

ENLARGED
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By TANIA PIERCE Deputy

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 GABRIEL ESPINOSA and ANTHONY
11 FERREIRO,

12 Plaintiffs,

13 vs.

14 BYTECH NY, INC.,

15 Defendant.

Case No.: RG18899185

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

Dept. 5118

Judge: Dennis Hayashi

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18 Plaintiffs Gabriel Espinosa (“Espinosa”) and Anthony Ferreiro (“Ferreiro”) (Collectively,
19 “Plaintiffs”), by and through their attorneys, allege the following cause of action in the public
20 interest of the citizens of the State of California.

21 **BACKGROUND OF THE CASE**

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

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FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF –
VIOLATION OF HEALTH & SAFETY CODE §25249.5

BY FAX

1 2. This complaint is a representative action brought by Plaintiffs in the public
2 interest of the citizens of the State of California to enforce the People’s right to be informed of
3 the health hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP) and Diisononyl
4 phthalate (DINP), toxic chemicals found in Aux/Charging Cables/Cords and/or Case Logic
5 armbands sold and/or distributed by defendant ByTech NY, Inc. (“ByTech” or “Defendant”) in
6 California.

7 3. DEHP and DINP (collectively, “Phthalates”) are harmful chemicals known to the
8 State of California to cause cancer and, in the case of DEHP, reproductive toxicity. On January
9 1, 1988, and on December 20, 2013, the State of California listed DEHP and DINP, respectively,
10 as chemicals known to the State to cause cancer and each chemical has come under the purview
11 of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health &
12 Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed
13 DEHP as a chemical known to cause 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 or threaten to violate” the statute. Health & Safety
23 Code § 25249.7.

24 6. Plaintiffs allege that Defendant manufactures, distributes, imports, sells and/or
25 offers for sale in California, without the requisite exposure warning, Aux/Charging Cables/Cords
26 and Case Logic Active Armbands (the “Products”) that expose persons to Phthalates.

27 7. Defendant’s failure to warn consumers and other individuals in California of the
28 health hazards associated with exposure to Phthalates in conjunction with the sale, manufacture

1 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendant to the
2 enjoinder and civil penalties described herein.

3 8. Plaintiffs seek civil penalties against Defendant for its violations of Proposition
4 65 in accordance with Health and Safety Code § 25249.7(b).

5 9. Plaintiffs also seek injunctive relief, preliminarily and permanently, requiring
6 Defendant to provide purchasers or users of the Product with the required warnings related to the
7 dangers and health hazards associated with exposure to Phthalates pursuant to Health and Safety
8 Code § 25249.7(a).

9 **PARTIES**

10 10. Plaintiff Espinosa is a citizen of the State of California acting in the interest of the
11 general public to promote awareness of exposures to toxic chemicals in products sold in
12 California and to improve human health by reducing hazardous substances contained in such
13 items. He brings this action in the public interest pursuant to Health and Safety Code §
14 25249.7(d).

15 11. Plaintiff Ferreiro is a citizen of the State of California acting in the interest of the
16 general public to promote awareness of exposures to toxic chemicals in products sold in
17 California and to improve human health by reducing hazardous substances contained in such
18 items. He brings this action in the public interest pursuant to Health and Safety Code §
19 25249.7(d).

20 12. Defendant, through its business, effectively manufactures, imports, distributes,
21 sells, and/or offers the Products for sale or use in the State of California, or it implies by its
22 conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale or use
23 in the State of California. Plaintiffs allege that Defendant is a “person” in the course of doing
24 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

25 **VENUE AND JURISDICTION**

26 13. Venue is proper in the County of Alameda because one or more of the instances
27 of wrongful conduct occurred, and continues to occur in this county and/or because Defendant
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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 April 4, 2017, and on February 9, 2018, Espinosa and Ferreiro, respectively
16 gave notice of alleged violation of Health and Safety Code § 25249.6 (collectively, the
17 “Notice”) to Defendant concerning the exposure of California citizens to Phthalates contained in
18 the Products without proper warning, subject to a private action to Defendant and to the
19 California Attorney General’s office and the offices of the County District attorneys and City
20 Attorneys for each city with a population greater than 750,000 persons wherein the herein
21 violations allegedly occurred.

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

27 18. After receiving the Notices, and to Plaintiffs’ best information and belief, none of
28 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted

1 a cause of action against Defendant under Proposition 65 to enforce the alleged violations which
2 are the subject of Plaintiffs' Notices.

3 19. Plaintiffs are commencing this action more than sixty (60) days from the date of
4 the Notices to Defendant, as required by law.

5 **FIRST CAUSE OF ACTION**

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

7 20. Plaintiffs hereby repeat and incorporate 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 a manufacturer, distributor,
10 and/or retailer of the Products.

11 22. The Products contain Phthalates, hazardous chemicals found on the Proposition
12 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. Plaintiffs, based on their best information and belief, avers that at all relevant
15 times herein, and at least since February 8, 2017 with respect to the cables/cord, and at least
16 since November 30, 2017 with respect to the active armbands, continuing until the present, that
17 Defendant has continued to knowingly and intentionally expose California users and consumers
18 of the Products to Phthalates without providing required warnings under Proposition 65.

19 25. The exposures that are the subject of the cable/cord Notice results from the
20 purchase, acquisition, handling and recommended use of the product. Consequently, the primary
21 route of exposure to these chemicals in the cords/cables is through dermal absorption. Users
22 may potentially be exposed to Phthalates by dermal absorption through direct skin contact with
23 the cord during routine use when the cord is manipulated with bare hands. The product can be
24 expected to emit gas phase Phthalates into the air over the lifetime of the product. If the cable is
25 stored or transported in a carrier Phthalates that leaches from the cable may contaminate other
26 articles contained within these closed spaces that are subsequently handled, worn, or ingested by
27 the user. Finally, while mouthing of the product does not seem likely, some amount of exposure
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1 through ingestion can occur by touching the product, with subsequent touching of the user's
2 hand to mouth.

3 26. The exposures that are the subject of the active armband Notice results from the
4 purchase, acquisition, handling and recommended use of the product. Consequently, the primary
5 route of exposure to these chemicals in the active armband is through dermal absorption. Users
6 may be exposed to DEHP by dermal absorption through direct skin contact with the plastic
7 during expected use when the armband is worn on the arm, grasped, or manipulated with bare
8 hands. If the plastic becomes wet due to precipitation or sweat and is handled, aqueous DEHP
9 skin permeation rates have been reported to be faster than neat DEHP permeation. DEHP that
10 leaches from the plastic can contaminate a cell phone contained within the phone pocket that is
11 subsequently handled. When a cell phone is removed from the armband pocket and used, dermal
12 absorption of DEHP is possible when the user manipulates the phone or holds the cell phone
13 against an ear. If the armband is stored or transported in a carrier, DEHP that leaches from the
14 armband may contaminate other articles contained within these closed spaces are subsequently
15 handled, worn, mouthed, or consumed. Finally, while mouthing of the product does not seem
16 likely, some amount of exposure through ingestion can occur by touching the product with
17 subsequent touching of the user's hand to mouth, through touching the DEHP contaminated
18 smartphone screen after it is removed from the pocket with subsequent touching of the user's
19 hand to mouth, or if the phone surface is contaminated with DEHP and comes into contact with
20 the user's mouth during use.

21 27. Plaintiffs, based on their best information and belief, avers that such exposures
22 will continue every day until clear and reasonable warnings are provided to purchasers and users
23 of the Products, or until these known toxic chemicals are removed from the Products.

24 28. Defendant has knowledge that the normal and reasonably foreseeable use of the
25 Products exposes individuals to Phthalates, and Defendant intends that exposures to Phthalates
26 will occur by its deliberate, non-accidental participation in the manufacture, importation,
27 distribution, sale and offering of the Products to consumers in California

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1 29. Plaintiffs have engaged in good faith efforts to resolve the herein claims prior to
2 this Complaint.

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

5 31. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
6 authorized to grant injunctive relief in favor of Plaintiffs and against Defendant.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs demands judgment against Defendant and requests the
9 following relief:

- 10 A. That the court assess civil penalties against Defendant in the amount of
- 11 \$2,500 per day for each violation in accordance with Health and Safety
- 12 Code § 25249.7(b);
- 13 B. That the court preliminarily and permanently enjoin Defendant mandating
- 14 Proposition 65 compliant warnings on the Product;
- 15 C. That the court grant Plaintiffs reasonable attorney’s fees and costs of suit.
- 16 D. That the court grant any further relief as may be just and proper.

17 Dated: May 1, 2018

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