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**ENDORSED
FILED
ALAMEDA COUNTY**

FEB 03 2006

**CLERK OF THE SUPERIOR COURT
By Dorothy L. Lee, Deputy**

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA – HAYWARD BRANCH
14 UNLIMITED CIVIL JURISDICTION

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16
17 WHITNEY R. LEEMAN, PH.D.,)

18 Plaintiff)

19 v.)

20 FRY'S ELECTRONICS, INC.; and DOES 1)
21 through 150, inclusive)

22 Defendants.)
23
24

AG
(No. 06-0253774)

**COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF**

(Health & Safety Code §25249, et seq.)

25 WHITNEY R. LEEMAN, PH.D., by and through her counsel, on behalf of herself, on
26 behalf all others similarly situated and on behalf of the general public, hereby alleges as follows:
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28

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff WHITNEY R.
3 LEEMAN, PH.D., on behalf of citizens of the State of California, to enforce each citizen's right to
4 be informed of the presence of and nature of toxic chemicals in consumer goods.

5 2. This Complaint seeks to remedy defendants' continuing failures to warn the citizens
6 of the State of California about the presence of, the nature of, and such citizens' actual and
7 potential exposure to lead present in or on consumer products placed into the stream of commerce
8 by defendants.

9 3. Lead is a chemical that is identified in Title 22, California Code of Regulations
10 ("CCR") §12000 and that is known to the State of California to cause birth defects and other
11 reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL".

12 4. The consumer products containing the LISTED CHEMICAL, and for which
13 defendants are responsible, are glass soda bottles and other glassware intended for the consumption
14 of food or beverages with colored artwork or designs on the exterior including, but not limited to,
15 *12oz Bottle 7up, #4101493 (#0 79103 32005 6)*. All such consumer products containing the
16 LISTED CHEMICAL shall hereafter be referred to as the "PRODUCTS".

17 5. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
18 Health & Safety Code §25249.5 *et seq.*¹ (hereafter "Proposition 65"), "No person in the course of
19 doing business shall knowingly and intentionally expose any individual to a chemical known to the
20 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
21 such individual...."

22 6. On February 27, 1987, the State listed lead as a chemical known to cause birth
23 defects and other reproductive harm. This chemical became subject to the warning requirement
24 one year later and was therefore subject to the "clear and reasonable warning" requirements of
25 Proposition 65, beginning on February 27, 1988. (22 CCR §12000(b)(c); Proposition 65.)

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

1 State of California, or otherwise purposefully avails itself of the California market.
2 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
3 courts consistent with traditional notions of fair play and substantial justice.

4 **FIRST CAUSE OF ACTION**

5 **(Violation of Proposition 65)**

6 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
7 Paragraphs 1 through 23, inclusive.

8 25. The citizens of the State of California have expressly stated in the Safe Drinking
9 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* ("Proposition
10 65") that they must be informed "about exposures to chemicals that cause cancer, birth defects and
11 other reproductive harm." (Proposition 65, §1(b).)

12 26. Proposition 65 further states that, "No person in the course of doing business shall
13 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer
14 or reproductive toxicity without first giving clear and reasonable warning to such individual...."

15 27. Based on information and good faith belief, plaintiff alleges that, at all times
16 relevant to this Complaint, DEFENDANTS have engaged in the sales of the PRODUCTS in
17 violation Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS' offensive sale of the
18 PRODUCTS has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice
19 of Violation. Plaintiff also alleges and believes that such violations will continue to occur into the
20 future.

21 28. On November 23, 2005, a "60-Day Notice" of Proposition 65 violations, containing
22 a Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1), was provided to
23 public enforcement agencies and to FRY'S ELECTRONICS, INC. stating that exposures to the
24 LISTED CHEMICAL were occurring in the State of California from the reasonably foreseeable
25 uses of the PRODUCTS, without the individual purchasers and users first having been provided
26 with a "clear and reasonable warning" regarding such exposure.

27 29. The appropriate public enforcement agencies have failed to commence and
28 diligently prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against

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

2 30. At all times relevant to this action, the PRODUCTS contained the LISTED
3 CHEMICAL.

4 31. At all times relevant to this action, the DEFENDANTS knew or should have known
5 that the PRODUCTS contained the LISTED CHEMICAL.

6 32. At all times relevant to this action, the LISTED CHEMICAL was present in or on
7 the PRODUCTS in such a way as to be available for transfer or release from PRODUCTS to
8 individuals during the reasonably foreseeable use of the PRODUCTS.

9 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
10 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by
11 22 CCR §12601.

12 34. Based on information and good faith belief, plaintiff alleges that at all times relevant
13 to this action, DEFENDANTS had knowledge that individuals' normal and reasonably foreseeable
14 use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL.

15 35. At all times relevant to this action, DEFENDANTS, and each of them, intended that
16 such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the
17 PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture,
18 distribution and/or sale of PRODUCTS to individuals in the State of California.

19 36. At all times relevant to this action, DEFENDANTS failed to provide a "clear and
20 reasonable warning" of reproductive toxicity (as defined by 22 CCR §12601) to those consumers or
21 other individuals in the State of California who were or could become exposed to the PRODUCTS
22 and the LISTED CHEMICAL contained therein.

23 37. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
24 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the
25 PRODUCTS, without "clear and reasonable warning", have suffered and continue to suffer
26 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

27 38. As a consequence of the above-described acts, DEFENDANTS, and each of them,
28 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 above-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 hereafter.

6 **PRAYER FOR RELIEF**

7 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

8 1. That the Court, pursuant to 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 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. 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: February², 2006

19 Respectfully Submitted,
HIRST & CHANLER, LLP

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21 Daniel Bornstein
22 Attorneys for Plaintiff
23 WHITNEY R. LEEMAN, PH.D.