

1 Evan J. Smith, Esquire (SBN 242352)  
2 Ryan P. Cardona, Esquire (SBN 302113)  
3 BRODSKY & SMITH  
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*

ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco

06/15/2022  
Clerk of the Court  
BY: LAURA SIMMONS  
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN FRANCISCO

11 DONATUS MCCOY,  
12 Plaintiff,

13 vs.

14 FIRST TEXAS PRODUCTS, LLC,  
15 Defendant.

Case No.:

**CGC-22-600182**

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

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

16 Plaintiff Donatus McCoy (“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 di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in First  
28 Texas headphones sold and/or distributed by defendant First Texas Products, LLC (“First Texas”)  
 (“Defendant”) in California.

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

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

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

19           6.       Plaintiff alleges that Defendant distribute and/or offer for sale in California, without  
20 a requisite exposure warning, First Texas Headphones (the “Products”) that expose persons to  
21 DEHP when used for their intended purpose.

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

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



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:<sup>1</sup>

- 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 <sup>1</sup> 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 (up to a maximum civil penalty amount per violation of \$912,000.00).

14 **FACTUAL BACKGROUND**

15 21. On January 1, 1988, the State of California listed DEHP as a chemical known to  
16 the State to cause cancer and it has come under the purview of Proposition 65 regulations since  
17 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).  
18 On October 24, 2003, the State of California listed DEHP as a chemical known to cause  
19 reproductive toxicity.

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

26 23. Defendant has manufactured, processed, marketed, distributed, offered to sell  
27 and/or sold the Products in California since at least October 13, 2021. The Products continue to be  
28 distributed and sold in California without the requisite warning information.



1 DEHP from use of the Products without proper warning, subject to a private action to Defendant  
2 and to the California Attorney General's office and the offices of the County District attorneys and  
3 City Attorneys for each city with a population greater than 750,000 persons wherein the herein  
4 violations allegedly occurred.

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

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

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

16 **FIRST CAUSE OF ACTION**

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

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

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

22 37. Use of the Products will expose users and consumers thereof to DEHP, a hazardous  
23 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

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

25 39. Plaintiff, based on his best information and belief, avers that at all relevant times  
26 herein, and at least since October 13, 2021, continuing until the present, that Defendant has  
27 continued to knowingly and intentionally expose California users and consumers of the Products  
28 to DEHP without providing required warnings under Proposition 65.

1           40.     The exposures that are the subject of the Notice result from the purchase,  
2 acquisition, handling and recommended use of the Product. The primary route of exposure to the  
3 is through dermal absorption directly through the skin when consumers use, touch, or handle the  
4 Products. Some amount of exposure through ingestion can occur by touching the Product with  
5 subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided  
6 with the Products regarding the health hazards of exposure.

7           41.     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          42.     Defendant has knowledge that the normal and reasonably foreseeable use of the  
11 Products exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur  
12 by their deliberate, non-accidental participation in the importation, distribution, sale and offering  
13 of the Products to consumers in California

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

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

18          45.     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 Defendant.

20  
21  
22  
23  
24  
25  
26  
27  
28




**PRAYER FOR RELIEF**

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

- A. That the court assess civil penalties against defendant in the amount of \$2,500 per day for each violation for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);
- B. That the court preliminarily and permanently enjoin Defendant mandating Proposition 65 compliant warnings on the Products;
- C. That the court grant Plaintiff reasonable attorney’s fees and costs of suit, in the amount of \$50,000.00.
- D. That the court grant any further relief as may be just and proper.

Dated: June 15, 2022

BRODSKY & SMITH

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

*Attorneys for Plaintiff*