

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

APR 30 2018

SUE PESKO

By: _____

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

11 ANTHONY FERREIRO,
12 Plaintiff,

13 v.

14 NO-FADE COATINGS, INC., a California
15 Corporation dba ALLEGRO
16 INDUSTRIES,
17 Defendant.

Case No.: RG18902236

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

18 Plaintiff Anthony Ferreiro (“Plaintiff” or “Ferreiro”), by and through his attorneys,
19 alleges the following cause of action in the public interest of the citizens of the State of
20 California.

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

BY FAX

1 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
2 Allegro Vortex Cooling Vests manufactured, distributed, offered for sale and/or sold by
3 defendant No-Fade Coatings, Inc., a California Corporation dba Allegro Industries (“Allegro” or
4 “Defendant”) in California.

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

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[s] or threaten[s] to violate” the statute. Health &
20 Safety Code § 25249.7.

21 6. Plaintiff alleges that Defendant manufactures, distributes and/or offers for sale in
22 California, without the required exposure warning, Allegro Vortex Cooling Vests and accessory
23 component parts (“Product” or “Products”) that contain DEHP.

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

28

1 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
2 65 in accordance with Health and Safety Code § 25249.7(b).

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

7 **PARTIES**

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

12 11. Defendant Allegro, through its business, effectively manufactures, imports,
13 distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies
14 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale
15 or use in the State of California.

16 12. Plaintiff alleges that defendant Allegro is a “person” in the course of doing
17 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

18 **VENUE AND JURISDICTION**

19 13. Venue is proper in the County of Alameda because one or more of the instances
20 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
21 conducts, and continues to conduct, business in the County of Alameda with respect to the
22 Product.

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

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 REQUIREMENTS**

8 16. On January 30, 2018, Plaintiff gave notice of alleged violation of Health and
9 Safety Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California
10 citizens to DEHP contained in the Product without proper warning, subject to a private action to
11 Defendant and to the California Attorney General’s office and the offices of the County District
12 attorneys and City Attorneys for each city with a population greater than 750,000 persons
13 wherein the herein violations allegedly occurred.

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

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

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

25 **FIRST CAUSE OF ACTION**

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

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

1 21. Defendant has, at all times mentioned herein, acted as either a manufacturer,
2 distributor and/or retailer of the Product.

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

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

6 24. Plaintiff, based on his best information and belief, avers that at all relevant times
7 herein, and at least since November 30, 2017, continuing until the present, that Defendant has
8 continued to knowingly and intentionally expose California users and consumers of the Product
9 to DEHP without providing required warnings under Proposition 65.

10 25. The exposures that are the subject of the Notice result from the purchase,
11 acquisition, handling and recommended use of the product. Consequently, the primary route of
12 exposure to these chemicals is through dermal absorption. The product can be expected to emit
13 gas phase DEHP into the air and accumulate DEHP at the surface over the lifetime of the
14 product. Users may potentially be exposed to DEHP by dermal absorption through direct skin
15 contact with the vest when it is handled or worn in contact with bare skin. Should the vest
16 become wet while wearing it, aqueous DEHP skin permeation rates are faster than neat DEHP
17 permeation. Cooling air that is passed through the vest can product gas phase DEHP in the
18 vicinity of the user's body and face and if this gas phase DEHP is breathed in, ingestion of
19 DEHP can occur. Clothing worn under the vest are likely to absorb DEHP. The contaminated
20 articles of clothing will continue to be a source of dermal transfer after the vest is removed. If
21 the vest is stored or transported in a carrier, DEHP that leaches from the vinyl may contaminate
22 other articles contained within these closed spaces that re subsequently handled, worn, or
23 ingested by the user. Finally, while mouthing of the product does not seem likely, some amount
24 of exposure through ingestion can occur by touching the product with subsequent touching of the
25 user's hand to mouth.

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

