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9 **ENDORSED  
10 FILED  
11 ALAMEDA COUNTY**

12 **NOV 22 2016**

13 **CLERK OF THE SUPERIOR COURT**  
14 By   
15 **JANIE THOMAS, Deputy**

16  
17  
18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
19 **COUNTY OF ALAMEDA**

20 ANTHONY FERREIRO,

21 Plaintiff,

22 v.

23 ALIMED, INC.,

24 Defendant.

25 Case No.: **RG16839779**

26 **COMPLAINT FOR CIVIL PENALTIES  
27 AND INJUNCTIVE RELIEF**

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

1 Plaintiff Anthony Ferreiro, by and through his attorneys, alleges the following cause of  
2 action in the public interest of the citizens of the State of California.

3 **BACKGROUND OF THE CASE**

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

14 **BY FAX**

1           2.       This complaint is a representative action brought by Plaintiff in the public interest  
2 of the citizens of the State of California to enforce the People’s right to be informed of the health  
3 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in  
4 *Alimed* wheelchair cushions sold and/or distributed by defendant AliMed, Inc. (“AliMed” or  
5 “Defendant”) in California.

6           3.       DEHP is a harmful chemical known to the State of California to cause cancer and  
7 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical  
8 known to the State to cause cancer and it has come under the purview of Proposition 65  
9 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§  
10 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical  
11 known to cause reproductive toxicity.

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

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

22           6.       Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,  
23 and/or offers for sale, without the required warning, AliMed Basic Wedge Wheelchair Cushions,  
24 Item #1287, Registry #3272, P#38358 (“Product” or “Products”) in California containing DEHP.

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

1 8. Plaintiff seeks civil penalties against Defendant for its 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 Defendant to provide purchasers or users of the Product with the required warnings related to the  
5 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety  
6 Code § 25249.7(a).

7 **PARTIES**

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

12 11. Defendant AliMed is one of the largest, most trusted suppliers of medical supplies  
13 and healthcare products. Through its business, AliMed effectively manufactures, imports,  
14 distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies  
15 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale  
16 or use in the State of California.

17 12. Defendant AliMed 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 13. Venue is proper in the County of Alameda because one or more of the instances  
21 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant  
22 conducted, and continues to conduct, business in the County of Alameda with respect to the  
23 Product.

24 14. 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  
27 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,  
28 this Court has jurisdiction over this lawsuit.

1           15. This Court has jurisdiction over Defendant because it is either a citizen of the  
2 State of California, has sufficient minimum contacts with the State of California, is registered  
3 with the California Secretary of State as foreign corporations authorized to do business in the  
4 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  
6 consistent and permissible with traditional notions of fair play and substantial justice.

7                                   **SATISFACTION OF NOTICE REQUIREMNTS**

8           16. On July 15, 2016, Plaintiff gave notice of alleged violation of Health and Safety  
9 Code § 25249.6 (the “Notice”) to AliMed concerning the exposure of California citizens to  
10 DEHP contained in the Product without proper warning, subject to a private action to AliMed  
11 and to the California Attorney General’s office and the offices of the County District attorneys  
12 and City Attorneys for each city with a population greater than 750,000 persons wherein the  
13 herein violations allegedly occurred.

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

19           18. After receiving the Notice, and to Plaintiff’s best information and belief, none of  
20 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted  
21 a cause of action against AliMed under Proposition 65 to enforce the alleged violations which  
22 are the subject of Plaintiff’s notice of violation.

23           19. Plaintiff is commencing this action more than sixty (60) days from the date of the  
24 Notice to AliMed, as required by law.

25                                   **FIRST CAUSE OF ACTION**

26                                   **(By Plaintiff against Defendant for the Violation of Proposition 65)**

27           20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of  
28 this complaint as though fully set forth herein.

1           21.     Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
2 and/or retailer of the Product.

3           22.     The Product contains DEHP, a hazardous chemical found on the Proposition 65  
4 list of chemicals known to be hazardous to human health.

5           23.     The Product does not comply with the Proposition 65 warning requirements.

6           24.     Plaintiff, based on his best information and belief, avers that at all relevant times  
7 herein, and at least since May 19, 2016 continuing until the present, that AliMed has continued  
8 to knowingly and intentionally expose California users and consumers of the Product to DEHP  
9 without providing required warnings under Proposition 65.

10          25.     The exposures that are the subject of this notice result from the purchase,  
11 acquisition, handling and recommended use of the product. Consequently, the primary route of  
12 exposure to these chemicals is through dermal exposure. During normal expected use,  
13 wheelchair cushion will be in contact with the user's buttocks and the back of the user's legs and  
14 the vinyl covering will be in contact with either bare, exposed skin or the user's clothing. The  
15 contaminated articles of clothing will continue to be a source of dermal transfer after the user is  
16 not in contact with the seat cushion. Should the wearer's skin perspire against the seat cushion  
17 or the seat cushion become wet due to contact with water or due to incontinence, aqueous DEHP  
18 skin permeation rates have been reported to be faster than neat DEHP permeation. The  
19 wheelchair cushion can be expected to emit gas phase DEHP into the air over the lifetime of the  
20 product. This gas phase DEHP can potentially be inhaled or can be absorbed to dust that can be  
21 resuspended and potentially ingested. Finally, while mouthing of the product does not seem  
22 likely, some amount of exposure through ingestion can occur by handling the product with  
23 subsequent touching of the user's hand to mouth.

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

27          27.     Defendant has knowledge that the normal and reasonably foreseeable use of the  
28 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur

1 by their deliberate, non-accidental participation in the manufacture, importation, distribution,  
2 sale and offering of the Product to consumers in California

3 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
4 Complaint.

5 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above  
6 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

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


9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff demands judgment against Defendant and requests the  
11 following relief:

- 12 A. That the court assess civil penalties against Defendant in the amount of  
13 \$2,500 per day for each violation in accordance with Health and Safety  
14 Code § 25249.7(b);
- 15 B. That the court preliminarily and permanently enjoin Defendant mandating  
16 Proposition 65 compliant warnings on the Product;
- 17 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 18 D. That the court grant any further relief as may be just and proper.

19  
20 Dated: November 22, 2016

BRODSKY & SMITH, LLC

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