

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

08/15/2023
Clerk of the Court
BY: DAEJA ROGERS
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-23-608373

11 GABRIEL ESPINOZA,

12 Plaintiff,

13 vs.

14 DICK'S SPORTING GOODS, INC.,
15 AMERICAN SPORTS LICENSING,
16 INC., AMERICAN SPORTS
LICENSING, LLC,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

19 **BACKGROUND OF THE CASE**

20 1. Plaintiff brings this representative action on behalf of all California citizens to
21 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
22 the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
23 "[n]o person in the course of doing business shall knowingly and intentionally expose any
24 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
25 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

26 2. This complaint is a representative action brought by Plaintiff in the public interest
27 of the citizens of the State of California to enforce the People's right to be informed of the health
28 hazards caused by exposure to chromium (hexavalent compounds) ("chromium (VI)"), a toxic

1 chemical found in *OMP*® traditional shooting gloves, UPC# 810173015103, sold and/or
2 distributed by defendant Dick’s Sporting Goods, Inc., American Sports Licensing, Inc., and/or
3 American Sports Licensing, LLC (collectively, “Defendants”) in California.

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

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 that will create an exposure above safe harbor levels with a “clear and
14 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
15 chemical.

16 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
17 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
18 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
19 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
20 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
21 25249.7.

22 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
23 without a requisite exposure warning, *OMP*® traditional shooting gloves, UPC# 810173015103,
24 (the “Products”) that expose persons to chromium (VI) when used for their intended purpose.

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

1 “person” in the course of doing business within the meaning of Health & Safety Code sections
2 25249.6 and 25249.11.

3 **VENUE AND JURISDICTION**

4 15. Venue is proper in the County of San Francisco because one or more of the
5 instances of wrongful conduct occurred and continue to occur in this county and/or because
6 Defendants conducted, and continue to conduct, business in the County of San Francisco with
7 respect to the Products.

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

13 17. This Court has jurisdiction over Defendants because each defendant is either a
14 citizen of the State of California, has sufficient minimum contacts with the State of California, is
15 registered with the California Secretary of State as foreign corporations authorized to do business
16 in the State of California, and/or has otherwise purposefully availed itself of the California market.
17 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
18 and permissible with traditional notions of fair play and substantial justice.

19 **STATUTORY BACKGROUND**

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

23 19. To effect this goal, Proposition 65 requires that individuals be provided with a
24 “clear and reasonable warning” before being exposed to substances listed by the State of California
25 as causing cancer and birth defects or other reproductive harm. H&S Code § 25249.6 states, in
26 pertinent part:

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

1
2 20. An exposure to a chemical in a consumer product is one “which results from a
3 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
4 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
5 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
6 shall provide a warning to any person to whom the product is sold or transferred unless the product
7 is packaged or labeled with a clear and reasonable warning.”

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

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

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

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

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

21 22. Proposition 65 provides that any “person who violates or threatens to violate” the
22 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
23 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
24 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil

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 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
2 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

3 **FACTUAL BACKGROUND**

4 23. On February 27, 1987, the State of California listed chromium (VI) as a chemical
5 known to the State to cause cancer and it has come under the purview of Proposition 65 regulations
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
7 25249.10(b). On December 19, 2008, the State of California listed chromium (VI) as a chemical
8 known to cause birth defects or other reproductive harm. In summary, chromium (VI) was listed
9 under Proposition 65 as a chemical known to the State to cause cancer and birth defects or other
10 reproductive harm.

11 24. The exposures that are the subject of the Notice result from the purchase,
12 acquisition, handling and recommended use of the Products. Increased duration of contact with the
13 Products, natural aging of the Products, temperature, light exposure, and contact of the Products
14 with oxidizing agents and alkaline solutions will result in increased conversion of chromium (III)
15 to chromium (VI) in the Products and thus increased dermal exposure to chromium (VI). Direct
16 mouthing of the Products and indirect hand to mouth exposure to chromium (VI) will occur by
17 touching the Products with subsequent touching of the user's hand to mouth.

18 25. Defendants have manufactured, processed, marketed, distributed, offered to sell
19 and/or sold the Products in California since at least August 15, 2022. The Products continue to be
20 distributed and sold in California without the requisite warning information.

21 26. At all times relevant to this action, Defendants have knowingly and intentionally
22 exposed users, consumers and/or patients to the Products and the chromium (VI) without first
23 giving a clear and reasonable exposure warning to such individuals.

24 27. As a proximate result of acts by each defendant, as a person in the course of doing
25 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
26 California, including in San Francisco County, have been exposed to chromium (VI) without a
27 clear and reasonable warning on the Products. The individuals subject to the violative exposures
28

1 include normal and foreseeable users, consumers and patients that use the Products, as well as all
2 others exposed to the Products.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 28. Plaintiff purchased the Product from Dick's Sporting Goods, Inc. At the time of
5 purchase, Defendants did not provide a Proposition 65 exposure warning for chromium (VI) or
6 any other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as
7 described *supra*.

8 29. The Product was sent to a testing laboratory to determine the chromium (VI)
9 content of the Product.

10 30. The laboratory provided the results of its analysis. Results of this test determined
11 the Product exposes users to chromium (VI) (the "Chemical Test Report").

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

17 32. On August 15, 2022, Plaintiff received from the analytical chemist an exposure
18 assessment report which concluded that persons in California who use the Products will be exposed
19 to levels of chromium (VI) that require a Proposition 65 exposure warning.

20 33. On August 15, 2022, Plaintiff gave notice of alleged violation of Health and Safety
21 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
22 chromium (VI) contained in the Products without proper warning, subject to a private action to
23 Defendants and to the California Attorney General's office and the offices of the County District
24 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
25 the herein violations allegedly occurred.

26 34. The Notice complied with all procedural requirements of Proposition 65 including
27 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
28 least one person with relevant and appropriate expertise who reviewed relevant data regarding

1 chromium (VI) exposure, and that counsel believed there was meritorious and reasonable cause
2 for a private action.

3 35. After receiving the Notice, and to Plaintiff's best information and belief, none of
4 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
5 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
6 are the subject of the Notice.

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

9 **FIRST CAUSE OF ACTION**

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

11 37. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 36 of
12 this Complaint as though fully set forth herein.

13 38. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
14 of the Products.

15 39. Use of the Products will expose users and consumers thereof to chromium (VI), a
16 hazardous chemical found on the Proposition 65 list of chemicals known to be hazardous to human
17 health.

18 40. The Products do not comply with the Proposition 65 warning requirements.

19 41. Plaintiff, based on his best information and belief, avers that at all relevant times
20 herein, and at least since August 15, 2022, continuing until the present, that Defendants have
21 continued to knowingly and intentionally expose California users and consumers of the Products
22 to chromium (VI) without providing required warnings under Proposition 65.

23 42. The exposures that are the subject of the Notice result from the purchase,
24 acquisition, handling and recommended use of the Products. Consequently, the primary route of
25 exposure to these chemicals is through dermal exposure. Increased duration of contact with the
26 Products, natural aging of the Products, temperature, light exposure, and contact of the Products
27 with oxidizing agents and alkaline solutions will result in increased conversion of chromium (III)
28 to chromium (VI) in the Products and thus increased dermal exposure to chromium (VI). Direct

1 mouthing of the Products and indirect hand to mouth exposure to chromium (VI) will occur by
2 touching the Products with subsequent touching of the user's hand to mouth.

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

6 44. Defendants have knowledge that the normal and reasonably foreseeable use of the
7 Product exposes individuals to chromium (VI), and Defendants intend those exposures to
8 chromium (VI) will occur by its deliberate, non-accidental participation in the importation,
9 distribution, sale and offering of the Products to consumers in California

10 45. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
11 Complaint.

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

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

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: August 15, 2023

BRODSKY SMITH

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

20 *Attorneys for Plaintiff*