

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

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Superior Court of California,
County of San Francisco

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Clerk of the Court
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

GABRIEL ESPINOZA,

Plaintiff,

vs.

WATER GREMLIN COMPANY, BIG 5
CORP.,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

CGC-22-600480

Plaintiff Gabriel Espinoza (“Plaintiff”), by and through his 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 Water Gremlin Company (“Water Gremlin”) and Big 5 Corp. (“Big 5” or collectively with Water Gremlin, “Defendants”) to enforce the People’s right to be informed of the health hazards caused by exposure to Bisphenol A (BPA)

1 from the use of Water Gremlin Egg Sinkers that are manufactured, distributed, offered for sale
2 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 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 defendants which “violate or threaten to violate” the statute.
17 Health & Safety Code § 25249.7.

18 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
19 without a requisite Proposition 65 exposure warning, Water Gremlin Egg Sinkers (the “Products”)
20 that expose persons to BPA when used as intended and/or for its intended purpose.

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

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

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

1 dangers and health hazards associated with exposure to BPA from use of the Products pursuant to
2 Health and 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 Water Gremlin, through its business, effectively imports, distributes,
10 sells and/or offers the Products for sale or use in the State of California, or it implies by its conduct
11 that it imports, distributes, sells and/or offers the Products for sale or use in the State of California.
12 Plaintiff alleges that defendant Water Gremlin is a "person" in the course of doing business within
13 the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 13. Defendant Big 5, through its business, effectively imports, distributes, sells and/or
15 offers the Products for sale or use in the State of California, or it implies by its conduct that it
16 imports, distributes, sells and/or offers the Products for sale or use in the State of California.
17 Plaintiff alleges that defendant Big 5 is a "person" in the course of doing business within the
18 meaning of Health & Safety Code sections 25249.6 and 25249.11.

19 **VENUE AND JURISDICTION**

20 14. Venue is proper in the County of San Francisco because one or more of the
21 instances of wrongful conduct occurred and continues to occur in this county and/or because
22 Defendants conducted, and continue to conduct, business in the County of San Francisco with
23 respect to the Products.

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

1 16. This Court has jurisdiction over Defendants because each defendant is either a
2 citizen of the State of California, has sufficient minimum contacts with the State of California, is
3 registered with the California Secretary of State as foreign corporations authorized to do business
4 in the State of California and/or has otherwise purposefully availed itself of the California market.
5 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
6 and permissible with traditional notions of fair play and substantial justice.

7 **STATUTORY BACKGROUND**

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

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

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

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

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

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

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

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

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

11 21. Proposition 65 provides that any "person who violates or threatens to violate" the
12 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
13 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
14 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
15 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
16 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

17 **FACTUAL BACKGROUND**

18 22. On May 11, 2015, the State of California listed BPA as a chemical known to the
19 State to cause female reproductive toxicity and BPA has come under the purview of Proposition
20 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
21 25249.8 & 25249.10(b).

22 23. The exposures that are the subject of this complaint result from the purchase,
23 acquisition, handling and recommend use of the Products. The primary route of exposure to BPA
24 is through dermal absorption directly through the skin when consumers use, touch, or handle the
25 Products. Exposure through ingestion will occur by touching the Product with subsequent touching
26 of the user's hand to mouth. No clear and reasonable warning is provided with the Products
27 regarding the health hazards of exposure to BPA.

1 24. Defendants have distributed, offered to sell and/or sold the Products in California
2 since at least August 16, 2021. The Products continue to be distributed and sold in California
3 without a requisite Proposition 65 compliant BPA exposure warning.

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

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

13 **SATISFACTION OF NOTICE REQUIREMENTS**

14 27. On June 10, 2021, Plaintiff purchased the Product from Big 5. At the time of
15 purchase, Defendants did not provide a Proposition 65 exposure warning for BPA or any other
16 Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
17 *supra*.

18 28. On or about August 8, 2021, the Product was sent to a testing laboratory to
19 determine the concentration of BPA present on the surface of the Product.

20 29. On August 10, 2021, the laboratory provided the results of its analysis. Surface
21 BPA was collected using a wipe test. Results of this test concluded the presence of BPA at the
22 surface of the product (the "Chemical Test Report").

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

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

2 40. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since August 16, 2021, continuing until the present, that Defendants have
4 continued to knowingly and intentionally expose California users and consumers of the Products
5 to BPA without providing required warnings under Proposition 65.

6 41. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling, and recommended use of the Products. The primary route of exposure to
8 BPA is through dermal absorption directly through the skin when consumers use, touch, or handle
9 the Products. Exposure through ingestion will occur by touching the Product with subsequent
10 touching of the user's hand to mouth. No clear and reasonable warning is provided with the
11 Products regarding the health hazards of exposure to BPA.

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

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

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

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

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

1 **PRAYER FOR RELIEF**

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

4 A. That the court assess civil penalties against Defendants 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 Defendants 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: June 30, 2022

BRODSKY & SMITH

13 By:  _____

14 Evan J. Smith (SBN242352)
15 Ryan P. Cardona (SBN302113)
16 9595 Wilshire Boulevard, Suite 900
17 Beverly Hills, CA 90212
18 Telephone: (877) 534-2590
19 Facsimile: (310) 247-0160

Attorneys for Plaintiff