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ELECTRONICALLY
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Superior Court of California,
County of San Francisco

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Clerk of the Court
BY: JEFFREY FLORES
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-22-602662

11 GABRIEL ESPINOZA,
12 Plaintiff,
13 vs.
14 HEAD USA, INC.,
15 Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

18 **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 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 (hexavalent compounds) (“chromium (VI)”), a toxic
28

1 chemical found in Head Renegade Racquet Gloves, sold and/or distributed by defendant Head
2 USA, Inc. (“Head USA” or “Defendant”) in California.

3 3. Chromium (VI) is a harmful chemical known to the State of California to cause
4 cancer and adverse developmental effects. On February 27, 1987, the State of California listed
5 chromium (VI) as a chemical known to the State to cause developmental toxicity and it has come
6 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 of
8 California listed chromium (VI) as a chemical known to cause adverse developmental effects.

9 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
10 within California or sell products therein to comply with Proposition 65 regulations. Included in
11 such regulations is the requirement that businesses must label any product containing a Proposition
12 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
13 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
14 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 to be imposed upon defendants in a civil action for violations of Proposition 65.
17 Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent
18 jurisdiction to enjoin the actions of a defendant which “violate or threaten to violate” the statute.
19 Health & Safety Code § 25249.7.

20 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
21 without a requisite exposure warning, Head Renegade Racquet Gloves (the “Products”) that
22 expose persons to chromium (VI) when used for their intended purpose.

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

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

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

5 10. Plaintiff further seeks a reasonable award of attorney’s fees and costs.

6 **PARTIES**

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

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

16 **VENUE AND JURISDICTION**

17 13. Venue is proper in the County of San Francisco because one or more of the
18 instances of wrongful conduct occurred and continue to occur in this county and/or because
19 Defendant conducted, and continues to conduct, business in the County of San Francisco with
20 respect to the Products.

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

26 15. This Court has jurisdiction over Defendant because defendant is either a citizen of
27 the State of California, has sufficient minimum contacts with the State of California, is registered
28 with the California Secretary of State as foreign corporations authorized to do business in the State

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

4 STATUTORY BACKGROUND

5 16. The people of the State of California declared in Proposition 65 their right “[t]o be
6 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
7 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

8 17. To effect this goal, Proposition 65 requires that individuals be provided with a
9 “clear and reasonable warning” before being exposed to substances listed by the State of California
10 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

11 No person in the course of doing business shall knowingly and intentionally expose any
12 individual to a chemical known to the state to cause cancer or reproductive toxicity without
13 first giving clear and reasonable warning to such individual...

14 18. An exposure to a chemical in a consumer product is one “which results from a
15 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
16 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
17 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
18 shall provide a warning to any person to whom the product is sold or transferred unless the product
19 is packaged or labeled with a clear and reasonable warning.”

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

22 a. A warning that appears on a product’s label or other labeling.

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

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

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

8 20. Proposition 65 provides that any "person who violates or threatens to violate" the
9 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
10 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
11 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
12 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
13 365 days.

14 **FACTUAL BACKGROUND**

15 21. On February 27, 1987, the State of California listed chromium (VI) as a chemical
16 known to the State to cause cancer and it has come under the purview of Proposition 65 regulations
17 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
18 25249.10(b). On December 19, 2008, the State of California listed chromium (VI) as a chemical
19 known to cause adverse developmental effects in both males and females. In summary, chromium
20 (VI) was listed under Proposition 65 as a chemical known to the State to cause cancer and adverse
21 developmental effects in both males and females.

22 22. The exposures that are the subject of the Notice result from the purchase,
23 acquisition, handling and recommended use of the Product. The primary route of exposure to the
24 chromium (VI) is through dermal absorption directly through the skin when consumers use, touch,
25 or handle the Products. Exposure through ingestion will occur by touching the Product with
26 subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided
27 with the Products regarding the health hazards of exposure to chromium (VI).

1 23. Defendant has manufactured, processed, marketed, distributed, offered to sell
2 and/or sold the Products in California since at least June 24, 2021. The Products continue to be
3 distributed and sold in California without the requisite warning information.

4 24. At all times relevant to this action, Defendant has knowingly and intentionally
5 exposed users, consumers and/or patients to the Products and the chromium (VI) without first
6 giving a clear and reasonable exposure warning to such individuals.

7 25. As a proximate result of acts by each defendant, as a person in the course of doing
8 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
9 California, including in San Francisco County, have been exposed to chromium (VI) without a
10 clear and reasonable warning on the Products. The individuals subject to the violative exposures
11 include normal and foreseeable users, consumers and patients that use the Products, as well as all
12 others exposed to the Products.

13 **SATISFACTION OF NOTICE REQUIREMENTS**

14 26. On April 21, 2021, Plaintiff purchased the Product from Big 5 Corp. At the time of
15 purchase, Big 5 and Head USA did not provide a Proposition 65 exposure warning for chromium
16 (VI) or any other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1
17 as described *supra*.

18 27. The Product was sent to a testing laboratory to determine the chromium (VI)
19 content of the Product.

20 28. On June 23, 2021, the laboratory provided the results of its analysis. Results of this
21 test determined the Product exposes users to chromium (VI) (the “Chemical Test Report”).

22 29. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
23 to determine if, based on the findings of the Chemical Test Report and the reasonable and
24 foreseeable use of the Product, exposure to chromium (VI) will occur at levels that require
25 Proposition 65 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of
26 the California Code of Regulations.

1 30. On June 24, 2021, Plaintiff received from the analytical chemist an exposure
2 assessment report which concluded that persons in California who use the Products will be exposed
3 to levels of chromium (VI) that require a Proposition 65 exposure warning.

4 31. On June 24, 2021, Plaintiff gave notice of alleged violation of Health and Safety
5 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to
6 chromium (VI) contained in the Products without proper warning, subject to a private action to
7 Defendant and to the California Attorney General's office and the offices of the County District
8 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
9 the herein violations allegedly occurred.

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

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

19 34. Plaintiff is commencing this action more than sixty (60) days from the date of the
20 Notice to Defendant, as required by law. Plaintiff and Defendant agreed to toll the statute of
21 limitations until October 30, 2022.

22 **FIRST CAUSE OF ACTION**

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

24 35. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 34 of
25 this Complaint as though fully set forth herein.

26 36. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
27 the Products.

1 37. Use of the Products will expose users and consumers thereof to chromium (VI), a
2 hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human
3 health.

4 38. The Products do not comply with the Proposition 65 warning requirements.

5 39. Plaintiff, based on his best information and belief, avers that at all relevant times
6 herein, and at least since June 24, 2021, continuing until the present, that Defendant has continued
7 to knowingly and intentionally expose California users and consumers of the Products to
8 chromium (VI) without providing required warnings under Proposition 65.

9 40. The exposures that are the subject of the Notice result from the purchase,
10 acquisition, handling and recommended use of the Product. The primary route of exposure to the
11 chromium (VI) is through dermal absorption directly through the skin when consumers use, touch,
12 or handle the Products. Exposure through ingestion will occur by touching the Product with
13 subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided
14 with the Products regarding the health hazards of exposure to chromium (VI).

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

18 42. Defendant has knowledge that the normal and reasonably foreseeable use of the
19 Product exposes individuals to chromium (VI), and Defendant intends those exposures to
20 chromium (VI) will occur by its deliberate, non-accidental participation in the importation,
21 distribution, sale and offering of the Products to consumers in California

22 43. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
23 Complaint.

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

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

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendant 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 in accordance with Health and Safety Code §
6 25249.7(b);

7 B. That the court preliminarily and permanently enjoin Defendant 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 28, 2022

BRODSKY & SMITH

13 By:  _____

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