| 1  | Even I Smith E-min (SDN 242252)   | ENDORSED<br>FILED                                   |
|----|---|---|
| 1  | Ryan P. Cardona, Esquire (SBN 302113)   | ALAMEDA COUNTY                                      |
| 3  | 9595 Wilshire Blvd., Ste. 900   | MAR 12 2019   |
| 4  | Telephone: (877) 534-2590   | CLERK OF THE SEPERIOR COURT                         |
| 5  |   | By Carlot Cook!                                     |
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| 8  | SUPERIOR COURT OF THE STATE OF CALIFORNIA   |   |
| 9  | COUNTY OF ALAMEDA   |   |
| 10 | ANTHONY FERREIRO,   | Case No.: RS19010543                                |
| 11 | Plaintiff,  | COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELEIF |
| 12 | VS.   | (Violation of Health & Safety Code §25249.5 et      |
| 13 | MIZUNO USA, INC., WALMART, INC.,  | seq.)   |
| 14 | Defendants.   |   |
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| 22 | "[n]o person in the course of doing business shall knowingly and intentionally expose any             |   |
| 23 | individual to a chemical known to the state to cause cancer or reproductive toxicity without first    |   |
| 24 | giving clear and reasonable warning to such individual". Health & Safety Code § 25249.6.              |   |
| 25 | 2. This complaint is a representative action brought by Plaintiff in the public interest              |   |
| 26 | of the citizens of the State of California to enforce the People's right to be informed of the health |   |
| 27 | hazards caused by exposure bisphenol A (BPA), a toxic chemical found in Mizuno batting                |   |

helmets sold and/or distributed by defendants Mizuno USA, Inc. ("Mizuno") and Walmart, Inc. ("Walmart") (collectively, "Defendants") in California.

- 3. BPA is a harmful chemical known to the State of California to cause reproductive toxicity. On May 11, 2015, the State of California listed BPA as a chemical known to the State to cause reproductive toxicity and BPA 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 or threaten to violate" the statute. Health & Safety Code § 25249.7.
- 6. Plaintiff alleges that Defendants manufacture, distribute, sell and/or offer for sale in California, without a requisite exposure warning, Mizuno batting helmets (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 exposure 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. He brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).
- 11. Mizuno, 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 defendant Mizuno is a "person" in the course of doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.
- 12. Walmart, 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 imports, distributes, sells, and/or offers the Product for sale or use in the State of California. Plaintiff alleges that defendant Walmart is a "person" in the course of doing business within the meaning of Health & Safety Code §§ 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 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 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 March 12, 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 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 Mizuno 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 a 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 January 9, 2018, 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 the Notice result from the purchase, acquisition, handling and recommended use of the Product. Consequently, the primary route of exposure to these chemicals is through dermal exposure. Dermal exposure to BPA is possible when the user handles the face guard of the Product. Should the Product ever contact hot water and/or soaps at elevated pH during washing, higher extraction rates of BPA and accumulation of BPA at the surface of the object will result. Finally, while mouthing of the Product does not seem likely, some amount of exposure through ingestion can occur by touching the face guard with subsequent touching of the user's hand to mouth.
- 26. Plaintiff, based on his best information and belief, avers that such exposures will continue every day until clear and reasonable warnings are provided to Product purchasers and users or until this known toxic chemical is removed from the Product.
- 27. Defendants have knowledge that the normal and reasonably foreseeable use of the Products expose individuals to BPA, and Mizuno intends that exposures to BPA will occur by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale and offering of the Product to consumers in California
- 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this Complaint.
- 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above described acts, Mizuno is liable for a maximum civil penalty of \$2,500 per day per violation.

| 1                               | 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically |  |  |
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| 2                               | authorized to grant injunctive relief in favor of Plaintiff and against Mizuno. |  |  |
| 3                               | PRAYER FOR RELIEF   |  |  |
| 4                               | WHEREFORE, Plaintiff demands judgment against Mizuno and requests the following |  |  |
| 5                               | relief:   |  |  |
| 6                               | A. That the court assess civil penalties against Mizuno in the amount of        |  |  |
| 7                               | \$2,500 per day for each violation in accordance with Health and Safety         |  |  |
| 8                               | Code § 25249.7(b);  |  |  |
| 9                               | B. That the court preliminarily and permanently enjoin Mizuno mandating         |  |  |
| 10                              | Proposition 65 compliant warnings on the Product;                               |  |  |
| 11                              | C. That the court grant Plaintiff reasonable attorney's fees and costs of suit  |  |  |
| 12                              | D. That the court grant any further relief as may be just and proper.           |  |  |
| 13                              | Dated: March 12, 2019 BRODSKY & SMITH, LLC                                      |  |  |
| 14                              | By:   |  |  |
| 15                              | Evan J. Smith (SBN242352)<br>Ryan P. Cardona (SBN302113)                        |  |  |
| 16                              | 9595 Wilshire Boulevard, Suite 900<br>Beverly Hills, CA 90212                   |  |  |
| 17                              | Telephone: (877) 534-2590<br>Facsimile: (310) 247-0160                          |  |  |
| 18                              | Attorneys for Plaintiff   |  |  |
| 19                              | Anorneys for 1 turning  |  |  |
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