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ALAMEDA COUNTY

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5 *Attorneys for Plaintiff*

CLERK OF THE SUPERIOR COURT  
By: ERICA BAKER Deputy

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA

10 KAREN CALACIN,

11 Plaintiff,

12 v.

13 THE ALLEN COMPANY, INC.,

14 Defendant.

Case No.: **RG18894989**

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

15  
16 Plaintiff Karen Calacin ("Plaintiff"), by and through her attorneys, alleges the following  
17 cause of action in the public interest of the citizens of the State of California.

18 **BACKGROUND OF THE CASE**

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

25 2. This complaint is a representative action brought by Plaintiff in the public interest  
26 of the citizens of the State of California to enforce the People's right to be informed of the health  
27 hazards caused by exposure to chemicals in consumer goods, including but limited to Diisononyl  
28 phthalate (DINP), a toxic chemical found in Allen Hearing Protection Ear Muffs (the "Products")

- 1 -

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

**BY FAX**

1 that have been sold and/or distributed for sale in California by defendant The Allen Company,  
2 Inc. (“Allen Company” or “Defendant”).

3 3. DINP is a harmful chemical known to the State of California to cause cancer. On  
4 December 20, 2013, the State of California listed DINP as a chemical known to the State to  
5 cause cancer thereby causing DINP to 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).

8 4. Proposition 65 requires all businesses with ten (10) or more employees that  
9 operate within California or sell products therein to comply with Proposition 65 regulations.  
10 Included in such regulations is the requirement that businesses must label any product containing  
11 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and  
12 intentionally” exposing any person to it.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
14 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety  
15 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin  
16 the actions of a defendant which “violate[s] or threaten[s] to violate” the statute. Health &  
17 Safety Code § 25249.7.

18 6. Plaintiff alleges that Defendant manufactures, distributes, imports, sells, and/or  
19 offers for sale in California, without the required Proposition 65 exposure warning, the Products  
20 that contain DINP.

21 7. Defendant’s failure to warn consumers and other individuals in California of the  
22 health hazards associated with exposure to DINP in conjunction with the sale, manufacture,  
23 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendant to the  
24 enjoyment and civil penalties described herein.

25 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition  
26 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
28 Defendant to provide purchasers or users of the Products with the required exposure warnings

1 related to the dangers and health hazards associated with exposure to DINP pursuant to Health  
2 and Safety Code § 25249.7(a).

3 **PARTIES**

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

8 11. Defendant Allen Company, through its business, effectively manufactures,  
9 imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or  
10 it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product  
11 for sale or use in the State of California.

12 12. Defendant Allen Company is a “person” in the course of doing business within  
13 the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 13. Venue is proper in the County of Alameda because one or more of the instances  
16 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant  
17 conducted, and continues to conduct, business in the County of Alameda with respect to the  
18 Product.

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

24 15. This Court has jurisdiction over Defendant because it is either a citizen of the  
25 State of California, has sufficient minimum contacts with the State of California, is registered  
26 with the California Secretary of State as foreign corporations authorized to do business in the  
27 State of California, and/or has otherwise purposefully availed itself of the California market.  
28

1 Such purposeful availment has rendered the exercise of jurisdiction by California courts  
2 consistent and permissible with traditional notions of fair play and substantial justice.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 16. On September 19, 2017, Plaintiff gave notice of alleged violation of Health and  
5 Safety Code § 25249.6 (the "Notice") to Allen Company concerning the exposure of California  
6 citizens to DINP contained in the Products without proper warning, subject to a private action to  
7 Allen Company and to the California Attorney General's office and the offices of the County  
8 District attorneys and City Attorneys for each city with a population greater than 750,000  
9 persons wherein the herein violations allegedly occurred.

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

15 18. After receiving the Notice, and to Plaintiff's best information and belief, none of  
16 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted  
17 a cause of action against Allen Company under Proposition 65 to enforce the alleged violations  
18 which are the subject of Plaintiff's notice of violation.

19 19. Plaintiff is commencing this action more than sixty (60) days from the date of the  
20 Notice to Allen Company, as required by law.

21 **FIRST CAUSE OF ACTION**

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

23 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of  
24 this complaint as though fully set forth herein.

25 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
26 and/or retailer of the Products.

27 22. The Products contain DINP, a hazardous chemical found on the Proposition 65  
28 list of chemicals known to be hazardous to human health.

1           23.     The Product does not comply with the Proposition 65 warning requirements.

2           24.     Plaintiff, based on her best information and belief, avers that at all relevant times  
3 herein, and at least since August 7, 2017, continuing until the present, that Allen Company has  
4 continued to knowingly and intentionally expose California users and consumers of the Products  
5 to DINP without providing required warnings under Proposition 65.

6           25.     The exposures that are the subject of the Notice result from the purchase,  
7 acquisition, handling and recommended use of the product. Consequently, the primary route of  
8 exposure to these chemicals is through direct skin exposure. The ear pad of these ear muffs are  
9 likely to be in constant contact with the user's had/ears during normal use and direct skin  
10 exposure is likely to occur. Direct skin exposure through direct contact with the ear pad of the  
11 ear muffs and the user's hands is possible during application, removal, and manipulation of the  
12 ear muffs. Should the wearer's skin perspire underneath the ear pad, aqueous HMWP skin  
13 permeation rates have been reported to be faster than neat HMWP permeation. Although the  
14 association between phthalates and atopic dermatitis has never been elucidated, as a multitude of  
15 chemicals are present in headphones that come into contact with human skin, phthalates in  
16 headphones and hearing protection aids has been reported to induce contact dermatitis. If the ear  
17 muffs are stored or transported in a carrier, DINP that leaches from the ear pad cover may  
18 contaminate other articles contained within the storage area or carrier that are subsequently  
19 handled, worn, mouthed, or ingested by the user. The ear pad can be expected to emit gas phase  
20 DINP into the air over the lifetime of the product. Gas phase DINP can be emitted into the ear  
21 canal during normal use of the product that can potentially permeate skin and membranes of the  
22 eardrum, middle ear, and inner ear. Finally, while mouthing of the product does not seem likely,  
23 some amount of exposure through ingest can occur by handling the product with subsequent  
24 touching of the user's hand to mouth.

25           26.     Plaintiff, based on her best information and belief, avers that such exposures will  
26 continue every day until clear and reasonable warnings are provided to the purchasers and users  
27 of the Products, or until these known toxic chemicals are removed from the Products.

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