

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*

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

06/09/2023
Clerk of the Court

BY: MARK UDAN
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-23-606994

11 GABRIEL ESPINOZA,

12 Plaintiff,

13 vs.

14 VALYRIA, LLC, C & F ENTERPRISES,
15 INC., NORDSTROM, INC., NIHC, INC.,

16 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

17 Plaintiff Gabriel Espinoza (“Plaintiff”), by and through his attorneys, alleges the following
18 cause of action in the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

20 1. Plaintiff brings this representative action on behalf of all California citizens to
21 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
22 the Health and Safety Code § 25249.5 et seq (“Proposition 65”), which reads, in relevant part,
23 “[n]o person in the course of doing business shall knowingly and intentionally expose any
24 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
25 giving clear and reasonable warning to such individual ...”. Health & Safety Code § 25249.6.

26 2. This complaint is a representative action brought by Plaintiff in the public interest
27 of the citizens of the State of California to enforce the People’s right to be informed of the health
28 hazards caused by exposure to lead, a toxic chemical found in *Transpac*® berry bowls, UPC #
885114408955, sold and/or distributed by defendants Nordstrom, Inc., NIHC, Inc. (collectively,

1 “Nordstrom”), Valyria, LLC (“Valyria”), and C & F Enterprises, Inc. (“C&F”) (collectively,
2 “Defendants”) in California.

3 3. Lead is a harmful chemical known to the State of California to cause cancer and
4 adverse developmental and reproductive effects in both males and females. On October 1, 1992,
5 the state of California listed lead as a chemical known to cause cancer and it has come under the
6 purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health
7 & Safety Code §§ 25249.8 & 25249.10(b). On February 27, 1987, the State of California listed
8 lead as a chemical known to cause adverse developmental and reproductive effects in both males
9 and females.

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

16 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
17 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
18 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
19 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
20 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
21 25249.7.

22 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
23 without a requisite exposure warning, *Transpac*® berry bowls, UPC # 885114408955, (the
24 “Products”) that expose persons to lead when used for their intended purpose.

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

1 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
2 65 in accordance with Health and Safety Code § 25249.7(b).

3 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
4 Defendants to provide purchasers or users of the Products with required warnings related to the
5 dangers and health hazards associated with exposure to lead pursuant to Health and Safety Code §
6 25249.7(a).

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

8 **PARTIES**

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

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

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

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

1 **VENUE AND JURISDICTION**

2 15. Venue is proper in the County of San Francisco because one or more of the
3 instances of wrongful conduct occurred, and continue to occur in this county and/or because
4 Defendants conducted, and continue to conduct, business in the County of San Francisco with
5 respect to the Products.

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

11 17. This Court has jurisdiction over Defendants because Defendants are either a citizen
12 of the State of California, have sufficient minimum contacts with the State of California, are
13 registered with the California Secretary of State as foreign corporations authorized to do business
14 in the State of California, and/or have otherwise purposefully availed itself of the California
15 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
16 consistent and permissible with traditional notions of fair play and substantial justice.

17 **STATUTORY BACKGROUND**

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

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

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

27 20. An exposure to a chemical in a consumer product is one “which results from a
28 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a

1 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
2 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
3 shall provide a warning to any person to whom the product is sold or transferred unless the product
4 is packaged or labeled with a clear and reasonable warning.”

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

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

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

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

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

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

24
25
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.

FACTUAL BACKGROUND

1
2 23. On October 1, 1992, the state of California listed lead as a chemical known to cause
3 cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code
4 Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On February 27,
5 1987, the State of California listed lead as a chemical known to cause adverse developmental and
6 reproductive effects in both males and females. In summary, lead was listed under Proposition 65
7 as a chemical known to the State to cause cancer and adverse developmental and reproductive
8 effects in both males and females.

9 24. The exposures that are the subject of the Notice result from the purchase,
10 acquisition, handling, and recommended use of the Products. Consequently, the primary route of
11 exposure to these chemicals is through ingestion and/or dermal contact. Increased duration of
12 contact, microwaving, increased acidity, and increased food temperatures in contact with the
13 glazed food contact surface will result in increased levels of lead transferred into food. When foods
14 contaminated with lead due to contact with the Products are consumed, lead ingestion will occur
15 which will increase BLLs.

16 25. Defendants have processed, marketed, distributed, offered to sell and/or sold the
17 Products in California since at least June 15, 2022. The Products continue to be distributed and
18 sold in California without the requisite warning information.

19 26. At all times relevant to this action, Defendants have knowingly and intentionally
20 exposed users and/or consumers of the Products to lead without first giving a clear and reasonable
21 exposure warning to such individuals.

22 27. As a proximate result of acts by Defendants, as a person in the course of doing
23 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
24 California, including in San Francisco County, have been exposed to lead without a clear and
25 reasonable warning on the Products. The individuals subject to the violative exposures include
26 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
27 the Products.
28

SATISFACTION OF NOTICE REQUIREMENTS

1
2 28. Plaintiff purchased the Product from Nordstrom. At the time of purchase,
3 Defendants did not provide a Proposition 65 exposure warning for lead or any other Proposition
4 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

5 29. The Product was sent to a testing laboratory to determine the concentration of lead
6 present on the surface of the Product.

7 30. The laboratory provided the results of its analysis. Results of this test determined
8 the Product exposes users to lead (the “Chemical Test Report”).

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

14 32. On June 15, 2022, Plaintiff received from the analytical chemist an exposure
15 assessment report which concluded that persons in California who use the Products will be exposed
16 to levels of lead that require a Proposition 65 exposure warning.

17 33. On June 15, 2022, Plaintiff gave notice of alleged violation of Health and Safety
18 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
19 lead contained in the Products without proper warning, subject to a private action to Defendants
20 and to the California Attorney General’s office and the offices of the County District attorneys and
21 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
22 violations allegedly occurred.

23 34. The Notice complied with all procedural requirements of Proposition 65 including
24 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
25 least one person with relevant and appropriate expertise who reviewed relevant data regarding lead
26 exposure, and that counsel believed there was meritorious and reasonable cause for a private
27 action.

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

4 44. Defendants have knowledge that the normal and reasonably foreseeable use of the
5 Products exposes individuals to lead, and Defendants intend that exposures to lead will occur by
6 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
7 Products to consumers in California.

8 45. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
9 Complaint.

10 46. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
11 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per violation.

12 47. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
13 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 each Defendant in the amount of \$2,500
5 per day for each violation for up to 365 days (up to a maximum civil penalty amount per
6 violation of \$912,000.00) in accordance with Health and Safety Code § 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 9, 2023

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

20 *Attorneys for Plaintiff*