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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

12/04/2024
Clerk of the Court
BY: SAHAR ENAYATI
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-24-620265

11 GABRIEL ESPINOZA,

12 Plaintiff,

13 vs.

14 AQUA-LEISURE RECREATION, LLC,

Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

15 Plaintiff Gabriel Espinoza (“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.

17 **BACKGROUND OF THE CASE**

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

24 2. This complaint is a representative action brought by Plaintiff in the public interest
25 of the citizens of the State of California against defendant Aqua-Leisure Recreation, LLC (“Aqua-
26 Leisure” or “Defendant”) to enforce the People’s right to be informed of the health hazards caused
27

1 by exposure to bisphenol A (BPA) from the use of snorkel masks that are manufactured,
2 distributed, offered for sale and/or sold by Defendant in California.

3 3. BPA is a harmful chemical known to the State of California to cause birth defects
4 or other reproductive harm. On May 11, 2015, the State of California listed BPA as a chemical
5 known to the State to cause birth defects or other reproductive harm and BPA 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).

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

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

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

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

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

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

6 **PARTIES**

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

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

17 **VENUE AND JURISDICTION**

18 13. Venue is proper in the County of San Francisco because one or more of the
19 instances of wrongful conduct occurred and continues to occur in this county and/or because
20 Defendant conducted, and continues to conduct, business in the County of San Francisco with
21 respect to the Products.

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

27 15. This Court has jurisdiction over Defendant because Defendant is either a citizen of
28 the State of California, has sufficient minimum contacts with the State of California, is registered

1 with the California Secretary of State as foreign corporations authorized to do business in the State
2 of California and/or has otherwise purposefully availed itself of the California market. Such
3 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
4 permissible with traditional notions of fair play and substantial justice.

5 **STATUTORY BACKGROUND**

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

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

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

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

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

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

1 23. Defendant has distributed, offered to sell and/or sold the Products in California
2 since at least January 23, 2024. The Products continue to be distributed and sold in California
3 without a requisite Proposition 65 compliant BPA exposure warning.

4 24. At all times relevant to this action, Defendant has 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 25. As a proximate result of Defendant’s 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 26. Plaintiff purchased the Product from Big 5 Corp. At the time of purchase,
15 Defendant did not provide a Proposition 65 exposure warning for BPA or any other Proposition
16 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

17 27. The Product was sent to a testing laboratory to determine if, and what amount of,
18 BPA would migrate and/or leach from the Product.

19 28. On January 8, 2024, the laboratory provided the results of its analysis. Results of
20 this test concluded the Products expose users to BPA (the “Chemical Test Report”).

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

26 30. On January 23, 2024, Plaintiff received from the analytical chemist an exposure
27 assessment report which concluded that persons in California who use the Products will be exposed
28 to levels of BPA that require a Proposition 65 exposure warning.

1 31. On January 23, 2024, Plaintiff gave notice of alleged violation of Health and Safety
2 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to BPA
3 from use of the Products without proper warning, subject to a private action to Defendant and to
4 the California Attorney General’s office and the offices of the County District attorneys and City
5 Attorneys for each city with a population greater than 750,000 persons wherein the herein
6 violations allegedly occurred.

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

12 33. After receiving the Notice, and to Plaintiff’s best information and belief, none of
13 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
14 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are
15 the subject of the Notice.

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

18 **FIRST CAUSE OF ACTION**

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

20 35. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 34 of
21 this complaint as though fully set forth herein.

22 36. Defendant has, at all times mentioned herein, acted as a distributor and/or retailer
23 of the Products.

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

26 38. The Products do not comply with the Proposition 65 warning requirements.

27 39. Plaintiff, based on his best information and belief, avers that at all relevant times
28 herein, and at least since January 23, 2024, continuing until the present, that Defendant has

1 continued to knowingly and intentionally expose California users and consumers of the Products
2 to BPA without providing required warnings under Proposition 65.

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

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

12 42. Defendant has knowledge that the normal and reasonably foreseeable use of the
13 Product exposes individuals to BPA, and Defendant intends those exposures to BPA will occur by
14 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
15 Products to consumers in California.

16 43. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to the
17 filing of the complaint.

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

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

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 (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 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: December 4, 2024

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