

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

6  
7 Attorneys for Plaintiff  
JOHN MOORE

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 UNLIMITED CIVIL JURISDICTION

12  
13 JOHN MOORE,

14 Plaintiff,

15 v.

16 TZUMI ELECTRONICS LLC; *et al.*,

17 Defendants.

Case No. CGC-17-557519

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.* and  
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”) and  
4 Tzumi Electronics LLC (“Tzumi”), with Moore and Tzumi each individually referred to as a  
5 “Party” and, collectively, as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Moore alleges that Tzumi manufactures, imports, distributes, sells, and/or offers for sale in  
16 California headphones, earphones, and/or earbuds with vinyl/PVC cords or other components  
17 containing DEHP, and that it does so without first providing the health hazard warning required by  
18 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth  
19 defects or other reproductive harm.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment, “Products” are defined as: headphones, earphones,  
22 and/or earbuds with vinyl/PVC cords or other components containing DEHP, that are  
23 manufactured, imported, distributed, sold, and/or offered for sale in California by Tzumi.  
24 Products specifically include, but are not limited to, the vinyl/PVC cords or other components of  
25 the (i) the *Tzumi ActivePak Sport Armband & Sport Earbuds, Item No. 2255, UPC #8 17243*  
26 *02255 9*; (ii) the *Tzumi Wireless Stereo Earbuds, #3743JCP, UPC # 8 17243 03743 0*; and (iii) the  
27 *Tzumi Bluetooth Stereo Headphones, #2686JCP, UPC #8 17243 02686 1*.

1           **1.6 Notices of Violation**

2           On May 26, 2016, Moore served Tzumi, the California Attorney General, and the requisite  
3 public enforcement agencies with a 60-Day Notice of Violation, alleging that Tzumi violated  
4 Proposition 65 by failing to warn its customers and consumers in California of the health hazards  
5 associated with exposures to DEHP from certain Tzumi earbud products.

6           On October 14, 2016, Moore served Tzumi, the California Attorney General, and the  
7 requisite public enforcement agencies with a second 60-Day Notice of Violation, alleging that  
8 Tzumi violated Proposition 65 by failing to warn its customers and consumers in California of the  
9 health hazards associated with exposures to DEHP from the vinyl/PVC components of certain  
10 Tzumi headphone and earbud products.

11           Hereinafter, the May 26, 2016 60-Day Notice of Violation and the October 14, 2016 60-  
12 Day Notice of Violation will be referred to, collectively, as the “Notices.” No public enforcer has  
13 commenced and is diligently prosecuting an action to enforce the violations alleged in either of the  
14 Notices.

15           **1.7 Complaint**

16           On March 13, 2017, Moore filed the instant action (“Complaint”), naming Tzumi as a  
17 defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject of the  
18 Notices.

19           **1.8 No Admission**

20           Tzumi denies the material, factual, and legal allegations contained in the Notices and  
21 Complaint and maintains that all of the products it sold and distributed for sale in California,  
22 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent  
23 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,  
24 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as  
25 an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This  
26 Section shall not, however, diminish or otherwise affect Tzumi’s obligations, responsibilities, and  
27 duties under this Consent Judgment.  
28

1           **1.9     Jurisdiction**

2           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
3 jurisdiction over Tzumi as to the allegations in the Complaint, that venue is proper in the County  
4 of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this  
5 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

6           **1.10    Effective Date**

7           For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on  
8 which the Motion for Approval of the Consent Judgment is granted by the Court.

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

10          **2.1     Commitment to Provide Reformulated Products or Warnings**

11          Commencing on the Effective Date and continuing thereafter, Tzumi agrees to only  
12 manufacture for sale, import for sale, distribute for sale, purchase for sale and/or sell in or into  
13 California, either (a) “Reformulated Products” as defined by Section 2.2; or (b) Products offered  
14 with clear and reasonable warnings pursuant to Section 2.3.

15          **2.2     Reformulated Products Defined**

16          For purposes of this Consent Judgment, “Reformulated Products” are defined as Products  
17 containing DEHP in a maximum concentration of 1,000 parts per million (0.1%) in any accessible  
18 component (i.e., any component that may be touched during a reasonably foreseeable use) when  
19 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and  
20 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of  
21 determining DEHP content in a solid substance.

22          **2.3     Product Warnings**

23          Any Products in Tzumi’s inventory on or after the Effective Date that do not qualify as  
24 Reformulated Products, and that Tzumi has reason to believe may be sold or distributed for sale in  
25 California shall contain a clear and reasonable warning in accordance with this Section 2.3. Any  
26 warnings provided shall be affixed to the packaging, labeling, or directly on each Product. Each  
27 warning shall be prominently placed with such conspicuousness as compared to other words,  
28 statements, designs, or devices as to render it likely to be read and understood by an ordinary

1 individual under customary conditions before purchase. Each warning shall be provided in a  
2 manner such that the consumer or user understands to which specific Product the warning applies,  
3 so as to minimize the risk of consumer confusion. The warning shall contain one of the following  
4 statements:

5 **WARNING:** This product can expose you to DEHP, a chemical  
6 known to the State of California to cause cancer and  
7 birth defects or other reproductive harm.

8 OR

9 **WARNING:** This product contains a chemical known to the State  
10 of California to cause cancer and birth defects or  
11 other reproductive harm.

#### 12 **2.4 Discontinuation of Warnings**

13 Tzumi represents that as of July 15, 2017, it will cease selling any remaining Products left  
14 in its inventory with warning labels, as described above in Section 2.3, in the State of California.  
15 Thereafter, Tzumi shall only distribute or sell to California, or cause to be distributed or sold to  
16 California, Products that qualify as Reformulated Products.

### 17 **3. MONETARY SETTLEMENT TERMS**

#### 18 **3.1 Civil Penalty Payment**

19 Pursuant to Health and Safety Code § 25249.7(b) and in settlement of all claims alleged in  
20 the Notices and referred to in this Consent Judgment, Tzumi agrees to pay \$12,000 in civil  
21 penalties. The civil penalty payment shall be allocated according to Health and Safety Code §§  
22 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California  
23 Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five  
24 percent (25%) of the penalty paid to Moore. Tzumi shall issue its payment in two checks for the  
25 following amounts (a) “OEHHA” in the amount of \$9,000; and (b) “John Moore, Client Trust  
26 Account” in the amount of \$3,000. Moore’s counsel shall be responsible for delivering OEHHA’s  
27 portion of the penalty payment made under this Settlement Agreement.

#### 28 **3.2 Reimbursement of Attorneys’ Fees and Costs**

The Parties acknowledge that Moore and his counsel offered to resolve this dispute without  
reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue

1 to be resolved after the material terms of this Consent Judgment had been settled. After the Parties  
2 reached an agreement as to all other settlement terms, the Parties then reached an accord on the  
3 compensation due to Moore and his counsel, under general contract principles and the private  
4 attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work  
5 performed through the mutual execution of this Consent Judgment. Under these legal principles,  
6 Tzumi agrees to pay \$38,500 to Moore and his counsel for all fees and costs incurred in  
7 investigating, bringing this matter to the attention of Tzumi’s management, and negotiating a  
8 settlement in the public interest. Tzumi’s payment shall be delivered in the form of a check  
9 payable to “The Chanler Group.”

10 **3.3 Payment Timing/Enforcement of Payment Terms**

11 Tzumi shall deliver all payments required by this Consent Judgment to Moore’s counsel  
12 within ten (10) days of the Effective Date. In the event that any payment is untimely, the Parties  
13 agree and acknowledge that (a) Tzumi shall be liable to Moore for ten percent (10%) simple  
14 interest on any unpaid amount(s); (b) Moore may seek to enforce Tzumi’s payment obligations  
15 under general contract principles and Code of Civil Procedure § 664.6; and (c) Moore shall be  
16 entitled to any fees incurred recovering such settlement payments pursuant to general contract  
17 principles and Code of Civil Procedure § 1021.5.

18 **3.4 Payment Address**

19 All payments required by this Consent Judgment shall be delivered to:

20 The Chanler Group  
21 Attn: Proposition 65 Controller  
22 2560 Ninth Street  
23 Parker Plaza, Suite 214  
24 Berkeley, CA 94710

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Moore’s Public Release of Proposition 65 Claims**

25 Moore, acting on his own behalf and in the public interest, releases Tzumi and its parents,  
26 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and  
27 attorneys (“Releasees”), and each entity to whom Tzumi directly or indirectly distributes or sells  
28 the Products, including, without limitation, its downstream customers, distributors, wholesalers,

1 and retailers, such as The Gap, Inc. and Old Navy, (“Downstream Releasees”), for any violation  
2 arising under Proposition 65 pertaining to the failure to warn about exposures to DEHP from  
3 Products manufactured, sold, or distributed for sale by Tzumi prior to the Effective Date, as set  
4 forth in the Notices. Compliance with the terms of this Consent Judgment constitutes  
5 compliance with Proposition 65 with respect to exposures to DEHP from Products sold or  
6 distributed for sale by Tzumi after the Effective Date. The Parties agree and acknowledge that  
7 the releases provided under this Consent Judgment shall not extend upstream to any entity that  
8 manufactured the Products, or any components part thereof, or to any entity that distributed or  
9 sold the Products, or any component parts thereof, to Tzumi.

#### 10 **4.2 Moore’s Individual Release of Claims**

11 Moore, in his individual capacity only and *not* in his representative capacity, also provides  
12 a release to Tzumi, Releasees, and Downstream Releasees which shall be effective as a full and  
13 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,  
14 attorneys’ fees, damages, losses, claims, liabilities and demands of Moore of any nature, character  
15 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual  
16 exposures to DEHP in Products manufactured, sold, or distributed for sale by Tzumi prior to the  
17 Effective Date.

#### 18 **4.3 Tzumi’s Release of Moore**

19 Tzumi, on its own behalf, and on behalf of its past and current agents, representatives,  
20 attorneys, successors, and assignees, hereby waives any and all claims against Moore and his  
21 attorneys and other representatives, for any and all actions taken or statements made by Moore  
22 and his attorneys and other representatives, whether in the course of investigating claims,  
23 otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the  
24 Products.

### 25 **5. ENFORCEMENT OF CONSENT JUDGMENT**

26 Any Party may file suit consistent with the terms and conditions set forth in this Section to  
27 enforce the terms and conditions contained in this Consent Judgment. The prevailing party shall  
28 be entitled to its reasonable attorneys’ fees and costs associated with such enforcement.

1 No action to enforce this Consent Judgment may be commenced or maintained, and no  
2 Notice of Violation related to the Products may be served or filed against Tzumi by Moore, unless  
3 the party seeking enforcement or alleging violation notifies the other party of the specific acts  
4 alleged to breach this Consent Judgment at least ninety (90) days before serving or filing any  
5 action or Notice of Violation and the entity receiving the notice fails to comply with the  
6 requirements set forth below. Any notice to Tzumi must contain (a) the name of the product, (b)  
7 specific dates when the product was sold after the Effective Date in California without  
8 reformulation or warnings, (c) the store or other place at which the product was available for sale  
9 to consumers, and (d) any other evidence or other support for the allegations in the notice.

10 Within 30 days of receiving the notice, Tzumi shall either (1) send the store or other place  
11 at which the product was available for sale to the public a letter directing that the offending  
12 product be immediately removed from inventory and returned to Tzumi for full credit, including  
13 shipping costs, (2) provide the store with warning materials to be applied to the Products offered  
14 for sale in compliance with Section 2.3, or (3) refute the information provided above by meeting  
15 and conferring with Moore in an effort to resolve the alleged violation. Should the Parties be  
16 unable to resolve the dispute after meeting and conferring for not less than 45 days, any Party may  
17 seek relief as described above.

18 Moore shall take no further action against Tzumi, if Tzumi (a) directs the store to remove  
19 the offending product from its inventory as described above within 30 days of receiving the notice  
20 from Moore, or (b) provides the store with warnings for the Product in compliance with Section  
21 2.3, above, and, thereafter, verifies with the store that such warnings have been, or are being,  
22 provided to consumers in California.

23 **6. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court, and it  
25 shall be null and void if it is not approved and entered by the Court within one year after it has  
26 been fully executed by the Parties, or within such additional time as the Parties may agree to in  
27 writing.

28



1 **7. SEVERABILITY**

2 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment,  
3 any provision is held by a court to be unenforceable, the validity of the remaining provisions shall  
4 not be adversely affected.

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the state of  
7 California and apply within the state of California. In the event that Proposition 65 is repealed, or  
8 is otherwise rendered inapplicable by reason of law generally or as to the Products, then Tzumi  
9 may provide written notice to Moore of any asserted change in the law, and shall have no further  
10 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the  
11 Products are so affected.

12 **9. NOTICE**

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

16 For Tzumi:

17 Abraham Weinberger, CFO  
18 Tzumi Electronics LLC  
19 16 East 34<sup>th</sup> Street, Floor 16  
New York, NY 10016

With a copy to:

Carol Brophy, Esq.  
Sedgwick LLP  
333 Bush Street, 30<sup>th</sup> Floor  
San Francisco, CA 94104-2834

20 For Moore:

21 Proposition 65 Coordinator  
22 The Chanler Group  
23 2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

24  
25 Any Party may, from time to time, specify in writing to the other, a change of address to which all  
26 notices and other communications shall be sent.  
27  
28

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile signature, each  
3 of which shall be deemed an original, and all of which, when taken together, shall constitute one  
4 and the same document.

5 **11. POST-EXECUTION ACTIVITIES**

6 Moore agrees to comply with the reporting form requirements referenced in Health and  
7 Safety Code § 25249.7(f). The Parties acknowledge that, pursuant to Health and Safety Code  
8 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In  
9 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and  
10 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial  
11 approval of their settlement in a timely manner. For purposes of this Section, “best efforts” shall  
12 include, at a minimum, supporting the motion, responding to any objection or opposition raised by  
13 any third-party, and appearing at the hearing before the Court if so requested.

14 **12. MODIFICATION**

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

18 **13. AUTHORIZATION**

19 The undersigned are authorized to execute this Consent Judgment and acknowledge that  
20 they have read, understand, and agree to all of the terms and conditions contained herein.

21 **AGREED TO:**

**AGREED TO:**

22  
23 Date: 4/20/2017

Date: 4/20/2017

24  
25 By:   
JOHN MOORE

By: 

Name: Abraham Weinberger

27 Title: CEO  
28 TZUMI ELECTRONICS LLC