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MARGARET J. DOWNIE

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

12 ANTHONY FERREIRO,

13 Plaintiff,

14 v.

15 SAN JAMAR, INC.,

16 Defendant.

Case No.:

RG18919771

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

**(Violation of Health & Safety Code §25249.5 et
seq.)**

17 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the
18 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 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 Bisphenol A (BPA), a toxic chemical found in polycarbonate

1 Rapi-Kool Chillers manufactured, sold and/or distributed in California by defendant San Jamar,
2 Inc. (“San Jamar” or “Defendant”) in California.

3 3. BPA is a harmful chemical known to the State of California to reproductive
4 toxicity. On May 11, 2015, the State of California listed BPA as a chemical known to the State
5 to cause reproductive toxicity and it has come under the purview of Proposition 65 regulations
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
7 25249.10(b).

8 4. Proposition 65 requires all businesses with ten (10) or more employees that
9 operate within California or sell products therein to comply with Proposition 65 regulations.
10 Included in such regulations is the requirement that businesses must label any product containing
11 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and
12 intentionally” exposing any person to it.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
14 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety
15 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
16 the actions of a defendant which “violate[s] or threaten[s] to violate” the statute. Health &
17 Safety Code § 25249.7.

18 6. Plaintiff alleges that Defendant manufactures, distributes, imports, sells, and/or
19 offers for sale in California, without the required Proposition 65 exposure warning, Rapi-Kool
20 Chillers (the “Products”), and that use of the Products will expose persons to BPA.

21 7. Defendant’s failure to warn consumers and other individuals in California of the
22 health hazards associated with exposure to BPA in conjunction with the sale, manufacture,
23 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendant to the
24 enjoyment and civil penalties described herein.

25 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
26 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
28 Defendant to provide purchasers or users of the Product with the required warnings related to the

1 dangers and health hazards associated with exposure to BPA pursuant to Health and Safety Code
2 § 25249.7(a).

3 **PARTIES**

4 10. Plaintiff is a citizen of the State of California acting in the interest of the general
5 public to promote awareness of exposures to toxic chemicals in products sold in California and
6 to improve human health by reducing hazardous substances contained in such items. He brings
7 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

8 11. Defendant effectively manufactures, imports, distributes, sells, and/or offers the
9 Products for sale or use in the State of California, or it implies by its conduct that it
10 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
11 California.

12 12. Defendant San Jamar is alleged to be a “person” in the course of doing business
13 within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 13. Venue is proper in the County of Alameda because one or more of the instances
16 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
17 conducted, and continues to conduct, business in the County of Alameda with respect to the
18 Product.

19 14. This Court has jurisdiction over this action pursuant to California Constitution
20 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
21 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
22 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
23 this Court has jurisdiction over this lawsuit.

24 15. This Court has jurisdiction over Defendant because it is either a citizen of the
25 State of California, has sufficient minimum contacts with the State of California, is registered
26 with the California Secretary of State as foreign corporations authorized to do business in the
27 State of California, and/or has otherwise purposefully availed itself of the California market.

28

1 Such purposeful availment has rendered the exercise of jurisdiction by California courts
2 consistent and permissible with traditional notions of fair play and substantial justice.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 16. On September 7, 2017, Plaintiff gave notice of alleged violation of Health and
5 Safety Code § 25249.6 (the "Notice") to San Jamar concerning the exposure of California
6 citizens to BPA contained in the Products without proper warning, subject to a private action to
7 San Jamar and to the California Attorney General's office and the offices of the County District
8 attorneys and City Attorneys for each city with a population greater than 750,000 persons
9 wherein the herein violations allegedly occurred.

10 17. The Notice complied with all procedural requirements of Proposition 65 including
11 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
12 least one person with relevant and appropriate expertise who reviewed relevant data regarding
13 BPA exposure, and that counsel believed there was meritorious and reasonable cause for a
14 private action.

15 18. After receiving the Notice, and to Plaintiff's best information and belief, none of
16 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
17 a cause of action against San Jamar under Proposition 65 to enforce the alleged violations which
18 are the subject of the Notice.

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

21 **FIRST CAUSE OF ACTION**

22 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

23 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
24 this complaint as though fully set forth herein.

25 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
26 and/or retailer of the Product.

27 22. The Products contain BPA, a hazardous chemical found on the Proposition 65 list
28 of chemicals known to be hazardous to human health.

1 23. The Products do not comply with the Proposition 65 warning requirements.

2 24. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since April 27, 2017, continuing until the present, that San Jamar has
4 continued to knowingly and intentionally expose California users and consumers of the Products
5 to BPA without providing required warnings under Proposition 65.

6 25. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling and recommended use of the Products. Consequently, the primary route of
8 exposure to these chemicals is through oral ingestion. Over time, it is expected that the Products
9 will be exposed to hot water and abrasion during hand and/or machine washing and future BPA
10 leaching rates can be expected to increase with continued exposure to hot water and washing
11 cycles. Washing the Products with hard water and/or dishwashing soaps at elevated pH will
12 result in higher extraction rates of BPA with subsequent uses of the Products. The Products are
13 expected to be in contact with hot liquids during normal expected use and thus BPA can leach
14 from the polycarbonate plastic into liquids that come into contact with the polycarbonate.
15 Extraction of BPA will be enhanced into liquids when the Products are immersed in liquids at
16 elevated temperatures or when the Products are immersed in liquids containing alcohol or milk.
17 When BPA contaminated liquids due to contact with the Products are consumed, oral ingestion
18 of BPA will result. Dermal exposure to BPA will occur when the Product is handled with bare
19 hands during normal expected use and cleaning. Finally, some amount of exposure to BPA
20 through ingestion can occur by handling the Product, with subsequent touching of the user's
21 hand to mouth.

22 26. Plaintiff, based on his best information and belief, avers that such exposures will
23 continue every day until clear and reasonable warnings are provided to Product purchasers and
24 users or until this known toxic chemical is removed from the Product.

25 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
26 Product exposes individuals to BPA, and Defendant intends that exposures to BPA will occur by
27 its deliberate, non-accidental participation in the manufacture, importation, distribution, sale and
28 offering of the Product to consumers in California

1 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
2 Complaint.

3 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
4 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

5 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
6 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

7
8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
10 following relief:

- 11 A. That the court assess civil penalties against Defendant in the amount of
12 \$2,500 per day for each violation in accordance with Health and Safety
13 Code § 25249.7(b);
14 B. That the court preliminarily and permanently enjoin Defendant mandating
15 Proposition 65 compliant warnings on the Product;
16 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
17 D. That the court grant any further relief as may be just and proper.
18

19 Dated: September 7, 2018

BRODSKY & SMITH, LLC

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