

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  
JAN 25 2018

CLERK OF THE SUPERIOR COURT  
By Lanette Buffin, Deputy

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

11 GABRIEL ESPINOSA,

12 Plaintiff,

13 vs.

14 THE BURTON CORP.,

15 Defendant.

Case No. *RG* 8890692

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

16  
17  
18 Plaintiff Gabriel Espinosa ("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) and Diisononyl phthalate  
2 (DINP), toxic chemicals found in Channel Island wallets and dry packs that are sold and/or  
3 distributed by defendant The Burton Corporation (“Burton” or “Defendant”) in California.

4 3. DEHP and DNIP are harmful chemicals known to the State of California to cause  
5 cancer and/or reproductive toxicity. On January 1, 1988, and on December 20, 2013, the State of  
6 California listed DEHP and DINP, respectively, as chemicals known to the State to cause cancer  
7 and each chemical has come under the purview of Proposition 65 regulations since that time.  
8 Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On  
9 October 24, 2003, the State of California listed DEHP as a chemical known to cause  
10 reproductive toxicity. *Id.*

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

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

21 6. Plaintiff alleges that Defendant manufactures, distributes, sells and/or offers for  
22 sale in California, without the requisite exposure warning, Channel Island dry packs and wallets  
23 (the “Products”) that expose persons to DEHP and/or DINP.

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

28



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

7                                 SATISFACTION OF NOTICE REQUIREMNTS

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

14           17. On October 30, 2017, Plaintiff gave notice of alleged violation of Health and  
15 Safety Code § 25249.6 (the "October Notice") to Defendant concerning the exposure of  
16 California citizens to DEHP contained in Channel Island Fin Wallets without proper warning,  
17 subject to a private action to Defendant and to the California Attorney General's office and the  
18 offices of the County District attorneys and City Attorneys for each city with a population  
19 greater than 750,000 persons wherein the herein violations allegedly occurred.

20           18. The January Notice and the October Notice are collectively referred to herein as,  
21 the "Notices."

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

27           20. After receiving the Notices, 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 Defendant under Proposition 65 to enforce the alleged violations which  
2 are the subject of Plaintiff's notice of violation.

3 21. Plaintiff is commencing this action more than sixty (60) days from the date of the  
4 Notices to Defendant, as required by law.

5 **FIRST CAUSE OF ACTION**

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

7 22. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 21 of  
8 this complaint as though fully set forth herein.

9 23. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
10 and/or retailer of the Product.

11 24. The Products contain DEHP and/or DINP, hazardous chemicals found on the  
12 Proposition 65 list of chemicals known to be hazardous to human health.

13 25. The Products do not comply with the Proposition 65 warning requirements.

14 26. Plaintiff, based on his best information and belief, avers that at all relevant times  
15 herein, and at least since December 6, 2016, with respect to the Channel Island Surfboards Dry  
16 Packs, and at least since September 27, 2017, with respect to the Channel Island Wallets,  
17 continuing until the present, that Defendant has continued to knowingly and intentionally expose  
18 California users and consumers of the Products to DEHP and/or DINP without providing  
19 required warnings under Proposition 65.

20 27. The exposures that are the subject of the January Notice result from the purchase,  
21 acquisition, handling and recommended use of the product. Consequently, the primary route of  
22 exposure to these chemicals is through dermal exposure. Dermal exposure through the user's  
23 hands to DINP is possible during insertion and removal of items into the dry bag, and during  
24 routine handling of the dry bag. It is anticipated during normal, expected use that the product  
25 can come into contact with water or humidity and should the user touch the wet dry bag, aqueous  
26 HMWP skin permeation rates have been reported to be faster than neat HMWP permeation.  
27 Items placed within the dry bag can become contaminated with DINP and dermal exposure is  
28 possible when these contaminated articles are handled or worn. If consumable items or

1 beverages are placed in the dry bag, DINP can contaminate the surface of these items and when  
2 the food or beverage is mouthed or consumed, DINP ingestion will occur. Finally, while  
3 mouthing of the product does not seem likely, some amount of exposure through ingestion can  
4 occur by touching the product, with subsequent touching of the user's hand to mouth.

5 28. The exposures that are the subject of the October Notice result from the purchase,  
6 acquisition, handling and recommended use of the product. Consequently, the primary route of  
7 exposure to these chemicals is through dermal absorption. Users may potentially be exposed to  
8 DEHP by dermal absorption through direct skin contact with the clear plastic case during routine  
9 use when the wallet is manipulated with bare hands. Concentrations of gas phase DEHP can be  
10 expected to build within the zippered, enclosed interior of the wallet. This gas phase DEHP can  
11 potentially be absorbed to the surface of the interior contents. When handled, these items can  
12 provide an indirect source of derma transfer of DEHP to the user's hands when the contents are  
13 grasped with bare hands. Should the user manipulate the wallet or contaminated inner contents  
14 with wet hands, aqueous DEHP skin permeation rates are faster than net DEHP permeation. If  
15 the wallet is stored or transported in a carrier, DEHP that leaches from the item may contaminate  
16 other articles contained within these closed spaces that are subsequently handled, worn,  
17 mouthed, or ingested by the user. Finally, while mouthing of the product does not seem likely,  
18 some amount of exposure through ingestion can occur by touching the product with subsequent  
19 touching of the user's hand to mouth, consuming contaminated items placed within the zippered  
20 pouches, or through mouthing DEHP contaminated items after removal from the wallet.

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

24 30. Defendant has knowledge that the normal and reasonably foreseeable use of the  
25 Products exposes individuals to DEHP and/or DINP, and Defendant intends that exposures to  
26 DEHP and DINP will occur by its deliberate, non-accidental participation in the manufacture,  
27 importation, distribution, sale and offering of the Products to consumers in California  
28

1 31. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
2 Complaint.

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

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

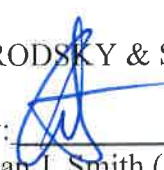
7 **PRAYER FOR RELIEF**

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

- 10 A. That the court assess civil penalties against Defendant in the amount of  
11 \$2,500 per day for each violation in accordance with Health and Safety  
12 Code § 25249.7(b);
- 13 B. That the court preliminarily and permanently enjoin Defendant mandating  
14 Proposition 65 compliant warnings on the Product;
- 15 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 16 D. That the court grant any further relief as may be just and proper.

17  
18 Dated: January 25, 2018

BRODSKY & SMITH, LLC

19 By:   
20 Evan J. Smith (SBN242352)  
21 Ryan P. Cardona (SBN302113)  
22 9595 Wilshire Boulevard, Suite 900  
23 Beverly Hills, CA 90212  
24 Telephone: (877) 534-2590  
25 Facsimile: (310) 247-0160

*Attorneys for Plaintiff*