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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By: ERICA BAKER, Deputy

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

5 *Attorneys for Plaintiff*

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

10
11 GABRIEL ESPINOSA,
12 Plaintiff,
13 v.
14 DO-ALL TRAPS, LLC, BIG 5 CORP.,
15 Defendants.

Case No.: **RG17885033**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

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.

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 Youth Passive Muffs manufactured, distributed, offered for sale and/or sold by defendants Do-
5 All Traps, LLC (“Do-All Traps”) and Big 5 Corp. (“Big 5”) (collectively, “Defendants”) in
6 California.

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

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

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

23 6. Plaintiff alleges that Defendants manufacture, distribute and/or offer for sale in
24 California, without the required exposure warning, Youth Passive Muffs, UPC No. 6 49898
25 14259 3 (“Product” or “Products”) that contain DEHP.

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

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

3 8. Plaintiff seeks civil penalties against Defendants for their violations of
4 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

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

9 **PARTIES**

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

14 11. Defendant Do-All Traps, through its business, effectively manufactures, imports,
15 distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies
16 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale
17 or use in the State of California. Plaintiff alleges that defendant Do-All Traps is a “person” in
18 the course of doing business within the meaning of Health & Safety Code sections 25249.6 and
19 25249.11.

20 12. Defendant Big 5, through its business, effectively manufactures, imports,
21 distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies
22 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale
23 or use in the State of California. Plaintiff alleges that defendant Big 5 Traps is a “person” in the
24 course of doing business within the meaning of Health & Safety Code sections 25249.6 and
25 25249.11.

26 **VENUE AND JURISDICTION**

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

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

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

15 **SATISFACTION OF NOTICE REQUIREMENTS**

16 16. On August 9, 2017, Plaintiff gave notice of alleged violation of Health and Safety
17 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
18 DEHP contained in the Product without proper warning, subject to a private action to Defendants
19 and to the California Attorney General's office and the offices of the County District attorneys
20 and City Attorneys for each city with a population greater than 750,000 persons wherein the
21 herein violations allegedly occurred.

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

27 18. After receiving the Notice, and to Plaintiff's best information and belief, none of
28 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted

1 a cause of action against Defendants 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 Defendants, 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. Defendants have, at all times mentioned herein, acted as either a manufacturer,
10 distributor, and/or retailer of the Product.

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

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

14 24. Plaintiff, based on his best information and belief, avers that at all relevant times
15 herein, and at least since June 24, 2017, continuing until the present, that Defendants have
16 continued to knowingly and intentionally expose California users and consumers of the Product
17 to DEHP 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. The ear cushion cover of these
21 headphones is likely to be in constant contact with the user's ears during normal expected use
22 and direct dermal exposure to DEHP can occur. Dermal exposure through direct contact with the
23 user's hands is possible during application, removal, and manipulation of the headphones.
24 Should the wearer's skin perspire underneath the ear cushion or the ear cushions become wet,
25 aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP
26 permeation. Although the association between HMWP phthalates such as DEHP and atopic
27 dermatitis has never been elucidated, as a multitude of chemicals are present in headphones that
28 come into contact with human skin, DEHP in headphones and hearing protection aids has been

1 reported to induce contact dermatitis. The ear cushion cover can be expected to emit gas phase
2 DEHP into the air and accumulate DEHP at the surface of the ear cushion over the lifetime of the
3 product. This gas phase DEHP can potentially be inhaled as the product is used in the vicinity of
4 the user's facial area. If the headphones are stored or transported in a carrier, DEHP that leaches
5 from the product may contaminate other articles contained within these closed spaces are
6 subsequently handled, worn, mouthed, or consumed. Finally, while mouthing of the product
7 does not seem likely, some amount of exposure through ingestion can occur by handling the
8 product with subsequent touching of the user's hand to mouth.

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

12 27. Defendants have knowledge that the normal and reasonably foreseeable use of the
13 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
14 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
15 sale and offering of the Product to consumers in California

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

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

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

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff demands judgment against Defendants and requests the
24 following relief:

- 25 A. That the court assess civil penalties against each Defendant in the amount
26 of \$2,500 per day for each violation in accordance with Health and Safety
27 Code § 25249.7(b);

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- B. That the court preliminarily and permanently enjoin Defendants 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: December 6, 2017

BRODSKY & SMITH, LLC

By: _____

Evan J. Smith (SBN242352)
Ryan P. Cardona (SBN302113)
9595 Wilshire Boulevard, Suite 900
Beverly Hills, CA 90212
Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff