



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
 Telephone: (877) 534-2590
 Facsimile: (310) 247-0160
 Attorneys for Plaintiff

FILED
 ALAMEDA COUNTY
 OCT 13 2020
 CLERK OF THE SUPERIOR COURT
 By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF ALAMEDA

RG20077402

10 GABRIEL ESPINOZA,
 11 Plaintiff,
 12 vs.
 13 ACUSHNET COMPANY, BIG 5 CORP.,
 14 Defendants.

Case No.:
**COMPLAINT FOR CIVIL PENALTIES AND
 INJUNCTIVE RELIEF**
 (Violation of Health & Safety Code § 25249.5 et
 seq.)

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

BACKGROUND OF THE CASE

17
 18
 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 at
 21 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 chromium VI, a toxic chemical found in WeatherSof golf gloves

Filed By Fax

1 sold and/or distributed by defendant Acushnet Company (“Acushnet”) and defendant Big 5 Corp.
2 (“Big 5”) (collectively, the “Defendants”) in California.

3 3. Chromium (VI) is a harmful chemical known to the State of California to cause
4 cancer and adverse developmental effects in both males and females. On February 27, 1987, the
5 State of California listed chromium (VI) as a chemical known to the State to cause cancer and it
6 has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27,
7 § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On December 19, 2008, the State
8 of California listed chromium (VI) as a chemical known to cause adverse developmental effects
9 in both males and females.

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

15 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
16 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
17 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
18 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
19 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
20 25249.7.

21 6. Plaintiff alleges that Defendants distribute and/or offers for sale in California,
22 without a requisite exposure warning, WeatherSof golf gloves (the “Products”) that expose persons
23 to chromium (VI).

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

28

1 8. Plaintiff seeks civil penalties against Defendants for their 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 Defendants to provide purchasers or users of the Products with required warnings related to the
5 dangers and health hazards associated with exposure to chromium (VI) pursuant to Health and
6 Safety Code § 25249.7(a).

7 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

8 **PARTIES**

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

13 12. Defendant Acushnet, through its business, effectively imports, distributes, sells,
14 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
15 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
16 Plaintiff alleges that defendant Acushnet is a "person" in the course of doing business within the
17 meaning of Health & Safety Code sections 25249.6 and 25249.11.

18 13. Defendant Big 5, through its business, effectively imports, distributes, sells, and/or
19 offers the Products for sale or use in the State of California, or it implies by its conduct that it
20 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
21 Plaintiff alleges that defendant Big 5 is a "person" in the course of doing business within the
22 meaning of Health & Safety Code sections 25249.6 and 25249.11.

23 **VENUE AND JURISDICTION**

24 14. Venue is proper in the County of Alameda because one or more of the instances of
25 wrongful conduct occurred, and continue to occur in this county and/or because Defendants
26 conducted, and continue to conduct, business in the County of Alameda with respect to the
27 Products.
28

1 20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
2 more of the following methods individually or in combination:¹

3 a. A warning that appears on a product's label or other labeling.

4 b. Identification of the product at the retail outlet in a manner which provides
5 a warning. Identification may be through shelf labeling, signs, menus, or a combination
6 thereof.

7 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
8 prominently placed upon a product's labels or other labeling or displayed at the retail outlet
9 with such conspicuousness, as compared with other words, statements, designs, or devices
10 in the label, labeling or display as to render it likely to be read and understood by an
11 ordinary individual under customary conditions of purchase or use.

12 d. A system of signs, public advertising identifying the system and toll-free
13 information services, or any other system that provides clear and reasonable warnings.

14 21. Proposition 65 provides that any "person who violates or threatens to violate" the
15 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
16 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
17 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
18 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
19 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

20 **FACTUAL BACKGROUND**

21 22. On February 27, 1987, the State of California listed chromium (VI) as a chemical
22 known to the State to cause cancer and it has come under the purview of Proposition 65 regulations
23 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
24 25249.10(b). On December 19, 2008, the State of California listed chromium (VI) as a chemical

25
26
27 ¹ Alternatively, a person in the course of doing business may elect to comply with the warning
28 requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30,
2016, and operative on August 30, 2018.

1 known to cause adverse developmental effects in both males and females. In summary, the Listed
2 Chemical was listed under Proposition 65 as a chemical known to the State to cause cancer and
3 adverse developmental effects in both males and females.

4 23. The consumer exposures that are the subject of this Complaint result from through
5 dermal absorption. Increased duration of contact with the leather, natural aging of the Products,
6 temperature, light exposure, and contact of the Products with oxidizing agents and alkaline
7 solutions will result in increased conversion of chromium (III) to chromium (VI) in the Products
8 and thus increased dermal exposure to chromium (VI). Direct mouthing of the Products and
9 indirect hand to mouth exposure to chromium (VI) following wearing are possible additional
10 chromium (VI) exposure routes.

11 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
12 and/or sold the Products in California since at least October 10, 2019. The Products continue to be
13 distributed and sold in California without the requisite warning information.

14 25. At all times relevant to this action, Defendants have knowingly and intentionally
15 exposed users, consumers and/or patients to the Products and the Listed Chemical without first
16 giving a clear and reasonable exposure warning to such individuals.

17 26. As a proximate result of acts by each defendant, as a person in the course of doing
18 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
19 California, including in Alameda County, have been exposed to the Listed Chemical without a
20 clear and reasonable warning on the Products. The individuals subject to the violative exposures
21 include normal and foreseeable users, consumers and patients that use the Products, as well as all
22 others exposed to the Products.

23 **SATISFACTION OF NOTICE REQUIREMENTS**

24 27. On October 10, 2019, Plaintiff gave notice of alleged violation of Health and Safety
25 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
26 chromium (VI) contained in the Products without proper warning, subject to a private action to
27 Defendants and to the California Attorney General's office and the offices of the County District
28

1 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
2 the herein violations allegedly occurred.

3 28. The Notice complied with all procedural requirements of Proposition 65 including
4 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
5 least one person with relevant and appropriate expertise who reviewed relevant data regarding
6 chromium (VI) exposure, and that counsel believed there was meritorious and reasonable cause
7 for a private action.

8 29. After receiving the Notice, and to Plaintiff's best information and belief, none of
9 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
10 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
11 are the subject of the Notice.

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

14 **FIRST CAUSE OF ACTION**

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

16 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of
17 this Complaint as though fully set forth herein.

18 32. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
19 of the Products.

20 33. The Products contain chromium (VI), a hazardous chemical found on the
21 Proposition 65 list of chemicals known to be hazardous to human health.

22 34. The Products do not comply with the Proposition 65 warning requirements.

23 35. Plaintiff, based on his best information and belief, avers that at all relevant times
24 herein, and at least since October 10, 2019, continuing until the present, that Defendants have
25 continued to knowingly and intentionally expose California users and consumers of the Products
26 to chromium (VI) without providing required warnings under Proposition 65.

27 36. The exposures that are the subject of the Notice result from the purchase,
28 acquisition, handling and recommended use of the Products. Consequently, the primary route of

1 exposure to these chemicals is through dermal exposure. Increased duration of contact with the
2 leather, natural aging of the Products, temperature, light exposure, and contact of the Products with
3 oxidizing agents and alkaline solutions will result in increased conversion of chromium (III) to
4 chromium (VI) in the Products and thus increased dermal exposure to chromium (VI). Direct
5 mouthing of the Products and indirect hand to mouth exposure to chromium (VI) following
6 wearing are possible additional chromium (VI) exposure routes.

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

10 38. Defendants have knowledge that the normal and reasonably foreseeable use of the
11 Product exposes individuals to chromium (VI), and Defendants intend that exposures to chromium
12 (VI) will occur by its deliberate, non-accidental participation in the importation, distribution, sale
13 and offering of the Products to consumers in California

14 39. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
15 Complaint.

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

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

20
21
22
23
24
25
26
27
28

1 PRAYER FOR RELIEF

2 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
3 relief:

4 A. That the court assess civil penalties against each defendant in the amount of \$2,500
5 per day for each violation for up to 365 days (up to a maximum civil penalty amount per
6 violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);


7 B. That the court preliminarily and permanently enjoin Defendants mandating
8 Proposition 65 compliant warnings on the Products;

9 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
10 amount of \$50,000.00.

11 D. That the court grant any further relief as may be just and proper.

12 Dated: October 12, 2020

BRODSKY & SMITH, LLC

13 By: 
14 Evan J. Smith (SBN242352)
15 Ryan P. Cardona (SBN302113)
16 9595 Wilshire Boulevard, Suite 900
17 Beverly Hills, CA 90212
18 Telephone: (877) 534-2590
19 Facsimile: (310) 247-0160

Attorneys for Plaintiff