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County of San Francisco

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

PRECILA BALABBO,

Plaintiff,

vs.

OTTER PRODUCTS, LLC, THE TJX
COMPANIES, INC.,

Defendants,

Case No.:

CGC-22-599663

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

Plaintiff Precila Balabbo ("Plaintiff"), by and through her attorneys, alleges the following cause of action in the public interest of the citizens of the State of California.

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 against defendants Otter Products, LLC ("Otter"), The TJX Companies, Inc. ("TJX" or collectively with Otter, "Defendants") to enforce the People's

1 right to be informed of the health hazards caused by exposure to Bisphenol A (BPA) from use of
2 LIFEPROOF SLAM iPhone cases that are manufactured, distributed, offered for sale and/or sold
3 by Otter and/or TJX in California.

4 3. BPA is a harmful chemical known to the State of California to cause reproductive
5 toxicity. On May 11, 2015, the State of California listed BPA as a chemical known to the State to
6 cause reproductive toxicity and BPA has come under the purview of Proposition 65 regulations
7 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
8 25249.10(b).

9 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
10 within California or sell products therein to comply with Proposition 65 regulations. Included in
11 such regulations is the requirement that businesses must label any product containing a Proposition
12 65-listed chemical with a “clear and reasonable” warning before “knowingly and intentionally”
13 exposing any person to any such listed chemical.

14 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
15 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
16 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
17 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
18 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
19 25249.7.

20 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
21 without a requisite Proposition 65 exposure warning, LIFEPROOF SLAM iPhone cases (the
22 “Products”) that expose persons to BPA when used as intended and/or for its intended purpose.

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

27 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
28 65 in accordance with Health and Safety Code § 25249.7(b).

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 from use of the Products pursuant to Health and Safety Code § 25249.7(a).

PARTIES

12. Otter, 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 or through conduct that they import, distribute, sell and/or offer the Products for sale or use in the State of California.

14. Plaintiff alleges that defendant Otter 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

17. 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

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

3 18. 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, or
5 is registered with the California Secretary of State as foreign corporations authorized to do
6 business in the State of California and/or have otherwise purposefully availed themselves of the
7 California market. Such purposeful availment has rendered the exercise of jurisdiction by
8 California courts consistent and permissible with traditional notions of fair play and substantial
9 justice.

10 **STATUTORY BACKGROUND**

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

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

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

20 21. An exposure to a chemical in a consumer product is one “which results from a
21 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
22 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
23 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
24 shall provide a warning to any person to whom the product is sold or transferred unless the product
25 is packaged or labeled with a clear and reasonable warning.”
26
27
28

22. 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:¹

a. 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.

c. The warnings provided pursuant to subparagraphs (a) and (b) shall be 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.

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

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

FACTUAL BACKGROUND

24. 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).

¹ 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, 2016, and operative on August 30, 2018.

1 25. 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 If the Products are placed in contact with the user's mouth during a phone call, ingestion of BPA
6 can occur resulting in oral exposure to BPA. Exposure through ingestion will occur by touching
7 the Products with subsequent touching of the user's hand to mouth.

8 26. Defendants have distributed, offered to sell and/or sold the Products in California
9 since at least May 26, 2021. The Products continue to be distributed and sold in California without
10 a requisite Proposition 65 compliant BPA exposure warning.

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

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

20 **SATISFACTION OF NOTICE REQUIREMENTS**

21 29. On April 20, 2021, Plaintiff purchased the Product from TJX. At the time of
22 purchase, TJX and Otter did not provide a Proposition 65 exposure warning for BPA or any other
23 Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
24 *supra*.

25 30. On or about May 22, 2021, the Product was sent to a testing laboratory to determine
26 the concentration of BPA present on the surface of the Product.

1 31. On May 24, 2021, the laboratory provided the results of its analysis. Surface BPA
2 was collected using a wipe test. Results of this test concluded the presence of BPA at the surface
3 of the product (the “Chemical Test Report”).

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

9 33. On May 26, 2021, Plaintiff received from the analytical chemist an exposure
10 assessment report which concluded that persons in California who use the Products will be exposed
11 to levels of BPA that require a Proposition 65 exposure warning.

12 34. On May 26, 2021, Plaintiff gave notice of alleged violation of Health and Safety
13 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
14 BPA from use of the Products without proper warning, subject to a private action to Defendants
15 and to the California Attorney General’s office and the offices of the County District attorneys and
16 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
17 violations allegedly occurred.

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

23 36. After receiving the Notice, and to Plaintiff’s best information and belief, none of
24 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
25 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
26 are the subject of the Notice.

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

1 **FIRST CAUSE OF ACTION**

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

3 38. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 36 of
4 this first amended complaint as though fully set forth herein.

5 39. Defendants have, at all times mentioned herein, acted as either distributor and/or
6 retailer of the Products.

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

9 41. The Products do not comply with the Proposition 65 warning requirements.

10 42. Plaintiff, based on her best information and belief, avers that at all relevant times
11 herein, and at least since May 26, 2021, continuing until the present, that Defendants have
12 continued to knowingly and intentionally expose California users and consumers of the Products
13 to BPA without providing required warnings under Proposition 65.

14 43. The exposures that are the subject of the Notice result from the purchase,
15 acquisition, handling, and recommended use of the Products. The primary route of exposure to
16 BPA from use of the Products is dermal exposure. Dermal exposure to BPA is possible when the
17 user handles the Products, or the Products are placed in contact with exposed areas of the user's
18 skin. If the Products are placed in contact with the user's mouth during a phone call, ingestion of
19 BPA can occur resulting in oral exposure to BPA. Additionally, exposure through ingestion will
20 occur by touching the Products with subsequent touching of the user's hand to mouth.

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

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

