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4	Facsimile: (310) 247-0160	Superior Court of California, County of San Francisco
5 6	Attorneys for Plaintiff	01/14/2022 Clerk of the Court BY: KAREN VALDES
7	SUPERIOR COURT OF THE STATE OF CALIFORNIA	
	COUNTY OF SAN FRANCISCO	
8	ANTHONY FERREIRO,	Case No.:
9 10	Plaintiff,	COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF
11	vs.	(Violation of Health & Safety Code § 25249.5 et
12	ROBERT BOSCH TOOL CO.,	seq.)
13	WALMART, INC.,	CGC-22-597648
14	Defendants.	
15	Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the following	
16	cause of action in the public interest of the citizens of the State of California.	
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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 to enforce the People's right to be informed of the health	
27	hazards caused by exposure to Bisphenol A	(BPA), a toxic chemical found in Bosch tool cases

(UPC# 000346494829) sold and/or distributed by defendant Robert Bosch Tool Co. ("Bosch")
 and/or defendant Walmart, Inc. ("Walmart") (collectively, "Defendants") in California.

3 3. BPA is a harmful chemical known to the State of California to cause female
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 that will create an exposure above safe harbor levels with a "clear and
reasonable" warning before "knowingly and intentionally" exposing any person to any such listed
chemical.

5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) 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 distribute and/or offer for sale in California,
without a requisite exposure warning, Bosch tool cases (UPC# 000346494829) (the "Products")
that expose persons to BPA when used as intended and/or for their intended purpose.

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 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).

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

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

#### PARTIES

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

16 13. Defendant Walmart, through its business, effectively imports, distributes, sells,
and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
it imports, distributes, sells, and/or offers the Products 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 sections 25249.6 and 25249.11.

## **VENUE AND JURISDICTION**

14. Venue is proper in the County of San Francisco 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 San Francisco with
respect to the Products.

15. 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

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

16. 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 otherwise 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.

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#### **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:

No 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...

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

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COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5

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

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

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

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

A system of signs, public advertising identifying the system and toll-free d. 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).

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# FACTUAL BACKGROUND

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 BPA has come under the purview of Proposition 23 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 24 25249.8 & 25249.10(b).

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

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF - VIOLATION OF HEALTH & SAFETY CODE §25249.5

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 manufactured, processed, marketed, distributed, offered to sell
8 and/or sold the Products in California since at least April 22, 2021. The Products continue to be
9 distributed and sold in California without the requisite warning information.

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

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

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# SATISFACTION OF NOTICE REQUIREMNTS

20 27. Plaintiff purchased the Product from Walmart. At the time of purchase Walmart
21 and Bosch did not provide a Proposition 65 exposure warning for BPA or any other Proposition
22 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

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

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

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

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

9 32. On April 22, 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.

33. 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.

34. 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 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.

## FIRST CAUSE OF ACTION

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

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5

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

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

5 38. The Products contain BPA, a hazardous chemical found on the Proposition 65 list
6 of chemicals known to be hazardous to human health.

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39.

The Product does 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 April 22, 2021, continuing until the present, that Defendants have
10 continued to knowingly and intentionally expose California users and consumers of the Product to
11 BPA without providing required warnings under Proposition 65.

12 41. The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the Products. The primary route of exposure to 13 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.

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

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

27 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this28 Complaint.

1	45. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above		
2	described acts, Defendants are 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: January 14, 2022 BRODSKY & SMITH		
17	By: CAS		
18	Evan J. Smith (SBN242352) Ryan P. Cardona (SBN302113)		
19	9595 Wilshire Boulevard, Suite 900 Beverly Hills, CA 90212		
20	Telephone: (877) 534-2590 Facsimile: (310) 247-0160		
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22	Attorneys for Plaintiff		
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	<u>-9 -</u> COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5		
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