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ELECTRONICALLY
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Superior Court of California,
County of San Francisco

12/16/2021
Clerk of the Court
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Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-21-597169

11 ANTHONY FERREIRO,

12 Plaintiff,

13 vs.

14 MYERS INDUSTRIES, INC.,

15 Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

16 Plaintiff Anthony Ferreiro (“Plaintiff”), by and through his attorneys, alleges the following
17 cause of action in the public interest of the citizens of the State of California.

18 **BACKGROUND OF THE CASE**

19 1. Plaintiff brings this representative action on behalf of all California citizens to
20 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
21 the Health and Safety Code § 25249.5 et seq (“Proposition 65”), which reads, in relevant part,
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 against defendant Myers Industries, Inc. (“Myers” or
27 “Defendant”) to enforce the People’s right to be informed of the health hazards caused by exposure
28

1 to Bisphenol A (BPA) from the use of Akro-Mils polycarbonate storage bins/containers that are
2 manufactured, distributed, offered for sale and/or sold by Myers 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 BPA 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 Myers distributes and/or offers for sale in California, without
20 a requisite Proposition 65 exposure warning, Akro-Mils polycarbonate storage bins/containers (the
21 “Products”) that expose persons to BPA when used as intended and/or for its intended purpose.

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

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

1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Myers to provide purchasers or users of the Products with required warnings related to the dangers
3 and health hazards associated with exposure to BPA from use of the Products pursuant to Health
4 and Safety Code § 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 Myers, through its business, effectively imports, distributes, sells and/or
12 offers the Products for sale or use in the State of California, or it implies by its conduct that it
13 imports, distributes, sells and/or offers the Products for sale or use in the State of California..

14 13. Plaintiff alleges that defendant Myers is a "person" in the course of doing business
15 within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

16 **VENUE AND JURISDICTION**

17 14. Venue is proper in the County of San Francisco because one or more of the
18 instances of wrongful conduct occurred and continues to occur in this county and/or because Myers
19 conducted, and continues to conduct, business in the County of San Francisco with respect to the
20 Products.

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

26 16. This Court has jurisdiction over Myers because Defendant is either a citizen of the
27 State of California, has sufficient minimum contacts with the State of California, is registered with
28 the California Secretary of State as foreign corporations authorized to do business in the State of

1 California and/or has otherwise purposefully availed itself of the California market. Such
2 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
3 permissible with traditional notions of fair play and substantial justice.

4 STATUTORY BACKGROUND

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

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

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

14 19. An exposure to a chemical in a consumer product is one “which results from a
15 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
16 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
17 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
18 shall provide a warning to any person to whom the product is sold or transferred unless the product
19 is packaged or labeled with a clear and reasonable warning.”

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

- 22 a. A warning that appears on a product’s label or other labeling.
- 23 b. Identification of the product at the retail outlet in a manner which provides
24 a warning. Identification may be through shelf labeling, signs, menus, or a combination
25 thereof.

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

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

8 21. Proposition 65 provides that any "person who violates or threatens to violate" the
9 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
10 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
11 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
12 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
13 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

14 **FACTUAL BACKGROUND**

15 22. On May 11, 2015, the State of California listed BPA as a chemical known to the
16 State to cause female reproductive toxicity and BPA has come under the purview of Proposition
17 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
18 25249.8 & 25249.10(b).

19 23. The exposures that are the subject of this Complaint result from the purchase,
20 acquisition, handling and recommend use of the Products. The primary route of exposure to BPA
21 from use of the Products is dermal exposure. Dermal exposure to BPA is possible when the user
22 handles the Products, or the Products are placed in contact with exposed areas of the user's skin.
23 Additionally, exposure through ingestion will occur by touching the Products with subsequent
24 touching of the user's hand to mouth.

25 24. Myers has distributed, offered to sell and/or sold the Products in California since at
26 least December 21, 2020. The Products continue to be distributed and sold in California without a
27 requisite Proposition 65 compliant BPA exposure warning.

1 25. At all times relevant to this action, Myers has knowingly and intentionally exposed
2 users, consumers and/or purchasers of the Products to BPA without first providing a clear and
3 reasonable exposure warning to such individuals.

4 26. As a proximate result of Defendant's actions, and as a person in the course of doing
5 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
6 California, including in San Francisco County, have been exposed to BPA from use of the Products
7 without having first been provided a clear and reasonable exposure warning. The individuals
8 subject to the violative exposures include normal and foreseeable users and consumers that use the
9 Products.

10 **SATISFACTION OF NOTICE REQUIREMENTS**

11 27. Plaintiff purchased the Product from Best Buy. At the time of purchase, Best Buy
12 and Myers did not provide a Proposition 65 exposure warning for BPA or any other Proposition
13 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

14 28. The Product was sent to a testing laboratory to determine the concentration of BPA
15 present on the surface of the Product.

16 29. The laboratory provided the results of its analysis. Surface BPA was collected using
17 a wipe test. Results of this test concluded the presence of BPA at the surface of the product (the
18 "Chemical Test Report").

19 30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
20 to determine if, based on the findings of the Chemical Test Report and the reasonable and
21 foreseeable use of the Product, exposure to BPA will occur at levels that require Proposition 65
22 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
23 Code of Regulations.

24 31. Plaintiff received from the analytical chemist an exposure assessment report which
25 concluded that persons in California who use the Products will be exposed to levels of BPA that
26 require a Proposition 65 exposure warning.

27 32. On December 21, 2020, Plaintiff gave notice of alleged violation of Health and
28 Safety Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens

1 to BPA from use of the Products without proper warning, subject to a private action to Defendant
2 and to the California Attorney General's office and the offices of the County District attorneys and
3 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
4 violations allegedly occurred.

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

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

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

16 **FIRST CAUSE OF ACTION**

17 **(By Plaintiff against Defendant for its Violation of Proposition 65)**

18 36. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 35 of
19 this Complaint as though fully set forth herein.

20 37. Defendant has, at all times mentioned herein, acted as a distributor and/or retailer
21 of the Products.

22 38. Use of the Products will expose users and consumers thereof to BPA, a hazardous
23 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

24 39. The Products do not comply with the Proposition 65 warning requirements.

25 40. Plaintiff, based on his best information and belief, avers that at all relevant times
26 herein, and at least since December 21, 2020, continuing until the present, that Defendant has
27 continued to knowingly and intentionally expose California users and consumers of the Products
28 to BPA without providing required warnings under Proposition 65.

1 41. The exposures that are the subject of the Notice result from the purchase,
2 acquisition, handling, and recommended use of the Products. The primary route of exposure to
3 BPA from use of the Products is dermal exposure. Dermal exposure to BPA is possible when the
4 user handles the Products, or the Products are placed in contact with exposed areas of the user's
5 skin. If 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. Additionally, exposure through
7 ingestion will occur by touching the Products with subsequent touching of the user's hand to
8 mouth.

9 42. Plaintiff, based on his best information and belief, avers that such exposures will
10 continue every day until clear and reasonable warnings are provided to purchasers and users or
11 until BPA is removed from the Products.

12 43. Defendant has knowledge that the normal and reasonably foreseeable use of the
13 Product exposes individuals to BPA, and Defendant intends that exposures to BPA will occur by
14 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
15 Products to consumers in California.

16 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to the
17 filing of the Complaint.

18 45. Pursuant to Health and Safety Code § 25249.7(b), because of the above-described
19 acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

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

1 **PRAYER FOR RELIEF**

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

4 A. That the court assess civil penalties against Defendant in the amount of \$2,500 per
5 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 Defendant 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 16, 2021

BRODSKY & SMITH

13 By:  _____

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