

By Fax

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brian Johnson, State Bar No. 235965
Kimberly Gates, State Bar No. 282369
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118
E-mail: brian@chanler.com
E-mail: kimberly@chanler.com

Attorneys for Plaintiff
JOHN MOORE

FILED
San Francisco County Superior Court

MAR 13 2017

BY: [Signature]
CLERK OF THE COURT
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED CIVIL JURISDICTION **688 47-557519**

JOHN MOORE,

Plaintiff,

v.

TZUMI ELECTRONICS LLC; and DOES 1-150, inclusive,

Defendants.

Case No. _____

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

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

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff John Moore in the
3 public interest of the citizens of the State of California to enforce the People’s right to be
4 informed of the health hazards caused by exposures to di(2-ethylhexyl)phthalate (“DEHP”), a
5 toxic chemical found in and on the earbud cords and in and on the headphones with vinyl/PVC
6 components, sold by defendants in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
8 warn individuals not covered by California’s Occupational Safety Health Act, Labor Code §
9 6300 *et seq.*, who purchase, use, or handle defendants’ products about the risks of exposure to
10 DEHP, present in and on the earbud cords, and in and on the headphones with vinyl/PVC
11 components, that are manufactured, imported, distributed, sold, and/or offered for sale or use
12 throughout the State of California by defendants. Individuals not covered by California’s
13 Occupational Safety Health Act, Labor Code § 6300 *et seq.*, who purchase, use or handle
14 defendants’ products, are referred to, hereinafter, as “consumers.”

15 3. Detectable levels of DEHP are found in and on the earbud cords, and in and on
16 the headphones with vinyl/PVC components that defendants manufacture, import, distribute,
17 sell and/or offer for sale to consumers throughout the State of California.

18 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
19 Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
20 doing business shall knowingly and intentionally expose any individual to a chemical known to
21 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
22 warning to such individual” Health & Safety Code § 25249.6.

23 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
24 DEHP as a chemical known to cause birth defects (and reproductive harm). DEHP became
25 subject to the “clear and reasonable warning” requirements of the act one year later, on October
26 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
27 25249.10(b).

1 6. Defendants manufacture, import, distribute, sell, and/or offer for sale, without
2 health hazard warnings, in California: (a) earbud cords that contain DEHP, including, but not
3 limited to, the *Tzumi ActivePak Sports Armband & Sport Earbuds, Item No. 2255, UPC #8*
4 *17243 02255 9* and the *Tzumi Wireless Stereo Earbuds, #3743JCP, UPC #8 17243 03743 0*;
5 and (b) headphones with vinyl/PVC components that contain DEHP, including, but not limited
6 to, the *Tzumi Bluetooth Stereo Headphones, #2686JCP, UPC #8 17243 02686 1*. All such
7 earbud cords and all such headphones with vinyl/PVC components containing DEHP are
8 referred to, collectively, hereinafter as “PRODUCTS.”

9 7. Defendants’ failure to warn consumers in the State of California of the health
10 hazards associated with exposures to DEHP in conjunction with defendants’ sales of the
11 PRODUCTS are violations of Proposition 65, and subject defendants, and each of them, to
12 enjoinder of such conduct, as well as civil penalties for each violation. Health & Safety Code
13 §§ 25249.7(a) & (b)(1).

14 8. For defendants’ violations of Proposition 65, Plaintiff seeks preliminary and
15 permanent injunctive relief to compel defendants to provide consumers of the PRODUCTS with
16 the required warning regarding the health hazards associated with exposures to DEHP. Health
17 & Safety Code § 25249.7(a).

18 9. Pursuant to Health and Safety Code § 25249.7(b), Plaintiff also seeks civil
19 penalties against defendants for their violations of Proposition 65.

20 PARTIES

21 10. Plaintiff JOHN MOORE is a citizen of the State of California who is dedicated to
22 protecting the health of California citizens through the elimination or reduction of toxic
23 exposures from consumer products, and he brings this action in the public interest pursuant to
24 Health and Safety Code § 25249.7(d).

25 11. Defendant TZUMI ELECTRONICS LLC (“TZUMI”) is a person in the course of
26 doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

27
28

1 12. TZUMI manufactures, imports, distributes, sells, and/or offers the PRODUCTS for
2 sale or use in the State of California, or implies by its conduct that it manufactures, imports,
3 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

4 13. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
5 person in the course of doing business within the meaning of Health and Safety Code §§
6 25249.6 and 25249.11.

7 14. MANUFACTURER DEFENDANTS, and each of them, research, test, design,
8 assemble, fabricate, and manufacture, or each implies by its conduct that it researches, tests,
9 designs, assembles, fabricates, and manufactures one or more of the PRODUCTS offered for
10 sale or use in California.

11 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
12 in the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
13 25249.11.

14 16. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
15 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
16 retailers for sale or use in the State of California, or each implies by its conduct that it
17 distributes, exchanges, transfers, processes, and transports one or more of the PRODUCTS to
18 individuals, businesses, or retailers for sale or use in the State of California.

19 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
20 the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
21 25249.11.

22 18. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to
23 individuals in the State of California.

24 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are
25 unknown to Plaintiff, who, therefore, sues said defendants by their fictitious names, pursuant to
26 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that
27 each of the fictitiously named defendants is responsible for the acts and occurrences alleged
28

1 herein. When ascertained, their true names shall be reflected in an amended complaint.

2 20. TZUMI, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS,
3 and RETAILER DEFENDANTS shall, hereinafter, where appropriate, be referred to,
4 collectively, as the “DEFENDANTS.”

5 **VENUE AND JURISDICTION**

6 21. Venue is proper in the Superior Court for the County of San Francisco, pursuant
7 to Code of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of competent
8 jurisdiction, because Plaintiff seeks civil penalties against DEFENDANTS, because one or more
9 instances of wrongful conduct occurred, and continue to occur, in this county, and/or because
10 DEFENDANTS conducted, and continue to conduct, business in San Francisco with respect to
11 the PRODUCTS.

12 22. The California Superior Court has jurisdiction over this action, pursuant to
13 California Constitution Article VI, section 10, which grants the Superior Court “original
14 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
15 which this action is brought does not specify any other basis of subject matter jurisdiction.

16 23. The California Superior Court has jurisdiction over DEFENDANTS, based on
17 Plaintiff’s information and good faith belief that DEFENDANTS are each a person, firm,
18 corporation or association that is a citizen of the State of California, have sufficient minimum
19 contacts in the State of California, and/or otherwise purposefully avails themselves of the
20 California market. DEFENDANTS’ purposeful availment renders the exercise of personal
21 jurisdiction by California courts consistent with traditional notions of fair play and substantial
22 justice.

23 **FIRST CAUSE OF ACTION**

24 **(Violation of Proposition 65 - Against All Defendants)**

25 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
26 Paragraphs 1 through 23, inclusive.

1 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
2 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be
3 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
4 harm.”

5 26. Proposition 65 states, “[n]o person in the course of doing business shall
6 knowingly and intentionally expose any individual to a chemical known to the state to cause
7 cancer or reproductive toxicity without first giving clear and reasonable warning to such
8 individual” Health & Safety Code § 25249.6.

9 27. On May 26, 2016 and on October 14, 2016, Plaintiff served a 60-Day Notice of
10 Violation (hereinafter, “Notices”), together with the accompanying certificate of merit, on
11 TZUMI, the California Attorney General’s Office, and the requisite public enforcement
12 agencies, alleging that, as a result of DEFENDANTS’ sales of the PRODUCTS, consumers in
13 the State of California are being exposed to DEHP, resulting from their reasonably foreseeable
14 use of the PRODUCTS, without the consumers first receiving a “clear and reasonable warning”
15 regarding the harms associated with exposures to DEHP, as required by Proposition 65.

16 28. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
17 for sale or use in violation of Health and Safety Code § 25249.6, and DEFENDANTS’
18 violations have continued beyond their receipt of plaintiff’s Notices. As such, DEFENDANTS’
19 violations are ongoing and continuous in nature and, unless enjoined, will continue in the future.

20 29. After receiving plaintiff’s Notices, no public enforcement agency has commenced
21 and diligently prosecuted a cause of action against DEFENDANTS under Proposition 65 to
22 enforce the alleged violations that are the subject of Plaintiff’s Notices.

23 30. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
24 offer for sale or use in California cause exposures to DEHP, as a result of the reasonably
25 foreseeable use of the PRODUCTS. Such exposures, caused by DEFENDANTS and endured
26 by consumers in California, are not exempt from the “clear and reasonable” warning
27 requirements of Proposition 65, yet DEFENDANTS provide no clear & reasonable warning.
28

1 31. DEFENDANTS know or should have known that the PRODUCTS they
2 manufacture, import, distribute, sell, and offer for sale in California contain DEHP.

3 32. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
4 through dermal contact and/or ingestion during reasonably foreseeable use.

5 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
6 continues to cause, consumer exposures to DEHP, as defined by title 27 of the California Code
7 of Regulations, § 25602(b).

8 34. DEFENDANTS know that the normal and reasonably foreseeable use of the
9 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

10 35. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
11 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
12 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
13 consumers in California.

14 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
15 consumers in California who have been, or who will be, exposed to DEHP through dermal
16 contact and/or ingestion resulting from their use of the PRODUCTS.

17 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
18 directly by California voters, consumers exposed to DEHP through dermal contact and/or
19 ingestion, as a result of their use of the PRODUCTS that DEFENDANTS sold without a “clear
20 and reasonable” health hazard warning, have suffered, and continue to suffer, irreparable harm
21 for which they have no plain, speedy, or adequate remedy at law.

22 38. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-
23 described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty of
24 \$2,500 per day for each violation.

25 39. As a consequence of the above-described acts, Health and Safety Code
26 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
27 DEFENDANTS.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to Health and Safety Code § 25249.7(b), assess civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation;

2. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, importing, distributing, or offering the PRODUCTS for sale or use in California without first providing a “clear and reasonable warning,” in accordance with title 27 of the California Code of Regulations, § 25601 *et seq.*, regarding the harms associated with exposures to DEHP;

3. That the Court, pursuant to Health and Safety Code § 25249.7(a), issue preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS currently in the chain of commerce in California without a “clear and reasonable warning,” as defined by California Code of Regulations title 27, § 25601 *et seq.*;

4. That the Court grant Plaintiff his reasonable attorneys’ fees and costs of suit; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: March 10, 2017

Respectfully submitted,
THE CHANLER GROUP

By: Kimberly Gates
Kimberly Gates
Attorneys for Plaintiff
JOHN MOORE