

ENDORSED
FILED
ALAMEDA COUNTY

AUG 10 2018

CLERK OF THE SUPERIOR COURT
By Molly Kautz

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
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12 Plaintiff,
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14 vs.
15 RUBBERMAID COMMERCIAL
16 PRODUCTS, LLC,
17
18 Rubbermaid.

Case No.: RG18914320
Judge: Dennis Hayashi
Dept.: 518

**FIRST AMENDED COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE RELIEF**

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

19 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the
20 following cause of action in the public interest of the citizens of the State of California.

BACKGROUND OF THE CASE

21 1. Plaintiff brings this representative action on behalf of all California citizens to
22 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
23 at the Health and Safety Code § 25249.5 et seq. ("Proposition 65"), which reads, in relevant part,
24 "[n]o person in the course of doing business shall knowingly and intentionally expose any
25 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
26 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

27 2. This amended complaint is a representative action brought by Plaintiff in the
28 public interest of the citizens of the State of California to enforce the People's right to be
informed of the health hazards caused by exposure bisphenol A (BPA), a toxic chemical found in

1 Rubbermaid polycarbonate pitchers sold and/or distributed by defendant Rubbermaid
2 Commercial Products LLC (“Rubbermaid”) in California.

3 3. BPA is a harmful chemical known to the State of California to cause 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 BPA has come under the purview of Proposition 65
6 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
7 25249.8 & 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 or threaten to violate” the statute. Health & Safety
17 Code § 25249.7.

18 6. Plaintiff alleges that Rubbermaid manufactures, distributes, sells and/or offers for
19 sale in California, without a requisite exposure warning, Rubbermaid polycarbonate pitchers (the
20 “Products”) that expose persons to BPA.

21 7. Rubbermaid’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 Rubbermaid to
24 the enjoinder and civil penalties described herein.

25 8. Plaintiff seeks civil penalties against Rubbermaid 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 Rubbermaid to provide purchasers or users of the Product with exposure 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. Rubbermaid, through its business, effectively manufactures, imports, distributes,
9 sells, and/or offers the Product for sale or use in the State of California, or it implies by its
10 conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use
11 in the State of California.

12 12. Plaintiff alleges that defendant Rubbermaid is a “person” in the course of doing
13 business 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 Rubbermaid
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 Rubbermaid because it is a citizen of the State of
25 California, has sufficient minimum contacts with the State of California, is registered with the
26 California Secretary of State as foreign corporations authorized to do business in the State of
27 California, and/or has purposefully availed itself of the California market. Such purposeful
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1 availment has rendered the exercise of jurisdiction by California courts consistent and
2 permissible with traditional notions of fair play and substantial justice.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 16. On September 14, 2017, Plaintiff gave notice of alleged violation of Health and
5 Safety Code § 25249.6 (the "Notice") to Rubbermaid concerning the exposure of California
6 citizens to BPA contained in the Products without proper warning, subject to a private action to
7 Rubbermaid and to the California Attorney General's office and the offices of the County
8 District attorneys and City Attorneys for each city with a population greater than 750,000
9 persons 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 Rubbermaid under Proposition 65 to enforce the alleged violations
18 which are the subject of Plaintiff's notice of violation.

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

21 **FIRST CAUSE OF ACTION**

22 **(By Plaintiff against Rubbermaid 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. Rubbermaid has, at all times mentioned herein, acted as a manufacturer,
26 distributor 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 July 24, 2017, continuing until the present, that Rubbermaid has
4 continued to knowingly and intentionally expose California users and consumers of the Product
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 product. Consequently, the primary route of
8 exposure to these chemicals is through oral ingestion. The pitcher tested is expected to be in
9 contact with beverages and liquids during normal expected use and thus BPA can leach from the
10 polycarbonate plastic into beverages and liquids that come into contact with the polycarbonate.
11 Extraction of BPA may be enhanced into liquids when the pitcher contains liquids at elevated
12 temperatures or when the pitcher contains alcohol or milk. When BPA contaminated liquids
13 contained in the pitcher are consumed, oral ingestion of BPA will result. Over time, it is
14 expected that the pitcher will be exposed to hot water and abrasion during hand and/or machine
15 washing and future BPA leaching rates can be expected to increase with continued exposure to
16 hot water and washing cycles. Washing the product with hard water and/or dishwashing soaps at
17 elevated pH will result in higher extraction rates of BPA with subsequent used of the pitcher.
18 Dermal exposure to BPA will occur when the pitcher is handled with bare hands during normal
19 expected use and cleaning. If beverages are ingested directly from the pitcher, direct mouthing
20 of the polycarbonate will occur and ingestion of BPA is possible through mouthing. Finally,
21 some amount of exposure to BPA through ingestion can occur by handling the product, with
22 subsequent touching of the user's hand to mouth.

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

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

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

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

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

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff demands judgment against Rubbermaid and requests the
11 following relief:

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

19 Dated: August 10, 2018

BRODSKY & SMITH, LLC

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