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ENDORSED  
FILED  
ALAMEDA COUNTY

MAR 13 2018

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By \_\_\_\_\_

8 Attorneys for Plaintiff

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

11 GABRIEL ESPINOSA,  
12 Plaintiff,

13 v.

14 ANKIT, LLC, MARSHALLS OF MA,  
15 INC.,  
16 Defendants.

Case No.: RG18896501

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

17 Plaintiff Gabriel Espinosa ("Plaintiff"), by and through his attorneys, alleges the  
18 following cause of action in the public interest of the citizens of the State of California.

BY FAX

**BACKGROUND OF THE CASE**

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

25 2. This complaint is a representative action brought by Plaintiff in the public interest  
26 of the citizens of the State of California to enforce the People's right to be informed of the health  
27 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in  
28 Ankit branded Headphones (the "Products") sold and/or distributed for sale in California by

1 defendants Ankit, LLC (“Ankit”) and Marshalls of MA, Inc. (“Marhsalls”) (collectively,  
2 “Defendants”).

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

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

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

19 6. Plaintiff alleges that Defendants import, distribute, sell and/or offer for sale in  
20 California, without the required Proposition 65 exposure warning, the Products that contain  
21 DEHP.

22 7. Defendants’ failure to warn consumers and other individuals in California of the  
23 health hazards associated with exposure to DEHP in conjunction with the sale, manufacture,  
24 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendants to the  
25 enjoinder and civil penalties described herein.

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

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1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
2 Defendants to provide purchasers or users of the Products with the required exposure warnings  
3 related to the dangers and health hazards associated with exposure to DEHP pursuant to Health  
4 and Safety Code § 25249.7(a).

### 5 PARTIES

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

10 11. Defendant Ankit, through its business, effectively imports, distributes, sells,  
11 and/or offers the Products for sale or use in the State of California, or it implies by its conduct  
12 that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the  
13 State of California. Defendant Ankit is alleged to be a “person” in the course of doing business  
14 within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

15 12. Defendant Marshalls, through its business, effectively imports, distributes, sells,  
16 and/or offers the Products for sale or use in the State of California, or it implies by its conduct  
17 that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the  
18 State of California. Defendant Marshalls is alleged to be a “person” in the course of doing  
19 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

### 20 VENUE AND JURISDICTION

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

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

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

9 **SATISFACTION OF NOTICE REQUIREMENTS**

10 16. On October 26, 2017, Plaintiff gave notice of alleged violation of Health and  
11 Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California  
12 citizens to DEHP contained in the Products without proper warning, subject to a private action to  
13 Defendants and to the California Attorney General's office and the offices of the County District  
14 attorneys and City Attorneys for each city with a population greater than 750,000 persons  
15 wherein the herein violations allegedly occurred.

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

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

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

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1 **FIRST CAUSE OF ACTION**

2 **(By Plaintiff against Defendants for the Violation of Proposition 65)**

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

5 21. Defendants have, at all times mentioned herein, acted as manufacturer, distributor,  
6 and/or retailer of the Products.

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

9 23. The Products do not comply with the Proposition 65 warning requirements.

10 24. Plaintiff, based on his best information and belief, avers that at all relevant times  
11 herein, and at least since September 26, 2017, continuing until the present, that Defendants have  
12 continued to knowingly and intentionally expose California users and consumers of the Products  
13 to DEHP without providing required warnings under Proposition 65.

14 25. The exposures that are the subject of the Notice result from the purchase,  
15 acquisition, handling and recommended use of the product. Consequently, the primary route of  
16 exposure to these chemicals is through dermal exposure. The ear cushion cover of these  
17 headphones is likely to be in constant contact with the user's ears during normal expected use  
18 and direct dermal exposure to DEHP can occur. Dermal exposure through direct contact with the  
19 user's hands is possible during application, removal, and manipulation of the headphones.  
20 Should the wearer's skin perspire underneath the ear cushion or the ear cushion becomes wet,  
21 aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP  
22 permeation. Although the association between HMWP phthalates such as DEHP and atopic  
23 dermatitis has never been elucidated, as a multitude of chemicals are present in headphones that  
24 come into contact with human skin, DEHP in headphones and hearing protection aids has been  
25 reported to induce contact dermatitis. If the headphones are stored or transported in a carrier,  
26 DEHP that leaches from the product may contaminate other articles contained within these  
27 closed spaces are subsequently handled, worn, mouthed, or consumed. Finally, while mouthing  
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1 of the product does not seem likely, some amount of exposure through ingestion can occur by  
2 handling the product with subsequent touching of the user's hand to mouth.

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

6 27. Defendants have knowledge that the normal and reasonably foreseeable use of the  
7 Products exposes individuals to DEHP, and Defendants intend that exposures to DEHP will  
8 occur by its deliberate, non-accidental participation in the manufacture, importation, distribution,  
9 sale and offering of the Products to consumers in California.

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

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

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

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff demands judgment against Defendants and requests the  
18 following relief:

- 19 A. That the court assess civil penalties against Defendants in the amount of  
20 \$2,500 per day for each violation in accordance with Health and Safety  
21 Code § 25249.7(b);
- 22 B. That the court preliminarily and permanently enjoin Defendants  
23 mandating Proposition 65 compliant warnings on the Product;
- 24 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 25 D. That the court grant any further relief as may be just and proper.

26 Dated: March 13, 2018

BRODSKY & SMITH, LLC

27 By:   
28 Evan L. Smith (SBN242352)

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