

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

FILED
ALAMEDA COUNTY

OCT 13 2017

CLERK OF SUPERIOR COURT
By *JARIL BURGESS*
JARIL BURGESS, Clerk

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

11 GABRIEL ESPINOSA,

12 Plaintiff,

13 v.

14 IMPLUS FOOTCARE, LLC,

15 Defendant.

Case No.:

RG17878686

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

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 1. Plaintiff brings this representative action on behalf of all California citizens to
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

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 mobile phone, music device, and hydration product holders that are manufactured, distributed
5 and/or offered for sale in California by defendant Implus Footcare, LLC (“Implus” or
6 “Defendant”) under various trade names in California.

7 3. DEHP is a hazardous chemical known to the State of California as both a
8 reproductive toxin and carcinogen. On January 1, 1988, the State of California listed DEHP as a
9 chemical known to the State to cause cancer. On October 24, 2003, the State of California listed
10 DEHP as a chemical known to cause reproductive toxicity. DEHP has come under the purview
11 of Proposition 65 regulations since its listing on the Proposition 65 list of chemicals known to be
12 hazardous to human health. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
13 25249.8 & 25249.10(b).

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 manufactured, distributed and/or offered for sale
25 in California mobile phone, music device, and hydration product holders, including but not
26 limited to Perfect Fitness Hydration & Smartphone Holders (“Product” or “Products”), without
27 Proposition 65 exposure warning labels that the Products contain DEHP.

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

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

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

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

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

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

20 **PRAYER FOR RELIEF**

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

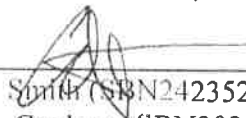
- 23 A. That the court assess civil penalties against Defendant in the amount of
24 \$2,500 per day for each violation in accordance with Health and Safety
25 Code § 25249.7(b);
- 26 B. That the court preliminarily and permanently enjoin Defendant mandating
27 Proposition 65 compliant warnings on the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

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D. That the court grant any further relief as may be just and proper.

Dated: October 13, 2017

BRODSKY & SMITH, LLC

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Beverly Hills, CA 90212
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