 1, 1988, California identified and listed
20 Polychlorinated biphenyls (containing 60 or more percent chlorine by molecular weight) as a
21 chemical known to cause cancer. PCBs became subject to the "clear and reasonable warning"
22 requirements of the act one year later on January 1, 1989. Cal. Code Regs. tit. 27, § 27001(c);
23 Health & Safety Code §§ 25249.8 & 25249.10(b). PCBs is referred to hereinafter as the
24 "LISTED CHEMICAL."

25 6. Defendants manufacture or otherwise process for sale, distribute, and sell bath
26 tissue and/or toilet paper, including, but not limited to, *Simply Value Bath Tissue* (UPC # 0-
27 41512-10792-4) (Distributed by AmeriFoods Trading Co.; sold by Smart & Final), and *Iris*

1 *Unscented Premium Super Soft 2-Ply Bathroom Tissue (UPC # 0-41512-08022-7) (Distributed by*
2 *AmeriFoods Trading Co.; sold by Smart & Final)*, the foreseeable use of which result in PCBs in
3 exposure to levels that require a warning under Proposition 65. All such bath tissue and/or toilet
4 paper 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 SMART & FINAL STORES, INC. (“SMART & FINAL”) is a person
22 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

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

1 13. Defendant AMERIFOODS TRADING COMPANY LLC (“AMERIFOODS”) is a
2 person in the course of doing business within the meaning of Health and Safety Code section
3 25249.11.

4 14. AMERIFOODS manufactures (or otherwise processes for sale), distributes, and/or
5 offers the PRODUCTS for sale or use in the state of California, or implies by its conduct that it
6 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California.

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

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

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

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

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

21 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
22 state of California.

23 21. At this time, the true names of defendants DOES 1 through 150, inclusive, are
24 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
25 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
26 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
27 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
28

22. SMART & FINAL, AMERIFOODS, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to as “DEFENDANTS.”

VENUE AND JURISDICTION

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

24. The California Superior Court has jurisdiction over this action pursuant to California Constitution Article VI, section 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.

25. 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 is a citizen of the state of California, has sufficient minimum contacts in the state of California, and/or otherwise purposefully avails itself 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 All Defendants)

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

27. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986, the People of California expressly declare their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.”

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

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

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

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

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

25 33. DEFENDANTS knew or should have known that the PRODUCTS they
26 manufacture, distribute, and offer for sale or use in California contain the LISTED
27 CHEMICAL.
28

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

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

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

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

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

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

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

41. 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 13, 2019

Respectfully Submitted,
BUSH & HENRY

By: 

David R. Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO