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9 **ENDORSED
FILED
ALAMEDA COUNTY**

10 **DEC 08 2020**

11 **CLERK OF THE SUPERIOR COURT**

12 By  Deputy

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF ALAMEDA**

15 Case No.: **RG2UU8357U**

16 **GABRIEL ESPINOZA,**

17 **Plaintiff,**

18 **vs.**

19 **CASE-MATE, INC., THE TJX
20 COMPANIES, INC.,**

21 **Defendants.**

22 **COMPLAINT FOR CIVIL PENALTIES AND
23 INJUNCTIVE RELIEF**

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

26 Plaintiff Gabriel Espinoza ("Plaintiff"), by and through his attorneys, alleges the following
27 cause of action in the public interest of the citizens of the State of California.

28 **BACKGROUND OF THE CASE**

1. Plaintiff brings this representative action on behalf of all California citizens to
enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
"[n]o person in the course of doing business shall knowingly and intentionally expose any
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.

2. This complaint is a representative action brought by Plaintiff in the 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 to Bisphenol A (BPA), a toxic chemical found in Case-Mate Karat

1 Pearl iPhone cases sold and/or distributed by defendant Case-Mate, Inc. (“Case-Mate”) and
2 defendant The TJX Companies, Inc. (“TJX”) (collectively, the “Defendants”) in California.

3 3. BPA is a harmful chemical known to the State of California to cause female
4 reproductive toxicity. On May 11, 2015, the State of California listed BPA as a chemical known
5 to the State to cause reproductive toxicity and it has come under the purview of Proposition 65
6 regulations 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 operate
9 within California or sell products therein to comply with Proposition 65 regulations. Included in
10 such regulations is the requirement that businesses must label any product containing a Proposition
11 65-listed chemical with a “clear and reasonable” warning before “knowingly and intentionally”
12 exposing any person to any such listed chemical.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
14 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
15 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
16 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
17 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
18 25249.7.

19 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
20 without a requisite exposure warning, Case-Mate Karat Pearl iPhone cases (the “Products”) that
21 expose persons to BPA.

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

26 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
27 65 in accordance with Health and Safety Code § 25249.7(b).

1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Defendants to provide purchasers or users of the Products with required warnings related to the
3 dangers and health hazards associated with exposure to BPA pursuant to Health and Safety Code
4 § 25249.7(a).

5 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

6 **PARTIES**

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

11 12. Defendant Case-Mate, through its business, effectively imports, distributes, sells,
12 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
13 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
14 Plaintiff alleges that defendant Case-Mate is a "person" in the course of doing business within the
15 meaning of Health & Safety Code sections 25249.6 and 25249.11.

16 13. Defendant TJX, through its business, effectively imports, distributes, sells, and/or
17 offers the Products for sale or use in the State of California, or it implies by its conduct that it
18 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
19 Plaintiff alleges that defendant TJX is a "person" in the course of doing business within the
20 meaning of Health & Safety Code sections 25249.6 and 25249.11.

21 **VENUE AND JURISDICTION**

22 14. Venue is proper in the County of Alameda because one or more of the instances of
23 wrongful conduct occurred, and continue to occur in this county and/or because Defendants
24 conducted, and continue to conduct, business in the County of Alameda with respect to the
25 Products.

26 15. This Court has jurisdiction over this action pursuant to California Constitution
27 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
28 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement

1 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
2 jurisdiction over this lawsuit.

3 16. This Court has jurisdiction over Defendants because each defendant is either a
4 citizen of the State of California, has sufficient minimum contacts with the State of California, is
5 registered with the California Secretary of State as foreign corporations authorized to do business
6 in the State of California, and/or has otherwise purposefully availed itself of the California market.
7 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
8 and permissible with traditional notions of fair play and substantial justice.

9 **STATUTORY BACKGROUND**

10 17. The people of the State of California declared in Proposition 65 their right “[t]o be
11 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
12 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

13 18. To effect this goal, Proposition 65 requires that individuals be provided with a
14 “clear and reasonable warning” before being exposed to substances listed by the State of California
15 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

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

19 19. An exposure to a chemical in a consumer product is one “which results from a
20 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
21 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
22 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
23 shall provide a warning to any person to whom the product is sold or transferred unless the product
24 is packaged or labeled with a clear and reasonable warning.”

1 20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
2 more of the following methods individually or in combination:¹

3 a. A warning that appears on a product’s label or other labeling.

4 b. Identification of the product at the retail outlet in a manner which provides
5 a warning. Identification may be through shelf labeling, signs, menus, or a combination
6 thereof.

7 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
8 prominently placed upon a product’s labels or other labeling or displayed at the retail outlet
9 with such conspicuousness, as compared with other words, statements, designs, or devices
10 in the label, labeling or display as to render it likely to be read and understood by an
11 ordinary individual under customary conditions of purchase or use.

12 d. A system of signs, public advertising identifying the system and toll-free
13 information services, or any other system that provides clear and reasonable warnings.

14 21. Proposition 65 provides that any “person who violates or threatens to violate” the
15 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
16 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
17 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
18 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
19 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

20 **FACTUAL BACKGROUND**

21 22. On May 11, 2015, the State of California listed BPA as a chemical known to the
22 State to cause female reproductive toxicity and it has come under the purview of Proposition 65
23 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8
24

25
26
27 ¹ Alternatively, a person in the course of doing business may elect to comply with the warning
28 requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30,
2016, and operative on August 30, 2018.

1 & 25249.10(b). In summary, the Listed Chemical was listed under Proposition 65 as a chemical
2 known to the State to cause reproductive toxicity in females.

3 23. The consumer exposures that are the subject of this Complaint result from through
4 dermal absorption. Dermal exposure to BPA is possible when the user handles the Products or the
5 Products are placed in contact with exposed areas of the user's skin that can include facial skin.
6 Should the Products contact hard water and/or soaps at elevated pH, higher extraction rates of BPA
7 and accumulation of BPA at the surface of the Products will result. If the Products are placed in
8 contact with the user's mouth during a phone call, ingestion of BPA can occur. Finally, some
9 amount of exposure through ingestion can occur by touching the Products with subsequent
10 touching of the user's hand to mouth. OEHHA has not established a safe harbor level for the oral
11 ingestion of BPA. As such, if BPA is ingested due to direct hand to mouth contact, a BPA exposure
12 warning is appropriate.

13 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
14 and/or sold the Products in California since at least December 18, 2019. The Products continue to
15 be distributed and sold in California without the requisite warning information.

16 25. At all times relevant to this action, Defendants have knowingly and intentionally
17 exposed users, consumers and/or patients to the Products and the Listed Chemical without first
18 giving a clear and reasonable exposure warning to such individuals.

19 26. As a proximate result of acts by each defendant, as a person in the course of doing
20 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
21 California, including in Alameda County, have been exposed to the Listed Chemical without a
22 clear and reasonable warning on the Products. The individuals subject to the violative exposures
23 include normal and foreseeable users, consumers and patients that use the Products, as well as all
24 others exposed to the Products.

25 **SATISFACTION OF NOTICE REQUIREMENTS**

26 27. On December 18, 2019, Plaintiff gave notice of alleged violation of Health and
27 Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens
28 to BPA contained in the Products without proper warning, subject to a private action to Defendants

1 and to the California Attorney General's office and the offices of the County District attorneys and
2 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
3 violations allegedly occurred.

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

9 29. After receiving the Notice, and to Plaintiff's best information and belief, none of
10 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
11 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
12 are the subject of the Notice.

13 30. Plaintiff is commencing this action more than sixty (60) days from the date of the
14 Notice to Defendants, as required by law.

15 **FIRST CAUSE OF ACTION**

16 **(By Plaintiff against Defendants for the Violation of Proposition 65)**

17 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of
18 this Complaint as though fully set forth herein.

19 32. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
20 of the Products.

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

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

24 35. Plaintiff, based on his best information and belief, avers that at all relevant times
25 herein, and at least since December 18, 2019, continuing until the present, that Defendants have
26 continued to knowingly and intentionally expose California users and consumers of the Products
27 to BPA without providing required warnings under Proposition 65.

1 36. The exposures that are the subject of the Notice result from the purchase,
2 acquisition, handling and recommended use of the Products. Consequently, the primary route of
3 exposure to these chemicals is through oral ingestion. Dermal exposure to BPA is possible when
4 the user handles the Products or the Products are placed in contact with exposed areas of the user's
5 skin that can include facial skin. Should the Products contact hard water and/or soaps at elevated
6 pH, higher extraction rates of BPA and accumulation of BPA at the surface of the Products will
7 result. If the Products are placed in contact with the user's mouth during a phone call, ingestion of
8 BPA can occur. Finally, some amount of exposure through ingestion can occur by touching the
9 Products with subsequent touching of the user's hand to mouth. OEHHA has not established a safe
10 harbor level for the oral ingestion of BPA. As such, if BPA is ingested due to direct hand to mouth
11 contact, a BPA exposure warning is appropriate.

12 37. Plaintiff, based on his best information and belief, avers that such exposures will
13 continue every day until clear and reasonable warnings are provided to purchasers and users or
14 until this known toxic chemical is removed from the Products.

15 38. Defendants have knowledge that the normal and reasonably foreseeable use of the
16 Product exposes individuals to BPA, and Defendants intend that exposures to BPA will occur by
17 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
18 Products to consumers in California

19 39. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
20 Complaint.

21 40. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
22 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per violation.

23 41. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
24 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
3 relief:

4 A. That the court assess civil penalties against each defendant in the amount of \$2,500
5 per day for each violation for up to 365 days (up to a maximum civil penalty amount per
6 violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);

7 B. That the court preliminarily and permanently enjoin Defendants mandating
8 Proposition 65 compliant warnings on the Products;

9 C. That the court grant Plaintiff reasonable attorney’s fees and costs of suit, in the
10 amount of \$50,000.00.

11 D. That the court grant any further relief as may be just and proper.

12 Dated: December 7, 2020

BRODSKY & SMITH, LLC

13 By:  _____

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