

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*

ENDORSED  
FILED  
ALAMEDA COUNTY

MAR 26 2018

CLERK OF THE SUPERIOR COURT  
CURTIYAH GANTER  
By \_\_\_\_\_ Deputy

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

12 ANTHONY FERREIRO,

13 Plaintiff,

14 vs.

15 LAST PUNCH, INC.,

16 Defendant.

Case No.:

RG10890317  
COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF

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

BY FAX

17  
18 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the  
19 following cause of action in the public interest of the citizens of the State of 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 2. This complaint is a representative action brought by Plaintiff in the public interest  
28 of the citizens of the State of California to enforce the People's right to be informed of the health

1 hazards caused by exposure Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in  
2 children's punching bags sold and/or distributed by defendant Last Punch, Inc. ("Last Punch" or  
3 "Defendant") in California.

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

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

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

20 6. Plaintiff alleges that Defendant manufactures, distributes and/or offers for sale in  
21 California, without the requisite exposure warning, children's punching bags (the "Products")  
22 that expose persons to DEHP.

23 7. Defendant's failure to warn consumers and other individuals in California of the  
24 health hazards associated with exposure to DEHP in conjunction with the sale and/or distribution  
25 of the Products is a violation of Proposition 65 and subjects Defendant to the injunction and  
26 civil penalties described herein.

27 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition  
28 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 Products with required warnings related to the dangers and health hazards associated with exposure to 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).

11. Defendant Last Punch, through its business, 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. Plaintiff alleges that defendant Last Punch 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 Products.

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.

15. This Court has jurisdiction over Defendant because Defendant is either a citizen of the 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

1 in the State of California, and/or has otherwise purposefully availed itself of the California  
2 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts  
3 consistent and permissible with traditional notions of fair play and substantial justice.

4 **SATISFACTION OF NOTICE REQUIREMENTS**

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

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

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

20 19. Plaintiff is commencing this action more than sixty (60) days from the date of his  
21 notice to Defendant, as required by law.

22 **FIRST CAUSE OF ACTION**

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

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

26 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
27 and/or retailer of the Product.  
28

1           22.     The Products contain DEHP, a hazardous chemical found on the Proposition 65  
2 list of chemicals known to be hazardous to human health.

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

4           24.     Plaintiff, based on his best information and belief, avers that at all relevant times  
5 herein, and at least since June 13, 2017, continuing until the present, that Defendant has  
6 continued to knowingly and intentionally expose California users and consumers of the Product  
7 to DEHP without providing required warnings under Proposition 65.

8           25.     The exposures that are the subject of this notice result from the purchase,  
9 acquisition, handling and recommended use of the product. Consequently, the primary route of  
10 exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can  
11 occur through direct skin contact with the red vinyl when the punching bag is grasped or struck  
12 with bare hands. If the red vinyl becomes wet with water or perspiration and is handled, aqueous  
13 DEHP skin permeation rates have been reported to be faster than neat DEHP permeation. If the  
14 user wears boxing gloves while using the punching bag, DEHP can contaminate the surface of  
15 the gloves. These gloves can subsequently transfer DEHP to another boxer's skin when used for  
16 boxing and can potentially transfer DEHP to another boxer's facial area including the mouth  
17 where indirect mouthing of the DEHP can possibly occur. The product can be expected to emit  
18 gas phase DEHP into the air and accumulate DEHP at the surface over the lifetime of the  
19 product. Finally, while mouthing of the product does not seem likely, some amount of exposure  
20 through ingestion can occur by touching the red vinyl with subsequent touching of the user's  
21 hand to mouth.

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

25           27.     Defendant has knowledge that the normal and reasonably foreseeable use of the  
26 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur  
27 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale  
28 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: March 23, 2018

BRODSKY &amp; SMITH, LLC

By: Evan J. Smith  
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*