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ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco

03/07/2022  
Clerk of the Court  
BY: KAREN VALDES  
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN FRANCISCO

11 ANTHONY FERREIRO,

12 Plaintiff,

13 vs.

14 MERCHSOURCE, LLC, LOWE'S  
15 HOME CENTERS, LLC,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

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

CGC-22-598551

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 defendants Merchsource, LLC, ("Merchsource")  
27 and Lowe's Home Centers, LLC, ("Lowe's") (collectively, with Merchsource, the "Defendants")  
28 to enforce the People's right to be informed of the health hazards caused by exposure to Bisphenol

1 A (BPA) from the use of Sharper Image True Wireless Earbuds that are manufactured, distributed,  
2 offered for sale and/or sold by 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 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 Defendants distribute and/or offer for sale in California,  
20 without a requisite Proposition 65 exposure warning, Sharper Image True Wireless Earbuds (the  
21 “Products”) that expose persons to BPA when used as intended and/or for its intended purpose.

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

28



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

7 24. Defendants have distributed, offered to sell and/or sold the Products in California  
8 since at least March 8, 2021. The Products continue to be distributed and sold in California without  
9 a requisite Proposition 65 compliant BPA exposure warning.

10 25. At all times relevant to this action, Defendants have knowingly and intentionally  
11 exposed users, consumers and/or purchasers of the Products to BPA without first providing a clear  
12 and reasonable exposure warning to such individuals.

13 26. As a proximate result of Defendants' actions, and as persons in the course of doing  
14 business within the meaning of H&S Code § 25249.11, individuals throughout the State of  
15 California, including in San Francisco County, have been exposed to BPA from use of the Products  
16 without having first been provided a clear and reasonable exposure warning. The individuals  
17 subject to the violative exposures include normal and foreseeable users and consumers that use the  
18 Products.

19 **SATISFACTION OF NOTICE REQUIREMENTS**

20 27. On February 2, 2021, Plaintiff purchased the Product from Lowe's. At the time of  
21 purchase, Defendants did not provide a Proposition 65 exposure warning for BPA or any other  
22 Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described  
23 *supra*.

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

26 29. On March 3, 2021, the laboratory provided the results of its analysis. Surface BPA  
27 was collected using a wipe test. Results of this test concluded the presence of BPA at the surface  
28 of the product (the "Chemical Test Report").

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

6 31. On March 8, 2021, Plaintiff received from the analytical chemist an exposure  
7 assessment report which concluded that persons in California who use the Products will be exposed  
8 to levels of BPA that require a Proposition 65 exposure warning.

9 32. On March 8, 2021, Plaintiff gave notice of alleged violation of Health and Safety  
10 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to  
11 BPA from use of the Products without proper warning, subject to a private action to Defendants  
12 and to the California Attorney General's office and the offices of the County District attorneys and  
13 City Attorneys for each city with a population greater than 750,000 persons wherein the herein  
14 violations allegedly occurred.

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

20 34. After receiving the Notice, and to Plaintiff's best information and belief, none of  
21 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a  
22 cause of action against Defendants under Proposition 65 to enforce the alleged violations which  
23 are the subject of the Notice.

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

26 **FIRST CAUSE OF ACTION**

27 **(By Plaintiff against Defendants for their Violation of Proposition 65)**

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

3           37. Defendants have, at all times mentioned herein, acted as a distributor and/or retailer  
4 of the Products.

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

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

8           40. Plaintiff, based on his best information and belief, avers that at all relevant times  
9 herein, and at least since March 8, 2021, continuing until the present, that Defendants have  
10 continued to knowingly and intentionally expose California users and consumers of the Products  
11 to BPA without providing required warnings under Proposition 65.

12           41. The exposures that are the subject of the Notice result from the purchase,  
13 acquisition, handling, and recommended use of the Products. The primary route of exposure to  
14 BPA from use of the Products is dermal exposure. Dermal exposure to BPA is possible when the  
15 user handles the Products, or the Products are placed in contact with exposed areas of the user's  
16 skin. If the Products contact hard water and/or soaps at elevated pH, higher extraction rates of BPA  
17 and accumulation of BPA at the surface of the Products will result. Additionally, exposure through  
18 ingestion will occur by touching the Products with subsequent touching of the user's hand to  
19 mouth.

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

23           43. Defendants have knowledge that the normal and reasonably foreseeable use of the  
24 Product exposes individuals to BPA, and Defendants intend those exposures to BPA will occur by  
25 their deliberate, non-accidental participation in the importation, distribution, sale and offering of  
26 the Products to consumers in California.

27           44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to the  
28 filing of the complaint.



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

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

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following  
7 relief:

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


11 B. That the Court preliminarily and permanently enjoin Defendants mandating  
12 Proposition 65 compliant warnings on the Products;

13 C. That the Court grant Plaintiff reasonable attorney's fees and costs of suit, in the  
14 amount of \$50,000.00.

15 D. That the Court grant any further relief as may be just and proper.

16 Dated: March 7, 2022

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