1 2 3 4 5 6 7 8	Laralei S. Paras, State Bar No. 203319 Daniel Bornstein, State Bar No. 181711 Christopher L. Brooke, State Bar No. 238747 HIRST & CHANLER, LLP 2560 Ninth Street Parker Plaza, Suite 214 Berkeley, CA 94710-2565 Tel: (510) 848-8880 Fax: (510) 848-8118 Attorneys for Plaintiff WHITNEY R. LEEMAN, PH.D.	ENDORSED FILED ALAMEDA GOUNTY FEB 0 3 2006 CLERK OF THE SUPERIOR COURT By Dorothy L. Lee, Deputy	
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11	SUPERIOR COURT OF THE STATE OF CALIFORNIA		
12	FOR THE COUNTY OF ALAMEDA – HAYWARD BRANCH		
131415	UNLIMITED CIVIL JURISDICTION		
16 17 18 19	WHITNEY R. LEEMAN, PH.D., Plaintiff v.	O 6 - 0 2 5 3 7 7 4 COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF	
20 21 22	FRY'S ELECTRONICS, INC.; and DOES 1 through 150, inclusive Defendants.)) (Health & Safety Code §25249, et seq.))	
23 24 25 26 27 28	WHITNEY R. LEEMAN, PH.D., by and t behalf all others similarly situated and on behalf o	hrough her counsel, on behalf of herself, on of the general public, hereby alleges as follows:	
COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF			

NATURE OF THE ACTION

- 1. This Complaint is a representative action brought by plaintiff WHITNEY R.

 LEEMAN, PH.D., on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the presence of and nature of toxic chemicals in consumer goods.
- 2. This Complaint seeks to remedy defendants' continuing failures to warn the citizens of the State of California about the presence of, the nature of, and such citizens' actual and potential exposure to lead present in or on consumer products placed into the stream of commerce by defendants.
- 3. Lead is a chemical that is identified in Title 22, California Code of Regulations ("CCR") §12000 and that is known to the State of California to cause birth defects and other reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL".
- 4. The consumer products containing the LISTED CHEMICAL, and for which defendants are responsible, are glass soda bottles and other glassware intended for the consumption of food or beverages with colored artwork or designs on the exterior including, but not limited to, 12oz Bottle 7up, #4101493 (#0 79103 32005 6). All such consumer products containing the LISTED CHEMICAL shall hereafter be referred to as the "PRODUCTS".
- 5. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5 et seq.¹ (hereafter "Proposition 65"), "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual...."
- 6. On February 27, 1987, the State listed lead as a chemical known to cause birth defects and other reproductive harm. This chemical became subject to the warning requirement one year later and was therefore subject to the "clear and reasonable warning" requirements of Proposition 65, beginning on February 27, 1988. (22 CCR §12000(b)(c); Proposition 65.)

¹ Unless specifically noted, all statutory citations refer to California law.

- 7. Defendants' failures to provide proper mandatory warnings about exposure to the LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinment of such conduct as well as civil penalties for each such violation.
- 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive and permanent injunctive relief to compel defendants to provide purchasers of the PRODUCTS with the appropriate Proposition 65 warning regarding the health hazards of the LISTED CHEMICAL.
- 9. Plaintiff also seeks civil penalties against defendants for their violations of Proposition 65, as provided for by Health & Safety Code §25249.7(b).

PARTIES

- 10. Plaintiff WHITNEY R. LEEMAN, PH.D. is a citizen of the State of California who is dedicated to protecting the health of California citizens, including the elimination or reduction of toxic exposures from consumer products, and who brings this action on behalf of the general public pursuant to Health & Safety Code §25249.7.
- 11. Defendant FRY'S ELECTRONICS, INC. ("FRY'S") is a person doing business within the meaning of Health & Safety Code §25249.11.
- 12. FRY'S distributes and/or offers the PRODUCTS for sale or use in the State of California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use in the State of California.
- 13. Defendants DOES 1-50 (hereafter "MANUFACTURER DEFENDANTS") are each persons doing business within the meaning of Health & Safety Code §25249.11.
- 14. MANUFACTURER DEFENDANTS engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing, one or more of the PRODUCTS for sale, consumption or use in the State of California.
- 15. Defendants DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each persons doing business within the meaning of Health & Safety Code §25249.11.

- 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of California.
- 17. Defendants DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each persons doing business within the meaning of Health & Safety Code §25249.11.
- 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State of California.
- 19. At this time, the true names of Defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code of Civil Procedure §474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences herein alleged. When ascertained, their true names shall be reflected in an amended complaint.
- 20. FRY'S, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 thought 150 shall, where appropriate, collectively be referred to hereafter as "DEFENDANTS".

VENUE AND JURISDICTION

- 21. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or more instances of wrongful conduct occurred, and continues to occur, in the County of Alameda and/or because DEFENDANTS conducted, and continue to conduct, business in this County with respect to the PRODUCTS.
- 22. The California Superior Court has jurisdiction over this action pursuant to California Constitution Article VI, §10, which grants the Superior Court "original jurisdiction in all causes except those given by statute to other trial courts." The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.
- 23. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that either is a citizen of the State of California, has sufficient minimum contacts in the

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State of California, or otherwise purposefully avails itself of the California market.

DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

FIRST CAUSE OF ACTION

(Violation of Proposition 65)

- 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 23, inclusive.
- 25. The citizens of the State of California have expressly stated in the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, et seq. ("Proposition 65") that they must be informed "about exposures to chemicals that cause cancer, birth defects and other reproductive harm." (Proposition 65, §1(b).)
- 26. Proposition 65 further states that, "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual...."
- 27. Based on information and good faith belief, plaintiff alleges that, at all times relevant to this Complaint, DEFENDANTS have engaged in the sales of the PRODUCTS in violation Health & Safety Code §25249.6, et seq., and that DEFENDANTS' offensive sale of the PRODUCTS has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice of Violation. Plaintiff also alleges and believes that such violations will continue to occur into the future.
- 28. On November 23, 2005, a "60-Day Notice" of Proposition 65 violations, containing a Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1), was provided to public enforcement agencies and to FRY'S ELECTRONICS, INC. stating that exposures to the LISTED CHEMICAL were occurring in the State of California from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first having been provided with a "clear and reasonable warning" regarding such exposure.
- 29. The appropriate public enforcement agencies have failed to commence and diligently prosecute a cause of action, under Health & Safety Code §25249.6, et seq., against

DEFENDANTS based on the claims asserted in Plaintiff's 60-Day Notice.

- 30. At all times relevant to this action, the PRODUCTS contained the LISTED CHEMICAL.
- 31. At all times relevant to this action, the DEFENDANTS knew or should have known that the PRODUCTS contained the LISTED CHEMICAL.
- 32. At all times relevant to this action, the LISTED CHEMICAL was present in or on the PRODUCTS in such a way as to be available for transfer or release from PRODUCTS to individuals during the reasonably foreseeable use of the PRODUCTS.
- 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by 22 CCR §12601.
- 34. Based on information and good faith belief, plaintiff alleges that at all times relevant to this action, DEFENDANTS had knowledge that individuals' normal and reasonably foreseeable use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL.
- 35. At all times relevant to this action, DEFENDANTS, and each of them, intended that such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture, distribution and/or sale of PRODUCTS to individuals in the State of California.
- 36. At all times relevant to this action, DEFENDANTS failed to provide a "clear and reasonable warning" of reproductive toxicity (as defined by 22 CCR §12601) to those consumers or other individuals in the State of California who were or could become exposed to the PRODUCTS and the LISTED CHEMICAL contained therein.
- 37. Contrary to the express policy and statutory prohibition of Proposition 65, enacted directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the PRODUCTS, without "clear and reasonable warning", have suffered and continue to suffer irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.
- 38. As a consequence of the above-described acts, DEFENDANTS, and each of them, are liable, pursuant to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500

1	per day for each violation.			
2	39.	As a consequence of the a	bove-described acts, Health & Safety Code §25249.7 also	
3	specifically authorizes the grant of injunctive relief under Proposition 65 against DEFENDANTS.			
4		Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as		
5	set forth herea	set forth hereafter.		
6	PRAYER FOR RELIEF			
7	:	Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:		
8	1.	That the Court, pursuant to	o Health & Safety Code §25249.7(b), assess civil penalties	
9	against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation			
10	alleged herein;			
11	2.	That the Court, pursuant to	o Health & Safety Code §25249.7(a), preliminarily and	
12	permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for sale or			
13	use in California, without providing an identification of the LISTED CHEMICAL in the			
14	PRODUCTS as well as "clear and reasonable warning[s]" as defined by 22 CCR §12601, as			
15	plaintiff shall specify in further application to the Court;			
16	3.	3. That the Court grant plaintiff her reasonable attorney's fees and costs of suit; and		
17	4.	That the Court grant such	other and further relief as may be just and proper.	
18	Dated: Februa	2006	Danier (C.1) - C. 1 - 24 - 1	
19	Dated: Februa	ary - , 2006	Respectfully Submitted, HIRST & CHANLER, LLP	
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21			Daniel Bornstein	
22			Attorneys for Plaintiff WHITNEY R. LEEMAN, PH.D.	
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