Evan J. Smith, Esquire (SBN 242352) Ryan P. Cardona, Esquire (SBN 302113) BRODSKY & SMITH, LLC ENDURSED 9595 Wilshire Blvd., Ste. 900 FILED Beverly Hills, CA 90212 ALAMRDA COMTY Telephone: (877) 534-2590 Facsimile: (310) 247-0160 FEB 0 2 2018 5 Attorneys for Plaintiff CFERRER DE SERVERINE COURT By: D. OLIVER, Deputy 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 COUNTY OF ALAMEDA 9 Case No.: RG18891707 10 ANTHONY FERREIRO, 11 COMPLAINT FOR CIVIL PENALTIES Plaintiff, AND INJUNCTIVE RELEIF 12 VS. (Violation of Health & Safety Code §25249.5 13 IMPULSE! ENTERPRISES, LLC, et seq.) OVERSTOCK.COM, INC., 14 Defendants. 15 16 17 18 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the following cause of action in the public interest of the citizens of the State of 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 25 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. 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

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

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- 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 or threaten to violate" the statute. Health & Safety Code § 25249.7.
- Plaintiff alleges that Defendants produce, manufacture, distribute, import, sell, 6. and/or offer for sale in California, without the requisite exposure warning, Impulse! polycarbonate food and drinkware items, including but not limited to Impulse! Capri Latte Sets (the "Products") that expose persons to BPA.
- 7. Defendants' failure to warn consumers and other individuals in California of the health hazards associated with exposure to BPA in conjunction with the sale, manufacture, and/or distribution of the Products 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 BPA pursuant to Health and Safety Code § 25249.7(a).

PARTIES

- 10. Plaintiff is a citizen of the State of California acting in the interest of the general 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. She brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).
- Defendant Impulse!, 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. Defendant Impulse! maintains a registered agent for service of process at c/o Robert Berman, 710 South Powerline Road, Suite C, Deerfield Beach, FL 33442. Plaintiff alleges that defendant Impulse! is a "person" in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.
- 12. Defendant Overstock, 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. Defendant Overstock maintains a registered agent for service of process at c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. Plaintiff alleges that defendant Overstock 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 conducted, 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 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 August 4, 2017, Plaintiff gave notice of alleged violation of Health and Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to BPA contained in the Products 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 BPA 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 manufacturer, distributer, and/or retailer of the Product.
- 22. The Products contain BPA, a hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.
 - 23. The Products do 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 May 16, 2017, continuing until the present, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Product to BPA without providing required warnings under Proposition 65.
- 25. The exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of the product. Consequently, the primary route of exposure to these chemicals is through oral ingestion. The polycarbonate tested is expected to be in contact with liquid beverages during normal expected use and thus BPA can leach from the polycarbonate plastic into liquids that come into contact with the polycarbonate. Extraction of BPA may be enhanced into liquids when the latte mug contains liquids at elevated temperatures, such as coffee, or when the latte mug contains alcohol or milk. When BPA contaminated liquids contained in the latte mug are consumed, oral ingestion of BPA will result. Over time, it is expected that the polycarbonate will be exposed to hot water and abrasion during hand and/or machine washing and future BPA leaching rates can be expected to increase with continued exposure to hot water and washing cycles. Washing the product with hard water and/or dishwashing soaps at elevated pH will result in higher extraction rates of BPA with subsequent uses of the latte mug. Dermal exposure to BPA will occur when the polycarbonate is handled

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