Evan J. Smith, Esquire (SBN 242352) 1 Ryan P. Cardona, Esquire (SBN 302113) BRODSKY & SMITH, LLC 9595 Wilshire Blvd., Ste. 900 Beverly Hills, CA 90212 Telephone: (877) 534-2590 OCT 1.3 2017 Facsimile: (310) 247-0160 4 CLERK OF THE STATE 5 Attorneys for Plaintiff 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 COUNTY OF ALAMEDA 9 10 GABRIEL ESPINOSA, 11 Case No.: RG17878686 Plaintiff, 12 COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELEIF ٧. 13 (Violation of Health & Safety Code §25249.5 IMPLUS FOOTCARE, LLC, 14 et seq.) Defendant. 15 16 17 Plaintiff Gabriel Espinosa ("Plaintiff" or "Espinosa"), by and through his attorneys, 18 alleges the following cause of action in the public interest of the citizens of the State of 19 California. 20 BACKGROUND OF THE CASE 21 Plaintiff brings this representative action on behalf of all California citizens to 1. 22 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified 23 at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part, 24 "[n]o 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 first 26 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6. 27

- This complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California to enforce the People's right to be informed of the health hazards caused by exposure to Di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical found in mobile phone, music device, and hydration product holders that are manufactured, distributed and/or offered for sale in California by defendant Implus Footcare, LLC ("Implus" or "Defendant") under various trade names in California.
- 3. DEHP is a hazardous chemical known to the State of California as both a reproductive toxin and carcinogen. On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer. On October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity. DEHP has come under the purview of Proposition 65 regulations since its listing on the Proposition 65 list of chemicals known to be hazardous to human health. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
- 4. Proposition 65 requires all businesses with ten (10) or more employees that operate within California or sell products therein to comply with Proposition 65 regulations.

 Included in such regulations is the requirement that businesses must label any product containing a Proposition 65-listed chemical with a "clear and reasonable" warning before "knowingly and intentionally" exposing any person to it.
- 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the actions of a defendant which "violate[s] or threaten[s] to violate" the statute. Health & Safety Code § 25249.7.
- 6. Plaintiff alleges that Defendant manufactured, distributed and/or offered for sale in California mobile phone, music device, and hydration product holders, including but not limited to Perfect Fitness Hydration & Smartphone Holders ("Product" or "Products"), without Proposition 65 exposure warning labels that the Products contain DEHP.

- 7. Defendant's failure to warn consumers and other individuals in California of the health hazards associated with exposure to the DEHP in conjunction with the sale, manufacture, and/or distribution of the Products is a violation of Proposition 65 and subjects Defendant to the enjoinment and civil penalties described herein.
- 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition 65 in accordance with Health and Safety Code § 25249.7(b).
- 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendant to provide purchasers or users of the Product with the required warnings related to the dangers and health hazards associated with exposure to the DEHP pursuant to Health and Safety Code § 25249.7(a).

PARTIES

- 10. Plaintiff is a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals in products sold in California and to improve human health by reducing hazardous substances contained in such items. He brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).
- Defendant Implus is a manufacturer of mobile phone, music device, and hydration product holders. Through its business, Implus effectively manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
- 12. Defendant Implus is a "person" in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

VENUE AND JURISDICTION

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

- 14. This Court has jurisdiction over this action pursuant to California Constitution Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has jurisdiction over this lawsuit.
- State of California, has sufficient minimum contacts with the State of California, is registered with the California Secretary of State as foreign corporations authorized to do business in the State of California, and/or has otherwise purposefully availed itself of the California market. Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent and permissible with traditional notions of fair play and substantial justice.

SATISFACTION OF NOTICE REQUIREMNTS

- 16. On June 15, 2017, Plaintiff gave notice of alleged violation of Health and Safety Code § 25249.6 (the "Notice") to Implus concerning the exposure of California citizens to the DEHP contained in the Products without proper warning, subject to a private action to Implus and to the California Attorney General's office and the offices of the County District attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein the herein violations allegedly occurred.
- 17. The Notice complied with all procedural requirements of Proposition 65 including the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at least one person with relevant and appropriate expertise who reviewed relevant data regarding the DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a private action.
- 18. After receiving the Notice, and to Plaintiff's best information and belief, none of the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a cause of action against Implus under Proposition 65 to enforce the alleged violations which are the subject of Plaintiff's notice of violation.

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

FIRST CAUSE OF ACTION

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

- 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of this complaint as though fully set forth herein.
- 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributer, and/or retailer of the Products.
- 22. The Products contain the DEHP, hazardous chemicals found on the Proposition 65 list of chemicals known to be hazardous to human health.
 - 23. The Products do not comply with the Proposition 65 warning requirements.
- 24. Plaintiff, based on his best information and belief, avers that at all relevant times herein, and at least since April 25, 2017, continuing until the present, that Implus has continued to knowingly and intentionally expose California users and consumers of the Products to the DEHP without providing required warnings under Proposition 65.
- 25. The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the product. Consequently, the primary route of exposure to these chemicals is through dermal absorption. Users may potentially be exposed to DEHP by dermal absorption through direct skin contact with the black plastic during routine use when the holder is grasped or manipulated with bare hands, or when skin contacts the plastic during cell phone or water bottle insertion or removal. If the black plastic becomes wet or is handled with wet hands, aqueous DEHP skin permeation rates have been reported to be faster than net DEHP permeation. The product can be expected to emit gas phase DEHP into the air over the lifetime of the product. DEHP that leaches from the black plastic may contaminate a cell phone contained within the holder that are subsequently handled. When the cell phone is removed from the holder and used, dermal absorption of DEHP is possible when the user manipulates the phone or holds the cell phone against an ear. As, the black plastic cover contained a hole through which the nipple of the included 8 oz. water bottle is passed,

contamination of the bottle nipple can occur with subsequent mouthing of the nipple. If the holder is stored or transported in a carrier, DEHP that leaches from the plastic may contaminate other articles contained within these closed spaces are subsequently handled, worn, mouthed, or consumed. While direct mouthing of the product does not seem likely, some amount of exposure through ingestion can occur by touching the product with subsequent touching of the user's hand to mouth.

- 26. Plaintiff, based on his best information and belief, avers that such exposures will continue every day until clear and reasonable warnings are provided to Products' purchasers and users or until these known toxic chemicals are removed from the Product.
- 27. Defendant has knowledge that the normal and reasonably foreseeable use of the Products exposes individuals to the DEHP, and Defendant intends that exposures to the DEHP will occur by their deliberate, non-accidental participation in the manufacture, importation, distribution, sale and offering of the Products to consumers in California
- 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this Complaint.
- 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.
- 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

PRAYER FOR RELIEF

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

- A. That the court assess civil penalties against Defendant in the amount of \$2,500 per day for each violation in accordance with Health and Safety Code § 25249.7(b);
- B. That the court preliminarily and permanently enjoin Defendant mandating
 Proposition 65 compliant warnings on the Product;
- C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.

D. That the court grant any further relief as may be just and proper. Dated: October 13, 2017 BRODSKY & SMITH, LLC By: Evan J. Spritt (\$18N242352) Ryan P. Cardona (SBN302113) 9595 Wilshire Boulevard, Suite 900 Beverly Hills, CA 90212 Telephone: (877) 534-2590 Facsimile: (310) 247-0160 Attorneys for Plaintiff - 7 -