FILED ALAMEDA COUNTY Brian C. Johnson, State Bar No. 235965 1 Josh Voorhees, State Bar No. 241436 AUG 1 0 2012 THE CHANLER GROUP 2 CLERK OF HOnnan Pharr 2560 Ninth Street Parker Plaza, Suite 214 3 Berkeley, CA 94710-2565 Telephone: (510) 848-8880 4 Facsimile: (510) 848-8118 5 Attorneys for Plaintiff RUSSELL BRIMER 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 9 ALAMEDA COUNTY UNLIMITED CIVIL JURISDICTION 10 11 G12643160 12 RUSSELL BRIMER, Case No 13 Plaintiff, 14 COMPLAINT FOR CIVIL PENALTIES ν. AND INJUNCTIVE RELIEF 15 (Health & Safety Code. § 25249.6 et seq.) ZEIKOS INC.; and DOES 1-150, inclusive, 16 Defendants. 17 18 19 20 21 22 23 24 25

ENDORSED

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NATURE OF THE ACTION

- 1. This Complaint is a representative action brought by plaintiff, RUSSELL BRIMER, in the public interest of the citizens of the State of California to enforce the People's right to be informed of the presence of di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical found in headphones sold in California.
- 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to warn California citizens about the risk of exposure to DEHP present in and on the headphones manufactured, distributed, and/or offered for sale or use to consumers throughout the state of California.
- 3. High levels of DEHP are commonly found in and on the headphones that defendants manufacture, distribute, and/or offer for sale to consumers throughout the state of California.
- 4. Under The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at California Health & Safety Code § 25249.6 et seq. ("Proposition 65"), "[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 giving clear and reasonable warning to such individual ..." (Cal. Health & Safety Code § 25249.6.)
- 5. On October 24, 2003, California identified and listed DEHP pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm. DEHP became subject to the "clear and reasonable warning" requirements of the Act one year later on October 24, 2004. (Cal. Code Regs., tit. 27, § 27001(c); Cal. Health & Safety Code §§ 25249.8 & 25249.10(b).) DEHP is referred to hereinafter as the "LISTED CHEMICAL."
- 6. Defendants manufacture, distribute, and/or sell headphones that contain excessive levels of DEHP, including, but not limited to, the *iHop DJ Style Headphones Team Logo*, NFF10271SAF (#1 87016 33283 4). All such headphones containing DEHP are referred to collectively hereinafter as "PRODUCTS."

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- 7. Defendants' failure to warn consumers and/or other individuals in the state of California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinment of such conduct as well as civil penalties for each violation. (Cal. Health & Safety Code § 25249.7(a) & (b)(1).)
- 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and permanent injunctive relief to compel defendants to provide purchasers or users of the PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL. (Cal. Health & Safety Code § 25249.7(a).)
- 9. Plaintiff also seeks civil penalties against defendants for their violations of Proposition 65, as provided by California Health & Safety Code § 25249.7(b).

PARTIES

- Plaintiff RUSSELL BRIMER is a citizen of the state of California who is 10. dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products, and brings this action in the public interest pursuant to California Health & Safety Code § 25249.7(d).
- Defendant ZEIKOS INC. ("ZEIKOS") is a person in the course of doing business 11. within the meaning of California Health & Safety Code § 25249.11.
- 12. Defendant ZEIKOS manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California, or implies by its conduct that it manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.
- 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons in the course of doing business within the meaning of California Health & Safety Code § 25249.11.
- 14. MANUFACTURER DEFENDANTS engage in the process of researching, testing, designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that

they engage in the process of researching, testing, designing, assembling, fabricating, and/or manufacturing, one or more of the PRODUCTS for sale or use in the state of California.

- 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons in the course of doing business within the meaning of California Health & Safety Code § 25249.11.
- 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in the State of California.
- 17. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each persons in the course of doing business within the meaning of California Health & Safety Code § 25249.11.
- 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the state of California.
- 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who therefore sues said defendants by their fictitious names pursuant to Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
- 20. ZEIKOS, MANUFACTURER DEFENDANTS, DISTRIBUTOR
 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to as "DEFENDANTS."

VENUE AND JURISDICTION

21. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil Procedure §§ 394, 395, and 395.5, because this Court is a court of competent jurisdiction, because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda County, and/or because DEFENDANTS conducted, and continue to conduct, business in this county with respect to the PRODUCTS.

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- 22. The California Superior 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." The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.
- 23. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that is a citizen of the state of California, has sufficient minimum contacts in the state of California, or otherwise purposefully avails itself of the California market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

FIRST CAUSE OF ACTION

(Violation of Proposition 65 - Against All Defendants)

- 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 23, inclusive.
- 25. The citizens of the State of California have expressly stated in The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 et seq. that they must be informed "about exposures to chemicals that cause cancer, birth defects and other reproductive harm." (Cal. Health & Safety Code § 25249.6.)
- 26. Proposition 65 states, "[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 giving clear and reasonable warning to such individual ..." (Id.)
- On or about March 29, 2012, plaintiff's sixty-day notice of violation, together 27. with the requisite certificate of merit, was provided to ZEIKOS and certain requisite public enforcement agencies stating that, as a result of the DEFENDANTS' sales of the PRODUCTS containing the LISTED CHEMICAL, purchasers and users in the state of California were being exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable use of the

PRODUCTS, without the individual purchasers and users first having been provided with a "clear and reasonable warning" regarding such toxic exposures, as required by Proposition 65.

- 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and such violations have continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day notice of violation. Plaintiff further alleges that DEFENDANTS' violations are ongoing and continuous in nature and, as such, will continue to occur in the future.
- 29. After receiving the claims asserted in the sixty-day notice of violation, the appropriate public enforcement agencies have failed to commence and diligently prosecute a cause of action against DEFENDANTS under Proposition 65.
- 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the allowable state limits, such that they require a "clear and reasonable" Proposition 65 warning.
- 31. DEFENDANTS knew or should have known that the PRODUCTS they manufactured, distributed, and/or offered for sale or use in California contain the LISTED CHEMICAL.
- 32. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to expose individuals through dermal contact and/or ingestion during reasonably foreseeable use.
- 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and continues to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are defined by Cal. Code Regs., tit. 27, § 25602(b).
- 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of the PRODUCTS exposes individuals to the LISTED CHEMICAL through dermal contact and/or ingestion.
- 35. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-

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27 28 accidental participation in the manufacture, distribution, and/or offering of the PRODUCTS for sale or use to individuals in the state of California.

- 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those consumers and/or other individuals in the state of California who were or who could become exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the reasonably foreseeable use of the PRODUCTS.
- Contrary to the express policy and statutory prohibition of Proposition 65 enacted directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by DEFENDANTS without a "clear and reasonable warning", have suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.
- 38. As a consequence of the above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day for each violation pursuant to California Health & Safety Code § 25249.7(b).
- As a consequence of the above-described acts, California Health & Safety Code § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

- 1. That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation alleged herein;
- 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California without first providing "clear and/or reasonable warnings" as defined by Cal. Code Regs., tit. 27, § 25601, as to the harms associated with exposure the LISTED CHEMICAL;

- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: August <u>9</u>, 2012

Respectfully Submitted, THE CHANLER GROUP

Brian C. Johnson

Attorneys for Plaintiff RUSSELL BRIMER