

ENDORSED
FILED
ALAMEDA COUNTY

JUN 27 2018

CLERK OF THE SUPERIOR COURT

By *C. Collins* Deputy

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

11 ESTATE OF KAREN CHARLENE
12 CALACIN,

13 Plaintiff,

14 v.

15 THE ALLEN COMPANY, INC.,

16 Defendant.

Case No.: RG18894989
Dept.: 22
Judeg: Robert McGuiness

**FIRST AMENDED COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE RELIEF**

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

17 Plaintiff, the Estate of Karen Charlene Calacin ("Plaintiff"), by and through its attorneys,
18 alleges the following cause of action in the public interest of the citizens of the State of
19 California.

20 BACKGROUND OF THE CASE

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

27 2. This first amended complaint is a representative action brought by Plaintiff in the
28 public interest of the citizens of the State of California to enforce the People's right to be

1 informed of the health hazards caused by exposure to chemicals in consumer goods, including
2 but limited to Diisononyl phthalate (DINP), a toxic chemical found in Allen Hearing Protection
3 Ear Muffs (the “Products”) that have been sold and/or distributed for sale in California by
4 defendant The Allen Company, Inc. (“Allen Company” or “Defendant”).

5 3. DINP is a harmful chemical known to the State of California to cause cancer. On
6 December 20, 2013, the State of California listed DINP as a chemical known to the State to
7 cause cancer thereby causing DINP to come under the purview of Proposition 65 regulations
8 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
9 25249.10(b).

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

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

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

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

27 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
28 65 in accordance with Health and Safety Code § 25249.7(b).

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

5 **PARTIES**

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

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

14 12. Defendant Allen Company is alleged to be a "person" in the course of doing
15 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

16 **VENUE AND JURISDICTION**

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

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

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

1 State of California, and/or has otherwise purposefully availed itself of the California market,
2 Such purposeful availment has rendered the exercise of jurisdiction by California courts
3 consistent and permissible with traditional notions of fair play and substantial justice.

4 **SATISFACTION OF NOTICE REQUIREMENTS**

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

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

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

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

22 **FIRST CAUSE OF ACTION**

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

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

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

28

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

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

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

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

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28

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

4 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
5 Products exposes individuals to DINP, and Defendant intends that exposures to DINP will occur
6 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale
7 and offering of the Products to consumers in California.

8 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
9 Complaint.

10 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
11 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

12 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
13 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
16 following relief:

- 17 A. That the court assess civil penalties against Defendant in the amount of
- 18 \$2,500 per day for each violation in accordance with Health and Safety
- 19 Code § 25249.7(b);
- 20 B. That the court preliminarily and permanently enjoin Defendant mandating
- 21 Proposition 65 compliant warnings on the Product;
- 22 C. That the court grant Plaintiff reasonable attorney’s fees and costs of suit.
- 23 D. That the court grant any further relief as may be just and proper.

24 Dated: June 26, 2018

BRODSKY & SMITH, LLC
By: 
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PROOF OF SERVICE

I, Evan J. Smith, Esquire, declare:

I am over the age of 18 years and not a party to this action; my business address is 9595 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90212 and 333 E. City Avenue, Suite 510, Bala Cynwyd, PA 19004.

On June 26, 2018, I served the following document:

FIRST AMENDED COMPLAINT

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL & FEDERAL EXPRESS OVERNIGHT DELIVERY

The above-described documents were transmitted via electronic mail and federal express overnight delivery to the following parties on June 26, 2018:

Caitlin C. Blanche
Caitlin.Blanche@klgates.com
K&L Gates LLP
1 Park Plaza
Twelfth Floor
Irvine, CA 92614

Attorneys for Defendant

I declare under penalty of perjury under the laws of California and of the United States of America that the above is true and correct.

Executed on June 26, 2018, at Bala Cynwyd, Pennsylvania.



Evan J. Smith