Evan J. Smith, Esquire (SBN 242352) Ryan P. Cardona, Esquire (SBN 302113) BRODSKY & SMITH, LLC ENDORSED 9595 Wilshire Blvd., Ste. 900 FILED 3 Beverly Hills, CA 90212 ALAMEDA COUNTY Telephone: (877) 534-2590 Facsimile: (310) 247-0160 AUG 1 3 2018 5 Attorneys for Plaintiff CLERK OF THE SUIT MOR COURT By <u>CURTIVAL GANTER</u> 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 COUNTY OF ALAMEDA 9 R G 18916367 10 ANTHONY FERREIRO. Case No.: 11 Plaintiff. COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELEIF 12 ν. (Violation of Health & Safety Code § 25249.5 et 13 BLACK DIAMOND INTERNATIONAL seq.) FOREST GROUP, LLC, TRUE VALUE 14 COMPANY, LLC, 15 Defendants. 16 Plaintiff Anthony Ferreiro ("Plaintiff" or "Ferreiro"), by and through his attorneys, 17 alleges the following cause of action in the public interest of the citizens of the State of 18 California. 19 **BACKGROUND OF THE CASE** 20 1. Plaintiff brings this representative action on behalf of all California citizens to 21 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified 22 at the Health and Safety Code § 25249.5 et seq. ("Proposition 65"), which reads, in relevant part, 23 "[n]o person in the course of doing business shall knowingly and intentionally expose any 24 individual to a chemical known to the state to cause cancer or reproductive toxicity without first 25 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6. 26 2. This complaint is a representative action brought by Plaintiff in the public interest 27 of the citizens of the State of California to enforce the People's right to be informed of the health 28 hazards caused by exposure to CARBON MONOXIDE, a toxic chemical byproduct from the use COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELEIF - VIOLATION OF

HEALTH & SAFETY CODE §25249.5

of Black Diamond fire starters that are manufactured, distributed, offered for sale and/or sold by defendants Black Diamond International Forest Group, LLC ("Black Diamond"), and True Value Company, LLC ("True Value") (collectively, "Defendants") in California. Black Diamond fire starters are used primarily for cooking, in order to promote fast and easy charcoal ignition. Combustion of charcoal produces CARBON MONOXIDE which is then inhaled by persons causing exposure to the chemical.

- 3. CARBON MONOXIDE is a harmful chemical known to the State of California to cause birth defects and other reproductive harm. On July 1, 1989, the State of California listed CARBON MONOXIDE as a chemical known to the State to cause birth defects and other reproductive harm and CARBON MONOXIDE has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
- 4. Proposition 65 requires all businesses with ten (10) or more employees that operate within California or sell products therein to comply with Proposition 65 regulations.

 Included in such regulations is the requirement that businesses must label any product containing a Proposition 65-listed chemical with a "clear and reasonable" warning before "knowingly and intentionally" exposing any person to it.
- 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the actions of a defendant which "violate[s] or threaten[s] to violate" the statute. Health & Safety Code § 25249.7.
- 6. Plaintiff alleges that Defendants manufacture, distribute and/or offer for sale in California, without the required exposure warning, Black Diamond fire starters ("Product" or "Products") that expose persons to CARBON MONOXIDE.
- 7. Defendants' failure to warn consumers and other individuals in California of the health hazards associated with exposure to CARBON MONOXIDE in conjunction with the sale,

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27 28 manufacture, and/or distribution of the Product is a violation of Proposition 65 and subjects Defendants to the enjoinment and civil penalties described herein.

- 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition 65 in accordance with Health and Safety Code § 25249.7(b).
- 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendants to provide purchasers or users of the Product with the required warnings related to the dangers and health hazards associated with exposure to CARBON MONOXIDE pursuant to Health and Safety Code § 25249.7(a).

PARTIES

- Plaintiff is a citizen of the State of California acting in the interest of the general 10. public to promote awareness of exposures to toxic chemicals in products sold in California and to improve human health by reducing hazardous substances contained in such items. He brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).
- 11. Defendant Black Diamond, through its business, effectively manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California. Plaintiff alleges that Black Diamond is a "person" in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.
- 12. Defendant True Value, through its business, effectively imports, distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California. Plaintiff alleges that True Value is a "person" in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

VENUE AND JURISDICTION

13. Venue is proper in the County of Alameda because one or more of the instances of wrongful conduct occurred, and continue to occur in this county and/or because Defendants conduct, and continue to conduct, business in the County of Alameda with respect to the Product.

- 14. This 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. Health and Safety Code § 25249.7 allows for the enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has jurisdiction over this lawsuit.
- 15. This Court has jurisdiction over Defendants because each Defendant is either a citizen of the State of California, has sufficient minimum contacts with the State of California, is registered with the California Secretary of State as foreign corporations authorized to do business in the State of California, and/or has otherwise purposefully availed itself of the California market. Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent and permissible with traditional notions of fair play and substantial justice.

SATISFACTION OF NOTICE REQUIREMNTS

- 16. On April 27, 2018, Plaintiff gave notice of alleged violation of Health and Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to CARBON MONOXIDE from use of the Product without proper warning, subject to a private action to Defendants and to the California Attorney General's office and the offices of the County District attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein the herein violations allegedly occurred.
- 17. The Notice complied with all procedural requirements of Proposition 65 including the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at least one person with relevant and appropriate expertise who reviewed relevant data regarding CARBON MONOXIDE exposure, and that counsel believed there was meritorious and reasonable cause for a private action.
- 18. After receiving the Notice, and to Plaintiff's best information and belief, none of the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a cause of action against Defendants under Proposition 65 to enforce the alleged violations which are the subject of Plaintiff's notice of violation.

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

FIRST CAUSE OF ACTION

(By Plaintiff against Defendants for the Violation of Proposition 65)

- 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of this complaint as though fully set forth herein.
- 21. Defendants have, at all times mentioned herein, acted as either a manufacturer, distributer, and/or retailer of the Product.
- 22. Use of the Product will expose persons to CARBON MONOXIDE, a hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.
 - 23. The Product does not comply with the Proposition 65 warning requirements.
- 24. Plaintiff, based on his best information and belief, avers that at all relevant times herein, and at least since February 16, 2018, continuing until the present, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Product to CARBON MONOXIDE without providing required warnings under Proposition 65.
- inhalation of the Products. The products are used primarily for grilling, campfires, fireplaces and fire pits in order to promote initiation of combustion of carbon-based fuels, including charcoal. Combustion of charcoal produces and exposes people to CARBON MONOXIDE. Because the combustion of charcoal causes CARBON MONOXIDE to be released in the air, people using charcoal-burning grills, and others standing near the products when charcoal is burning in or on the products, inhale CARBON MONOXIDE. Consequently, a primary route of exposure to the chemicals contained in these products is through inhalation. Inhalation exposure occur when persons using these products, or persons nearby when the products are being used, inhale that which is emitted during its use. These products cause CARBON MONOXIDE exposures to occur in people's yards and everywhere else throughout California where these products are used. These violations occur during the foreseeable use of the products and when the product is used as intended. These violations are alleged for consumer and environmental exposures.