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SAN FRANCISCO COUNTY
SUPERIOR COURT

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

11
12 CONSUMER ADVOCACY GROUP, INC.,
in the public interest,

13
14 Plaintiff,

15 v.

16 KIMAYA USA, INC., a New Jersey
Corporation, ROSS STORES, INC. dba dd's
17 Discounts, a Delaware Corporation, ROSS
18 DRESS FOR LESS, INC. dba dd's
Discounts, a Virginia Corporation, and
19 DOES 1-20;

20 Defendants.

CASE NO. CGC-12-519454

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

BY FAX

21
22 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against Defendants, as
23 follows:

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25 ///
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THE PARTIES

- 1
2 1. Plaintiff Consumer Advocacy Group, Inc. ("Plaintiff" or "CAG") is an organization
3 qualified to do business in the State of California. CAG is a person within the meaning
4 of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private
5 attorney general, brings this action in the public interest as defined under Health and
6 Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant KIMAYA USA, INC. ("KIMAYA") is a New Jersey corporation, qualified to
8 do business and doing business in the State of California at all relevant times herein.
- 9 3. Defendant ROSS STORES, INC. dba dd's Discounts ("ROSS STORES") is a Delaware
10 corporation, qualified to do business and doing business in the State of California at all
11 relevant times herein.
- 12 4. Defendant ROSS DRESS FOR LESS, INC. dba dd's Discounts ("ROSS DRESS FOR
13 LESS") is a Virginia corporation, qualified to do business and doing business in the State
14 of California at all relevant times herein.
- 15 5. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-20,
16 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
17 complaint to allege their true names and capacities when ascertained. Plaintiff is
18 informed, believes, and thereon alleges that each fictitiously named defendant is
19 responsible in some manner for the occurrences herein alleged and the damages caused
20 thereby.
- 21 6. At all times mentioned herein, the term "Defendants" includes KIMAYA, ROSS
22 STORES, ROSS DRESS FOR LESS, and Does 1-20.
- 23 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
24 times mentioned herein have conducted business within the State of California.
- 25 8. At all times relevant to this action, each of the Defendants, including Does 1-20, was an
26 agent, servant, or employee of each of the other Defendants. In conducting the activities
27 alleged in this Complaint, each of the Defendants was acting within the course and scope
28 of this agency, service, or employment, and was acting with the consent, permission, and

1 authorization of each of the other Defendants. All actions of each of the Defendants
2 alleged in this Complaint were ratified and approved by every other Defendant or their
3 officers or managing agents. Alternatively, each of the Defendants aided, conspired with
4 and/or facilitated the alleged wrongful conduct of each of the other Defendants.

5 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
6 Defendants was a person doing business within the meaning of Health and Safety Code
7 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
8 employees at all relevant times.

9 **JURISDICTION**

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

15 11. This Court has jurisdiction over Defendants named herein because Defendants either
16 reside or are located in this State or are foreign corporations authorized to do business in
17 California, are registered with the California Secretary of State, or who do sufficient
18 business in California, have sufficient minimum contacts with California, or otherwise
19 intentionally avail themselves of the markets within California through their manufacture,
20 distribution, promotion, marketing, or sale of their products within California to render
21 the exercise of jurisdiction by the California courts permissible under traditional notions
22 of fair play and substantial justice.

23 12. Venue is proper in the County of San Francisco because one or more of the instances of
24 wrongful conduct occurred, and continues to occur, in the County of San Francisco
25 and/or because Defendants conducted, and continue to conduct, business in the County of
26 San Francisco with respect to the consumer product that is the subject of this action.

1 **BACKGROUND AND PRELIMINARY FACTS**

2 13. In 1986, California voters approved an initiative to address growing concerns about
3 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
4 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
5 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
6 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
7 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
8 from contamination, to allow consumers to make informed choices about the products
9 they buy, and to enable persons to protect themselves from toxic chemicals as they see
10 fit.

11 14. Proposition 65 requires the Governor of California to publish a list of chemicals known to
12 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
13 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
14 chemicals and chemical families. Proposition 65 imposes warning requirements and
15 other controls that apply to Proposition 65-listed chemicals.

16 15. All businesses with ten (10) or more employees that operate or sell products in California
17 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
18 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
19 water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear and
20 reasonable” warnings before exposing a person, knowingly and intentionally, to a
21 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

22 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
23 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
24 "Threaten to violate" means "to create a condition in which there is a substantial
25 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
26 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
27 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

1 17. Plaintiff identified certain practices of manufacturers and distributors of lead-bearing
2 products of exposing, knowingly and intentionally, persons in California to the
3 Proposition 65-listed chemicals of such products without first providing clear and
4 reasonable warnings of such to the exposed persons prior to the time of exposure.
5 Plaintiff later discerned that Defendants engaged in such practice.

6 18. On October 1, 1992, the Governor of California added Lead and Lead compounds to the
7 list of chemicals known to the State to cause cancer (*Cal. Code Regs. tit. 27, § 27001(b)*).
8 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
9 after addition of Lead and lead compounds to the list of chemicals known to the State to
10 cause cancer, Lead and lead compounds became fully subject to Proposition 65 warning
11 requirements and discharge prohibitions.

12 19. On February 27, 1987, the Governor of California added Lead to the list of chemicals
13 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).
14 Lead is known to the State to cause developmental, female, and male reproductive
15 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
16 months after addition of Lead to the list of chemicals known to the State to cause
17 reproductive toxicity, Lead became fully subject to Proposition 65 warning requirements
18 and discharge prohibitions.

19 **SATISFACTION OF PRIOR NOTICE**

20 20. On or about July 17, 2011, Plaintiff gave notice of alleged violations of Health and Safety
21 Code section 25249.6, concerning consumer products exposures and occupational
22 exposures, subject to a private action to KIMAYA, ROSS DRESS FOR LESS, and ROSS
23 STORES and to the California Attorney General, County District Attorneys, and City
24 Attorneys for each city containing a population of at least 750,000 people in whose
25 jurisdictions the violations allegedly occurred, concerning the product AM/FM Radios.

26 21. Before sending the notices of alleged violation, Plaintiff investigated the consumer
27 products involved, the likelihood that such products would cause users to suffer
28 significant exposures to lead, and the corporate structure of each of the Defendants.

1 22. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
2 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
3 Plaintiff who executed the certificate had consulted with at least one person with relevant
4 and appropriate expertise who reviewed data regarding the exposures to lead,
5 respectively, which are the subject Proposition 65-listed chemicals of this action. Based
6 on that information, the attorney for Plaintiff who executed the Certificate of Merit
7 believed there was a reasonable and meritorious case for this private action. The attorney
8 for Plaintiff attached to the Certificate of Merit served on the Attorney General the
9 confidential factual information sufficient to establish the basis of the Certificate of
10 Merit.

11 23. Plaintiff's notices of alleged violations also included a Certificate of Service and a
12 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
13 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

14 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
15 gave notices of the alleged violations to KIMAYA, ROSS STORES, and ROSS DRESS
16 FOR LESS, and the public prosecutors referenced in Paragraph 20.

17 25. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
18 any applicable district attorney or city attorney has commenced and is diligently
19 prosecuting an action against the Defendants.

20 FIRST CAUSE OF ACTION

21 **(By Consumer Advocacy Group, Inc. and against KIMAYA, ROSS STORES, ROSS**
22 **DRESS FOR LESS, and Does 1-20 for Violations of Proposition 65, The Safe Drinking**
23 **Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

24 **AM/FM RADIOS**

25 26. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
26 paragraphs 1 through 25 of this complaint as though fully set forth herein.

27 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
28 distributor, promoter, or retailer of AM/FM RADIOS, an exemplar of which includes but

1 is not limited to Zenex on the move® AM/FM Radio, ZN-RD5426, with free pouch and
2 earphones, a consumer product designed as an electronic listening device.

3 28. Plaintiff is informed, believes, and thereon alleges that AM/FM Radios contains Lead.

4 29. Defendants knew or should have known that Lead has been identified by the State of
5 California as a chemical known to cause cancer and reproductive toxicity and therefore
6 was subject to Proposition 65 warning requirements. Defendants were also informed of
7 the presence of Lead in AM/FM Radios within Plaintiff's notice of alleged violations
8 further discussed above at Paragraph 20.

9 30. Plaintiff's allegations regarding AM/FM Radios concern "[c]onsumer products
10 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
11 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
12 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
13 *25602(b)*. AM/FM Radios is a consumer product, and, as mentioned herein, exposures to
14 Lead took place as a result of such normal and foreseeable consumption and use.

15 31. Plaintiff is informed, believes, and thereon alleges that between July 14, 2008 and the
16 present, each of the Defendants knowingly and intentionally exposed California
17 consumers and users of AM/FM Radios, which Defendants manufactured, distributed, or
18 sold as mentioned above, to Lead, without first providing any type of clear and
19 reasonable warning of such to the exposed persons before the time of exposure.
20 Defendants have distributed and sold AM/FM Radios in California. Defendants know
21 and intend that California consumers will use and consume AM/FM Radios thereby
22 exposing them to Lead. Defendants thereby violated Proposition 65.

23 32. The principal routes of exposure are through dermal contact, ingestion and inhalation.
24 Persons sustain exposures by handling AM/FM Radios without wearing gloves or any
25 other personal protective equipment, or by touching bare skin or mucous membranes with
26 gloves after handling AM/FM Radios, as well as through hand to mouth contact, hand to
27 mucous membrane, or breathing in particulate matter dispersed from AM/FM Radios.

1 And as to Defendants' employees, employees may be exposed to lead in the course of
2 their employment by handling, distributing, and selling AM/FM Radios.

3 33. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
4 Proposition 65 as to AM/FM Radios have been ongoing and continuous to the date of the
5 signing of this complaint, as Defendants engaged and continue to engage in conduct
6 which violates Health and Safety Code section 25249.6, including the manufacture,
7 distribution, promotion, and sale of AM/FM Radios, so that a separate and distinct
8 violation of Proposition 65 occurred each and every time a person was exposed to Lead
9 by AM/FM Radios as mentioned herein.

10 34. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
11 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
12 violations alleged herein will continue to occur into the future.

13 35. Based on the allegations herein, Defendants are liable for civil penalties of up to
14 \$2,500.00 per day per individual exposure to Lead from AM/FM Radios, pursuant to
15 Health and Safety Code section 25249.7(b).

16 36. In the absence of equitable relief, the general public and Defendants' employees will
17 continue to be involuntarily exposed to Lead that is contained in AM/FM Radios,
18 creating a substantial risk of irreparable harm. Thus, by committing the acts alleged
19 herein, Defendants have caused irreparable harm for which there is no plain, speedy, or
20 adequate remedy at law.

21 37. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
22 filing this Complaint.

1 **PRAYER FOR RELIEF**

2 Plaintiff demands against each of the Defendants as follows:

- 3 1. A permanent injunction mandating Proposition 65-compliant warnings;
- 4 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
- 5 3. Costs of suit;
- 6 4. Reasonable attorney fees and costs; and
- 7 5. Any further relief that the court may deem just and equitable.

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9 Dated: March 22, 2012

YEROUSHALMI & ASSOCIATES

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12 BY: 

13 Reuben Yeroushalmi
14 Attorneys for Plaintiff,
15 Consumer Advocacy Group, Inc.

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