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9 **ENDORSED
FILED
ALAMEDA COUNTY**

10 **MAY 13 2021**

11 **CLERK OF THE COURT
Roni Gill**

12 BY: _____ Deputy Clerk

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

15 **RG 21101989**

16 ANTHONY FERREIRO,

17 Plaintiff,

18 vs.

19 HORI (U.S.A.), INC., BEST BUY CO.,
20 INC.,

21 Defendants.

22 Case No.:

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

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

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

27 **BACKGROUND OF THE CASE**

28 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 HORI Nintendo

1 Switch armor sold and/or distributed by defendant HORI (U.S.A.), Inc. (“HORI”) and defendant
2 Best Buy Co., Inc. (“Best Buy”) (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, HORI Nintendo Switch armor (the “Products”) that expose
21 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 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 & 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.
5 Should the Products contact hard water and/or soaps at elevated pH, higher extraction rates of BPA
6 and accumulation of BPA at the surface of the Products will result. If the Products are stored or
7 transported in a carrier, BPA that leaches from the Products may contaminate other articles
8 contained within these closed spaces that are subsequently handled, worn, mouthed, or ingested
9 by the user. Finally, some amount of exposure through ingestion can occur by touching the
10 Products with subsequent touching of the user's hand to mouth.

11 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
12 and/or sold the Products in California since at least October 19, 2020. The Products continue to be
13 distributed and sold in California without the requisite warning information.

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

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

23 **SATISFACTION OF NOTICE REQUIREMENTS**

24 27. On October 19, 2020, Plaintiff gave notice of alleged violation of Health and Safety
25 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
26 BPA contained in the Products without proper warning, subject to a private action to Defendants
27 and to the California Attorney General's office and the offices of the County District attorneys and
28

1 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
2 violations allegedly occurred.

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

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

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

14 **FIRST CAUSE OF ACTION**

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

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

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

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

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

23 35. Plaintiff, based on his best information and belief, avers that at all relevant times
24 herein, and at least since October 19, 2020, continuing until the present, that Defendants have
25 continued to knowingly and intentionally expose California users and consumers of the Products
26 to BPA without providing required warnings under Proposition 65.

27 36. The exposures that are the subject of the Notice result from the purchase,
28 acquisition, handling and recommended use of the Products. Consequently, the primary route of

1 exposure to these chemicals is through dermal exposure. Dermal exposure to BPA is possible when
2 the user handles the Products. Should the Products contact hard water and/or soaps at elevated pH,
3 higher extraction rates of BPA and accumulation of BPA at the surface of the Products will result.
4 If the Products are stored or transported in a carrier, BPA that leaches from the Products may
5 contaminate other articles contained within these closed spaces that are subsequently handled,
6 worn, mouthed, or ingested by the user. Finally, some amount of exposure through ingestion can
7 occur by touching the Products with subsequent touching of the user's hand to mouth.

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

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

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

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

19 41. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
20 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: May 13, 2021

BRODSKY SMITH

13 By:  _____

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