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Brian Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
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Attorneys for Plaintiff
RUSSELL BRIMER

FILED
ALAMEDA COUNTY

APR 10 2013 *MR*
CLERK OF THE SUPERIOR COURT
By Nancy A. Boso

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

ZEIKOS INC.; *et al.*,

Defendants.

Case No. RG12643160

~~PROPOSED~~ JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT

Date: April 10, 2013
Time: 2:30 p.m.
Dept. 516
Judge: Hon. Brenda Harbin-Forte

Reservation No. R-1371142

1 Plaintiff, Russell Brimer, and defendant, Zeikos Inc., having agreed through their
2 respective counsel that Judgment be entered pursuant to the terms of their settlement
3 agreement in the form of a Consent Judgment, and following this Court's issuance of an
4 order approving the Proposition 65 settlement and Consent Judgment,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to
6 Health and Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6,
7 judgment is hereby entered in accordance with the terms of the Consent Judgment attached
8 hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to
9 enforce the terms of the settlement under Code of Civil Procedure section 664.6.

10 **IT IS SO ORDERED.**

11
12
13 Dated: APR 10 2013


14 
15 JUDGE OF THE SUPERIOR COURT
16 **BRENDA HARBIN-FORTE**

Exhibit 1

1 Brian C. Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
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5 Attorneys for Plaintiff
6 RUSSELL BRIMER

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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 UNLIMITED CIVIL JURISDICTION
12
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14 RUSSELL BRIMER,
15 Plaintiff,

16 v.

17 ZEIKOS INC.; *et al.*,
18 Defendants.
19

Case No. RG12643160

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 et seq.)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Russell Brimer (“Brimer”),
4 and defendant, Zeikos Inc. (“Zeikos”), with Brimer and Zeikos individually referred to as a “Party”
5 and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Brimer is an individual residing in California who seeks to promote awareness of exposures to
8 toxic chemicals and improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Zeikos employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code
13 § 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Zeikos sold headphones with PVC or vinyl components containing di(2-
16 ethylhexyl)phthalate (“DEHP”) without first providing the clear and reasonable warning required by
17 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the state of
18 California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are headphones with PVC or vinyl
21 components containing DEHP that are imported, manufactured, sold, or distributed for sale by Zeikos
22 in California (collectively “Products”) including, but not limited to, the *iHip DJ Style Headphones*
23 *Team Logo model no. NSF10271SAF*, which is individually referred to as the “Notice Exemplar.”

24 **1.6 Notices of Violation**

25 On or about March 29, 2012, Brimer served Zeikos and certain requisite public enforcement
26 agencies with a “60-Day Notice of Violation” (“Notice”), a document alleging that Zeikos was in
27 violation of Proposition 65 for failing to warn its customers and consumers in California that the
28 Products expose users to DEHP.

1 Thereafter, on November 9, 2012, Brimer sent a second “60-Day Notice of Violation” (the
2 “Ross Notice”) to Zeikos’ retail customer, Ross Stores, Inc. (“Ross”), alleging that Ross also violated
3 Proposition 65 when it failed to warn consumers in California that the Products expose users to lead.

4 The Notice and Ross Notice are collectively referred to hereafter as the “Notices.” To the best
5 of the Parties’ knowledge, no public enforce has commenced and is diligently prosecuting an action
6 for the alleged violations that are the subject of the “Notices.”

7 **1.7 Complaint**

8 On August 10, 2012, Brimer filed the instant action against Zeikos (“Complaint”) for the
9 alleged violations of Health & Safety Code § 25249.6 that are the subject of the Notice.

10 **1.8 No Admission**

11 Zeikos denies the material, factual and legal allegations contained in the Notices and
12 Complaint, and it maintains that all of the products that it has sold and distributed in California,
13 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
14 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
15 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
16 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
17 not, however, diminish or otherwise affect Zeikos’ obligations, responsibilities, and duties under this
18 Consent Judgment.

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
21 jurisdiction over Zeikos as to the allegations in the Complaint, that venue is proper in Alameda
22 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
23 Judgment.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term “Effective Date” shall mean February 1,
26 2013.

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1 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2 **2.1 Reformulated Products**

3 Zeikos represents that it no longer sells or distributes the Notice Exemplar for sale in
4 California. Prior to recommencing sales of the Notice Exemplar in the future, Zeikos agrees that it
5 will only offer such Product if it is a Reformulated Product as defined by this section. For all other
6 Products, commencing on the Effective Date and continuing thereafter, Zeikos shall only import,
7 manufacture, sell or distribute for sale in California “Reformulated Products” or Products that are
8 sold with a clear and reasonable warning pursuant to section 2.2.

9 For purposes of this Consent Judgment, Reformulated Products contain a maximum of 1,000
10 parts per million (0.1%) DEHP content in any accessible component (i.e., any component that may be
11 touched or handled during a reasonably foreseeable use) when analyzed pursuant to EPA testing
12 methodologies 3580A and 8270C, or equivalent methodologies utilized by state or federal agencies
13 for the purpose of determining DEHP content in a solid substance.

14 **2.2 Product Warnings**

15 Commencing on the Effective Date and continuing thereafter, for Products other than the
16 Notice Exemplar that are not Reformulated Products as, Zeikos agrees to provide Proposition 65
17 warnings that comply with this section. Such warnings shall be deemed to be “clear and reasonable”
18 within the meaning of Proposition 65 and the implementing regulations that appear at Cal. Code
19 Regs, tit. 27, § 25601, provided that the statement that appears below is printed on the label or
20 labeling, for such Products, or is affixed to such labels or labeling by means of adhesive stickers on
21 such Products that identify the Products to which the warnings pertain, provided that such warnings,
22 whether they appear on labels or labeling shall be printed and/or affixed with such conspicuousness,
23 as compared to other words or statements on the label or labeling so as to render the warnings
24 reasonably likely to be read by an ordinary individual under customary conditions of purchase or use.
25 The warning shall contain language substantially similar to the following:

26 **WARNING:** This product contains DEHP, a
27 chemical known to the State of
28 California to cause birth defects or
other reproductive harm

1 **3. MONETARY PAYMENTS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health & Safety Code § 25249.7(b), Zeikos shall pay \$10,000 in civil penalties.
4 On or before the Effective Date, Zeikos shall pay an initial civil penalty of \$2,500. On September 1,
5 2013, Zeikos shall make a final civil penalty payment of \$7,500, except that the final civil penalty
6 payment shall be waived in its entirety if, no later than August 15, 2013, an officer of Zeikos certifies
7 in writing to Brimer’s counsel that, as of such date, one hundred percent of Zeikos’ Products
8 purchased for sale, manufactured for sale, or distributed for sale in California by Zeikos are
9 Reformulated Products as defined by section 2.1, and that Zeikos will continue to only offer
10 Reformulated Products for sale in California in the future.

11 Each penalty payment shall be allocated according to Health & Safety Code § 25249.12 (c)(1)
12 and (d), with seventy-five percent (75%) of the penalty amount earmarked for the California Office of
13 Environmental Health Hazard Assessment (“OEHHHA”) and the remaining twenty-five (25%) of the
14 penalty amount earmarked for Brimer.

15 **3.2 Reimbursement of Brimer’s Fees and Costs**

16 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
17 reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to be
18 resolved after the material terms of the agreement had been settled. Shortly after all other settlement
19 terms had been finalized, Zeikos expressed a desire to negotiate the reimbursement of Brimer’s fees
20 and costs. The Parties then attempted to (and did) reach an accord on the compensation due Brimer
21 and his counsel under general contract principles and the private attorney general doctrine codified at
22 Code of Civil Procedure § 1021.5 for all work performed in this matter exclusive of fees and costs
23 incurred on appeal, if any. Under these legal principles, on or before the Effective Date, Zeikos shall
24 pay \$29,500 for the fees and costs incurred investigating, litigating, and enforcing this matter,
25 including the fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining the
26 Court’s approval of this Consent Judgment in the public interest.

1 **3.3 Payment Procedures**

2 **3.3.1 Payments to Brimer in Trust**

3 All payments made under this Consent Judgment shall be held in trust until the Court
4 approves the settlement. The Parties acknowledge that Brimer’s counsel gave Zeikos the option of
5 depositing the funds into its attorneys’ trust account, but that Zeikos elected to have The Chanler
6 Group hold the settlement funds in trust until such time as the hearing of the motion for judicial
7 approval. Settlement funds delivered to The Chanler Group shall be in the form of three checks for
8 the for the following amounts made payable to:

- 9 (a) “The Chanler Group in Trust for OEHHA” in the amount of \$1,875;
10 (b) “The Chanler Group in Trust for Russell Brimer” in the amount of \$625; and
11 (c) “The Chanler Group in Trust” in the amount of \$29,500.

12 **3.3.2 Issuance of 1099 Forms**

13 After the Consent Judgment has been approved, Zeikos shall provide Brimer’s
14 counsel with a separate 1099 form for each of its payments to:

- 15 (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010,
16 Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid in the 2012
17 calendar year;
18 (b) “Russell Brimer”, whose address and tax identification number shall be
19 furnished upon request after this Consent Judgment has been fully executed by the
20 Parties for the civil penalty payment in the 2012 calendar year; and
21 (c) “The Chanler Group” (EIN: 94-3171522) for fees and costs reimbursed
22 pursuant to section 3.2.

23 Zeikos will also provide Brimer’s counsel with two additional 1099 forms for the final civil penalty
24 payments to OEHHA and Brimer, if any.

1 **3.3.3 Payment Address**

2 All payments and tax forms required by this Consent Judgment shall be delivered to
3 the following address:

4 The Chanler Group
5 Attn: Proposition 65 Controller
6 2560 Ninth Street
7 Parker Plaza, Suite 214
8 Berkeley, CA 94710

9 **4. CLAIMS COVERED AND RELEASED**

10 **4.1 Brimer’s Public Release of Proposition 65 Claims**

11 Brimer, acting on his own behalf and in the public interest, releases Zeikos, its past and
12 current agents, employees, representatives, attorneys, successors, and/or assignees, from all claims
13 for violations of Proposition 65 up through the Effective Date arising out of unwarned exposures to
14 DEHP from the Products as set forth in the Notice. Compliance with the terms of this Consent
15 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from
16 Products sold or distributed for sale by Zeikos before the Effective Date as set forth in the Notice.

17 **4.2 Brimer’s Individual Release of Claims**

18 Brimer, in his individual capacity only and *not* in his representative capacity, also provides a
19 release to Zeikos, its past and current agents, employees, representatives, attorneys, successors,
20 and/or assignees, which shall be effective as a full and final accord and satisfaction, as a bar to all
21 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
22 liabilities and demands of Brimer of any nature, character or kind, whether known or unknown,
23 suspected or unsuspected, arising out of alleged or actual exposures to DEHP in Products sold or
24 distributed for sale by Zeikos before the Effective Date.

25 **4.3 Zeikos’ Release of Brimer**

26 Zeikos, on its own behalf, and on behalf of its past and current agents, representatives,
27 attorneys, successors, and/or assignees, hereby waives any and all claims against Brimer and his
28 attorneys and other representatives, for any and all actions taken or statements made (or those that
could have been taken or made) by Brimer and his attorneys and other representatives, whether in

1 the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this
2 matter, or with respect to the Products.

3 **5. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court, and shall
5 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
6 has been fully executed by the Parties.

7 **6. SEVERABILITY**

8 If, subsequent to the Court's approval of this Consent Judgment, any provision of this Consent
9 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be
10 adversely affected.

11 **7. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the state of California
13 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
14 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Zeikos may
15 provide written notice to Brimer of any asserted change in the law, and shall have no further
16 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
17 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Zeikos from any
18 obligation to comply with any pertinent state or federal toxics control laws.

19 **8. NOTICES**

20 Unless specified herein, all correspondence and notices required by this Consent Judgment
21 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return
22 receipt requested; or (iii) a recognized overnight courier to the following addresses:

23 For Zeikos:

24 Sion Chams, CEO
25 Zeikos Inc.
26 86 Northfield Avenue
27 Edison, NJ 08837

28 with a copy to:

1 Brian S. Tretter, Esq.
2 Oved & Oved, LLP
3 401 Greenwich St.
4 New York, NY 10013

5 For Brimer:

6 The Chanler Group
7 Attn: Proposition 65 Coordinator
8 2560 Ninth Street
9 Parker Plaza, Suite 214
10 Berkeley, CA 94710

11 Any Party may, from time to time, specify in writing to the other Party a change of address to which
12 all notices and other communications shall be sent.

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 This Consent Judgment may be executed in counterparts and by facsimile or portable
15 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
16 taken together, shall constitute one and the same document.

17 **10. POST EXECUTION ACTIVITIES**

18 Brimer agrees to comply with the reporting form requirements referenced in Health & Safety
19 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
20 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance
21 of obtaining such approval, Brimer and Zeikos agree to mutually employ their best efforts, and that of
22 their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain judicial
23 approval of the settlement in a timely manner. For purposes of this Section, “best efforts” shall
24 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers, and
25 supporting the motion for judicial approval.

26 **12. MODIFICATION**

27 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
28 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
application of any Party and the entry of a modified consent judgment by the Court.

1 **13. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read, understood,
3 and agree to all of the terms and conditions contained herein.

4
5 **AGREED TO:**

AGREED TO:

6 Date: January 24, 2013

Date: _____

7
8 By:  _____

By: _____

9 RUSSELL BRIMER

Sion Chams, CEO
ZEIKOS INC.

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1 **13. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read, understood,
3 and agree to all of the terms and conditions contained herein.

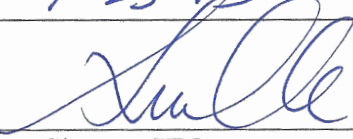
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5 **AGREED TO:**

6 Date: _____

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8 By: _____
9 RUSSELL BRIMER

AGREED TO:

6 Date: 1-25-13 _____

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8 By:  _____
9 Sion Chams, CEO
ZEIKOS INC.

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