

1 LEXINGTON LAW GROUP
Eric S. Somers, State Bar No. 139050
2 Joseph Mann, State Bar No. 207968
503 Divisadero Street
3 San Francisco, CA 94117
Telephone: (415) 913-7800
4 Facsimile: (415) 759-4112
esomers@lexlawgroup.com
5 jmann@lexlawgroup.com

6 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

OCT 13 2016

By SUE PESKO

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 a non-profit corporation,)
14 Plaintiff,)
15 v.)
16 DS SERVICES OF AMERICA, INC.; HOME)
17 DEPOT U.S.A., INC.; and DOES 1 through 200,)
18 inclusive,)
19 Defendants.)
20

Case No. **RG16884953**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to bisphenol A ("BPA"), a chemical known
7 to the State of California to cause birth defects and other reproductive harm. Such exposures
8 have occurred, and continue to occur, when people consume bottled water in polycarbonate
9 plastic bottles that are sold by Defendants for use in water coolers ("Bottled Water").

10 Consumers, including pregnant women, are exposed to BPA when they consume Bottled Water.

11 2. Under California's Proposition 65, Health & Safety Code §25249.5, *et*
12 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
13 to chemicals known to the State to cause birth defects or other reproductive harm without first
14 providing clear and reasonable warnings to exposed individuals. Defendants introduce Bottled
15 Water containing significant quantities of BPA into the California marketplace, thereby exposing
16 consumers of their Bottled Water, many of whom are pregnant women, to BPA.

17 3. Despite the fact that Defendants expose pregnant women and other
18 consumers to BPA, Defendants provide no warnings whatsoever about the reproductive hazards
19 associated with BPA exposure. Defendants' conduct thus violates the warning provision of
20 Proposition 65. Health & Safety Code §25249.6.

21 PARTIES

22 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
23 non-profit corporation dedicated to protecting the public from environmental health hazards and
24 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
25 State of California. CEH is a "person" within the meaning of Health & Safety Code
26 §25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
27 Safety Code §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
28 group that has prosecuted a large number of Proposition 65 cases in the public interest. These

1 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
2 play and substantial justice.

3 12. Venue is proper in Alameda County Superior Court because one or more of
4 the violations arise in the County of Alameda.

5 **BACKGROUND FACTS**

6 13. The People of the State of California have declared by initiative under
7 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
8 defects, or other reproductive harm.” Proposition 65, §1(b).

9 14. To effectuate this goal, Proposition 65 prohibits exposing people to
10 chemicals listed by the State of California as known to cause birth defects or other reproductive
11 harm above certain levels without a “clear and reasonable warning” unless the business
12 responsible for the exposure can prove that it fits within a statutory exemption. Health & Safety
13 Code §25249.6 states, in pertinent part:

14 No person in the course of doing business shall knowingly and
15 intentionally expose any individual to a chemical known to the
16 state to cause cancer or reproductive toxicity without first giving
clear and reasonable warning to such individual

17 15. On May 11, 2015, the State of California officially listed BPA as a
18 chemical known to cause reproductive toxicity. BPA is specifically identified as a reproductive
19 toxicant under the subcategory “female reproductive toxicity,” which means harm to the female
20 reproductive system. 27 California Code of Regulations (“C.C.R.”) §27001(c). On May 11,
21 2016, one year after it was listed as a chemical known to cause reproductive toxicity, BPA
22 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
23 under Proposition 65. *Ibid.*; Health & Safety Code §25249.10(b).

24 16. Exposure to BPA, a known endocrine disruptor, has been associated with
25 numerous adverse reproductive impacts. One study summarizing recent scientific research
26 concluded that BPA acts as both an ovarian toxicant (*e.g.*, by altering levels of sex hormones and
27 reducing egg quality) and as a uterine toxicant (*e.g.*, by impairing the ability of the embryo to
28 implant in the uterus). Peretz, J., *et al.*, “Bisphenol A and Reproductive Health: Update of

1 Experimental and Human Evidence, 2007–2013,” *Environmental Health Perspectives*, Vol.
2 122:8, August 2014. Another recent study focusing on human epidemiological studies confirmed
3 these impacts, and further found BPA exposure to be linked to a host of developmental harms,
4 including disrupted neurological development and increased asthma prevalence in children.
5 Rochester, J., “Bisphenol A and Human Health: A Review of the Literature,” *Reproductive*
6 *Toxicology*, Vol. 42, December 2013.

7 17. BPA is a structural component of the polycarbonate plastic used to make
8 water cooler bottles. Such BPA migrates from polycarbonate plastic bottles into the drinking
9 water they contain. *See, e.g.,* Le, H., *et al.*, “Bisphenol A Is Released from Polycarbonate
10 Drinking Bottles and Mimics the Neurotoxic Actions of Estrogen in Developing Cerebellar
11 Neurons,” *Toxicology Letters*, Vol. 176:2, January 30, 2008.

12 18. Defendants’ Bottled Water contains sufficient quantities of BPA such that
13 consumers, including pregnant women, who consume the Bottled Water are exposed to a
14 significant amount of BPA. The primary route of exposure for the violations is direct ingestion
15 when consumers drink the Bottled Water. These exposures occur in homes, workplaces and
16 everywhere else throughout California where the Bottled Water is consumed.

17 19. No clear and reasonable warning is provided with Defendants’ Bottled
18 Water regarding the reproductive hazards of BPA.

19 20. One of the primary reasons people purchase bottled water is that they are
20 concerned about their health and the safety of their tap water. They believe that bottle water will
21 not expose them to toxic chemicals such as BPA and are thus willing to pay more for bottled
22 water on the mistaken assumption that it is safer.

23 21. Bottled water costs substantially more than tap water which does not
24 contain BPA. According to the International Bottled Water Association, the average cost per
25 gallon of bottled water – not counting imported or sparkling waters – was \$1.21 in 2013. The
26 average cost of tap water is \$2 per every thousand gallons, according to the U.S. Environmental
27 Protection Agency. Thus, when priced by the gallon, bottled water is more than 600 times more
28 expensive than tap water.

1 22. Any person acting in the public interest has standing to enforce violations
2 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
3 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
4 action within such time. Health & Safety Code §25249.7(d).

5 23. More than sixty days prior to naming each Defendant in this lawsuit, CEH
6 provided a 60-Day “Notice of Violation” of Proposition 65 to the California Attorney General, to
7 the District Attorneys of every county in California, to the City Attorneys of every California city
8 with a population greater than 750,000 and to each of the named Defendants. In compliance with
9 Health & Safety Code §25249.7(d) and 27 C.C.R. §25903(b), each Notice included the following
10 information: (1) the name and address of each violator; (2) the statute violated; (3) the time
11 period during which violations occurred; (4) specific descriptions of the violations, including (a)
12 the routes of exposure to BPA from Bottled Water, and (b) the specific type of products sold and
13 used in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed
14 chemical that is the subject of the violations described in each Notice.

15 24. CEH also sent a Certificate of Merit for each Notice to the California
16 Attorney General, to the District Attorneys of every county in California, to the City Attorneys of
17 every California city with a population greater than 750,000 and to each of the named
18 Defendants. In compliance with Health & Safety Code §25249.7(d) and 11 C.C.R. §3101, each
19 Certificate certified that CEH’s counsel: (1) has consulted with one or more persons with
20 relevant and appropriate experience or expertise who reviewed facts, studies or other data
21 regarding the exposures to BPA alleged in each Notice; and (2) based on the information
22 obtained through such consultations, believes that there is a reasonable and meritorious case for a
23 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health
24 & Safety Code §25249.7(d) and 11 C.C.R. §3102, each Certificate served on the Attorney
25 General included factual information – provided on a confidential basis – sufficient to establish
26 the basis for the Certificate, including the identity of the person(s) consulted by CEH’s counsel
27 and the facts, studies or other data reviewed by such persons.

28

1 25. None of the public prosecutors with the authority to prosecute violations
2 of Proposition 65 has commenced or is diligently prosecuting a cause of action against
3 Defendants under Health & Safety Code §25249.5, *et seq.*, based on the claims asserted in each
4 of CEH's Notices.

5 26. Defendants both know and intend that individuals, including pregnant
6 women, will consume the Bottled Water, thus exposing them to BPA.

7 27. Under Proposition 65, an exposure is "knowing" where the party
8 responsible for such exposure has:

9 knowledge of the fact that a[n] . . . exposure to a chemical listed
10 pursuant to [Health & Safety Code §25249.8(a)] is occurring. No
11 knowledge that the . . . exposure is unlawful is required.

12 27 C.C.R. §25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
13 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
14 §12601).

15 28. Defendants have been informed of the BPA in their Bottled Water by the
16 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

17 29. Defendants also have constructive knowledge that their Bottled Water
18 contains BPA due to the widespread media coverage concerning the problem of BPA in
19 consumer products in general, and in products made with polycarbonate plastic in particular. The
20 problem of BPA in bottled water has been the subject of articles in national newspapers, industry
21 trade papers and scholarly journals, as well as numerous Internet postings.

22 30. As companies that manufacture, import, distribute or sell Bottled Water
23 for use in the California marketplace, Defendants know or should know that the Bottled Water
24 contains BPA and that individuals who consume the Bottled Water will be exposed to BPA. The
25 BPA exposures to consumers who consume Bottled Water are a natural and foreseeable
26 consequence of Defendants' placing Bottled Water into the stream of commerce.

1 PRAYER FOR RELIEF

2 CEH prays for judgment against Defendants as follows:

3 1. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil
4 penalties against each of the Defendants in the amount of \$2,500 per day for each violation of
5 Proposition 65 according to proof;

6 2. That the Court, pursuant to Health & Safety Code §25249.7(a),
7 preliminarily and permanently enjoin Defendants from offering Bottled Water for sale in
8 California without either reformulating Bottled Water such that no Proposition 65 warnings are
9 required or providing prior clear and reasonable warnings, as CEH shall specify in further
10 application to the Court;

11 3. That the Court, pursuant to Health & Safety Code §25249.7(a), order
12 Defendants to take action to stop ongoing unwarned exposures to BPA resulting from use of
13 Bottled Water sold by Defendants, as CEH shall specify in further application to the Court;

14 4. That the Court, pursuant to Code of Civil Procedure §1021.5 or any other
15 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

16 5. That the Court grant such other and further relief as may be just and
17 proper.

18
19 Dated: October 13, 2016

Respectfully submitted,

20 LEXINGTON LAW GROUP

21
22 

23 Eric S. Somers
24 Attorneys for Plaintiff
25 CENTER FOR ENVIRONMENTAL HEALTH
26
27
28