

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) and Diisononyl phthalate
4 (DINP), toxic chemicals found in Aqua Lung, Aqua Lung Sport, U.S. Divers, Aqua Sphere and
5 MP branded sports bags manufactured, sold and/or distributed by defendant Aqua Lung
6 America, Inc. (“Aqua Lung” or “Defendant”) under various trade names in California.

7 3. DEHP and DINP are harmful chemicals known to the State of California to cause
8 cancer and/or reproductive toxicity. On January 1, 1988, and December 20, 2013, the State of
9 California listed DEHP and DINP, respectively, as chemicals known to the State to cause cancer
10 and each chemical has come under the purview of Proposition 65 regulations since that time.
11 Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On
12 October 24, 2003, the State of California listed DEHP as a chemical known to cause
13 reproductive toxicity.

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

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

24 6. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
25 and/or offers for sale in California Aqua Lung, Aqua Lung Sport, U.S. Divers, Aqua Sphere and
26 MP branded sports bags, backpacks, and bags for snorkel gear (“Product” or “Products”),
27 without requisite Proposition 65 warning labels that the Products contain DEHP and DINP.
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1 conducted, and continues to conduct, business in the County of Alameda with respect to the
2 Product.

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

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

14 **SATISFACTION OF NOTICE REQUIREMENTS**

15 16. On August 1, 2016, Plaintiff gave notice of alleged violation of Health and Safety
16 Code § 25249.6 (the "Notice") to Aqua Lung concerning the exposure of California citizens to
17 DEHP and DINP contained in the Products without proper warning, subject to a private action to
18 Aqua Lung and to the California Attorney General's office and the offices of the County District
19 attorneys and City Attorneys for each city with a population greater than 750,000 persons
20 wherein the herein violations allegedly occurred.

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

26 18. After receiving the Notice, and to Plaintiff's best information and belief, none of
27 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
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1 a cause of action against Aqua Lung under Proposition 65 to enforce the alleged violations which
2 are the subject of Plaintiff's notice of violation.

3 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
4 Notice to Aqua Lung, as required by law.

5 **FIRST CAUSE OF ACTION**

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

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

9 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
10 and/or retailer of the Products.

11 22. The Products contain DEHP and DINP, hazardous chemicals found on the
12 Proposition 65 list of chemicals known to be hazardous to human health.

13 23. The Products do not comply with the Proposition 65 warning requirements.

14 24. Plaintiff, based on her best information and belief, avers that at all relevant times
15 herein, and at least since June 23, 2016, continuing until the present, that Aqua Lung has
16 continued to knowingly and intentionally expose California users and consumers of the Products
17 to DEHP and DINP without providing required warnings under Proposition 65.

18 25. The exposures that are the subject of the Notice result from the purchase,
19 acquisition, handling and recommended use of the product. Consequently, the primary route of
20 exposure to these chemicals is through dermal exposure. Dermal exposure to DEHP and DINP
21 can occur during insertion and removal of items into the clear plastic pocket and black mesh.
22 Should these areas of the sport bag come into contact with water or humidity, as may be
23 expected during snorkeling, or the wearer touch the clear plastic pocket or black mesh with wet,
24 bare hands, aqueous DEHP skin permeation rates have been reported to be faster than neat
25 DEHP permeation. DEHP and DINP can leach from the clear plastic pocket and black mesh can
26 contaminate articles placed inside the clear plastic pocket and black mesh that are subsequently
27 handled or used. The clear plastic pocket and black mesh can be expected to emit gas phase
28 DEHP and DINP into the air over the lifetime of the product. This gas phase DEHP and DINP

1 can be inhaled or absorbed to dust that can be subsequently ingested. Some amount of ingestion
2 of DEHP is possible if the user stores snorkeling gear that is mouthed in the black mesh pocket,
3 for instance a snorkeling breathing tube. Finally, while mouthing of the product does not seem
4 likely, some amount of exposure through ingestion can occur by touching the product, with
5 subsequent touching of the user's band to mouth.

6 26. Plaintiff, based on her best information and belief, avers that such exposures will
7 continue every day until clear and reasonable warnings are provided to Products' purchasers and
8 users or until these known toxic chemicals are removed from the Product.

9 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
10 Products exposes individuals to DEHP and DINP, and Defendant intends that exposures to
11 DEHP and DINP will occur by their deliberate, non-accidental participation in the manufacture,
12 importation, distribution, sale and offering of the Products to consumers in California

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

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

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

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
21 following relief:

- 22 A. That the court assess civil penalties against Defendant in the amount of
23 \$2,500 per day for each violation in accordance with Health and Safety
24 Code § 25249.7(b);
- 25 B. That the court preliminarily and permanently enjoin Defendant mandating
26 Proposition 65 compliant warnings on the Product;
- 27 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 28 D. That the court grant any further relief as may be just and proper.

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Dated: December 22, 2016

BRODSKY & SMITH, LLC

By:  _____

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