1 2 3	Evan J. Smith, Esquire (SBN 242352) Ryan P. Cardona, Esquire (SBN 302113) BRODSKY SMITH 9595 Wilshire Blvd., Ste. 900 Beverly Hills, CA 90212 ELECTRONICALLY				
4	Telephone: (877) 534-2590 Facsimile: (310) 247-0160		<b>FILED</b> Superior Court of California, County of San Francisco		
5	Attorneys for Plaintiff		04/19/2024		
6	SUPERIOR COURT OF T	THE STATE OF CALIFORNIA	Clerk of the Court BY: AUSTIN LAM Deputy Clerk		
7		SAN FRANCISCO	CGC-24-614090		
8		Case No.:			
9	GABRIEL ESPINOZA,	COMPLAINT FOR CIVIL	PENALTIES AND		
10	Plaintiff,	INJUNCTIVE RELIEF			
11	VS.	(Violation of Health & Safet seq.)	ty Code § 25249.5 et		
12	CYCLE GEAR, INC.,				
13	Defendant.				
14	Plaintiff Gabriel Espinoza ("Plaintiff"), by and through his attorneys, alleges the following cause of action in the public interest of the citizens of the State of California.				
15					
16	BACKGROUND OF THE CASE				
17	1. Plaintiff brings this representative action on behalf of all California citizens to				
18	enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part, "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first				
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23	2. This complaint is a representat	ive action brought by Plaintiff	in the public interest		
24	of the citizens of the State of California to enforce the People's right to be informed of the health				
25	hazards caused by exposure to di(2-ethylhes	xyl) phthalate (DEHP), a toxi	c chemical found in		
26	Stockton Tool Company compact roadside	tool kit bags, UPC # 884475	5112853 sold and/or		
27	distributed by defendant Cycle Gear, Inc. ("Cycle Gear" or "Defendant") in California.				
28	- 1 -				
	COMPLAINT FOR CIVIL PENALTIES A	AND INJUNCTIVE RELIEF –	VIOLATION OF		

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

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

5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
for up to 365 days to be imposed upon defendants in a civil action for violations of Proposition 65.
Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent
jurisdiction to enjoin the actions of a defendant which "violate or threaten to violate" the statute.
Health & Safety Code § 25249.7.

18 6. Plaintiff alleges that Defendant distribute and/or offer for sale in California, without
19 a requisite exposure warning, Stockton Tool Company compact roadside tool kit bags, UPC #
20 884475112853 (the "Products") that expose persons to DEHP when used for their intended
21 purpose.

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

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

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

5 6 10. Plaintiff further seeks a reasonable award of attorney's fees and costs.

### PARTIES

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

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

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### **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.

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

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

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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 first giving clear and reasonable warning to such individual		
13	18. An exposure to a chemical in a consumer product is one "which results from a		

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

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

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

- b. Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs, menus, or a combination thereof.
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 <sup>&</sup>lt;sup>1</sup> Alternatively, a person in the course of doing business may elect to comply with the warning 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.

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

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d. A system of signs, public advertising identifying the system and toll-free 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.

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# 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 birth
19 defects or other reproductive harm.

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 chemical is through dermal absorption directly through the skin when consumers use, touch, or 23 handle the Products. Exposure through ingestion will 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 April 27, 2023. The Products continue to be
28 distributed and sold in California without the requisite warning information.

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At all times relevant to this action, Defendant has knowingly and intentionally
 exposed users of the Products to DEHP without first giving a clear and reasonable exposure
 warning to such individuals.

4 25. As a proximate result of acts by defendant, as a person in the course of doing 5 business within the meaning of H&S Code § 25249.11, individuals throughout the State of 6 California, including in San Francisco County, have been exposed to DEHP without a clear and 7 reasonable warning on the Products. The individuals subject to the violative exposures include 8 normal and foreseeable users and consumers that use the Products, as well as all others exposed to 9 the Products.

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#### SATISFACTION OF NOTICE REQUIREMNTS

Plaintiff purchased the Product from Cycle Gear. At the time of purchase,
 Defendant did not provide a Proposition 65 exposure warning for DEHP or any other Proposition
 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

14 27. The Product was sent to a testing laboratory for phthalate testing to determine the
15 phthalate content of the Product.

16 28. The laboratory provided the results of its analysis. Results of this test determined
17 the Product exposes users to DEHP (the "Chemical Test Report").

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

30. On April 27, 2023, Plaintiff received from the analytical chemist an exposure
assessment report which concluded that persons in California who use the Products will be exposed
to levels of DEHP that require a Proposition 65 exposure warning.

31. On April 27, 2023, Plaintiff gave notice of alleged violation of Health and Safety
Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to
DEHP from use of the Products without proper warning, subject to a private action to Defendant

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and to the California Attorney General's office and the offices of the County District attorneys and
 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
 violations allegedly occurred.

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

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

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

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### FIRST CAUSE OF ACTION

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

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

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

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

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

39. Plaintiff, based on his best information and belief, avers that at all relevant times
herein, and at least since April 27, 2023, continuing until the present, that Defendant has continued
to knowingly and intentionally expose California users and consumers of the Products to DEHP
without providing required warnings under Proposition 65.

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

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

14 43. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this15 Complaint.

44. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
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.

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- 8 -COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5

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 defendant in the amount of \$2,500 per		
5	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: April 19, 2024 BRODSKY SMITH		
13	By: Evan J. Smith (SBN242352)		
14	Ryan P. Cardona (SBN302113) 9595 Wilshire Boulevard, Suite 900		
15 16	Beverly Hills, CA 90212 Telephone: (877) 534-2590		
17	Facsimile: (310) 247-0160		
18	Attorneys for Plaintiff		
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