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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,

12 Plaintiff,

13 vs.

14 ACE HARDWARE CORPORATION,

15 Defendant.

Case No.: 22CV015756

**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 Ace Hardware Corporation (“Ace” 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 Milwaukee Packout Storage/Organizers that are
2 manufactured, distributed, offered for sale and/or sold by Ace 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 to be imposed upon defendants in a civil action for violations of Proposition 65.
15 Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent
16 jurisdiction to enjoin the actions of a defendant which “violate or threaten to violate” the statute.
17 Health & Safety Code § 25249.7.

18 6. Plaintiff alleges that Ace distributes and/or offers for sale in California, without a
19 requisite Proposition 65 exposure warning, Milwaukee Packout Storage/Organizers (the
20 “Products”) that expose persons to BPA when used as intended and/or for its intended purpose.

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

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

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Ace
28 to provide purchasers or users of the Products with required warnings related to the dangers and

1 health hazards associated with exposure to BPA from use of the Products pursuant to Health and
2 Safety Code § 25249.7(a).

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

4 **PARTIES**

5 11. Plaintiff is a citizen of the State of California acting in the interest of the general
6 public to promote awareness of exposures to toxic chemicals in products sold in California and to
7 improve human health by reducing hazardous substances contained in such items. He brings this
8 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

9 12. Defendant Ace, through its business, effectively imports, distributes, sells and/or
10 offers the Products for sale or use in the State of California, or it implies by its conduct that it
11 imports, distributes, sells and/or offers the Products for sale or use in the State of California..

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

14 **VENUE AND JURISDICTION**

15 14. Venue is proper in the County of Alameda because one or more of the instances of
16 wrongful conduct occurred and continues to occur in this county and/or because Ace conducted,
17 and continues to conduct, business in the County of Alameda with respect to the Products.

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

23 16. This Court has jurisdiction over Ace because Defendant is either a citizen of the
24 State of California, has sufficient minimum contacts with the State of California, is registered with
25 the California Secretary of State as foreign corporations authorized to do business in the State of
26 California and/or has otherwise purposefully availed itself of the California market. Such
27 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
28 permissible with traditional notions of fair play and substantial justice.

1 **STATUTORY BACKGROUND**

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

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

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

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

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

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

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

23 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
24 prominently placed upon a product’s labels or other labeling or displayed at the retail outlet
25 with such conspicuousness, as compared with other words, statements, designs, or devices

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 in the label, labeling or display as to render it likely to be read and understood by an
2 ordinary individual under customary conditions of purchase or use.

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

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

11 **FACTUAL BACKGROUND**

12 22. On May 11, 2015, the State of California listed BPA as a chemical known to the
13 State to cause female reproductive toxicity and BPA has come under the purview of Proposition
14 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
15 25249.8 & 25249.10(b).

16 23. The exposures that are the subject of the Notice result from the purchase,
17 acquisition, handling, and recommended use of the Products. The primary route of exposure to
18 BPA is through dermal absorption directly through the skin when consumers use, touch, or handle
19 the Products. Exposure through ingestion will occur by touching the Product with subsequent
20 touching of the user’s hand to mouth. No clear and reasonable warning is provided with the
21 Products regarding the health hazards of exposure to bisphenol.

22 24. Ace has distributed, offered to sell and/or sold the Products in California since at
23 least August 13, 2021. The Products continue to be distributed and sold in California without a
24 requisite Proposition 65 compliant BPA exposure warning.

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

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

3 33. 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 34. 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 Defendant under Proposition 65 to enforce the alleged violations which are
11 the subject of the Notice.

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

14 **FIRST CAUSE OF ACTION**

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

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

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

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

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

23 40. Plaintiff, based on his best information and belief, avers that at all relevant times
24 herein, and at least since August 13, 2021, continuing until the present, that Defendant has
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 41. The exposures that are the subject of the Notice result from the purchase,
28 acquisition, handling, and recommended use of the Products. The primary route of exposure to

1 BPA is through dermal absorption directly through the skin when consumers use, touch, or handle
2 the Products. Exposure through ingestion will occur by touching the Product with subsequent
3 touching of the user's hand to mouth. No clear and reasonable warning is provided with the
4 Products regarding the health hazards of exposure to bisphenol.

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

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

12 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to the
13 filing of the first amended complaint.

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

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

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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 in accordance with Health and Safety Code §
6 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: August 8, 2022

BRODSKY & SMITH

13 By:  _____

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