

ENDORSED
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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA – HAYWARD BRANCH
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D.,)	Case No. HG060253774
)	
Plaintiff)	FIRST AMENDED COMPLAINT
)	FOR CIVIL PENALTIES AND
v.)	INJUNCTIVE RELIEF
)	
FRY'S ELECTRONICS, INC.; REAL SODA IN)	
REAL BOTTLES, LTD., and DOES 1 through 50)	(Health & Safety Code §25249, et seq.)
and 52-150, inclusive)	
)	
Defendants.)	

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

NATURE OF THE ACTION

1. This First Amended Complaint ("FAC") 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.

1 2. By this FAC, plaintiff seeks to remedy defendants' continuing failure to warn the
2 citizens of the State of California about the presence of, the nature of, and such citizens' actual and
3 potential exposure to, lead present in or on consumer products placed into the stream of commerce
4 by defendants.

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

8 4. The consumer products containing the LISTED CHEMICAL, and for which
9 defendants are responsible, are glass soda bottles and other glassware intended for the consumption
10 of food or beverages with colored artwork or designs on the exterior. All such consumer products
11 containing the LISTED CHEMICAL shall hereafter be referred to as the "PRODUCTS".

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

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

21 7. Defendants distribute and sell glass-bottled sodas produced by bottling companies in
22 the United States and Mexico with (1) painted artwork or designs containing lead on their exterior,
23 and/or (2) lead contained in the soda itself.

24 8. Defendants' failure to warn adequately, if at all, a variety of California consumers,
25 businesses, employees, and other persons not covered by California's Occupational Safety Health
26 Act, Labor Code Section 6300 *et seq.*, in the state of California about their exposure to the LISTED
27 CHEMICAL in conjunction with defendants' distribution and sale of the PRODUCTS is a
28 violation of Proposition 65 and subjects defendants to enjoinder of such conduct as well as civil

1 penalties for each violation.

2 9. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
3 and permanent injunctive relief to compel defendants to provide purchasers of the PRODUCTS
4 with the appropriate Proposition 65 warning regarding the health hazards of the LISTED
5 CHEMICAL.

6 10. Plaintiff also seeks civil penalties against defendants for their violations of
7 Proposition 65, as provided for by Health & Safety Code §25249.7(b).

8 **PARTIES**

9 11. Plaintiff WHITNEY R. LEEMAN, PH.D. is a citizen of the State of California who
10 is dedicated to protecting the health of California citizens, including the elimination or reduction of
11 toxic exposures from consumer products, and who brings this action on behalf of the general public
12 pursuant to Health & Safety Code §25249.7.

13 12. Defendant FRY'S ELECTRONICS, INC. ("FRY's") is a retailer of primarily
14 consumer electronics headquartered in Silicon Valley, with approximately 20 stores in California
15 and more than 40 nationwide.

16 13. Plaintiff is informed and believes that at all relevant times defendant FRY'S has
17 maintained at least ten employees and is a person doing business within the meaning of Health &
18 Safety Code §25249.11.

19 14. FRY'S distributes and/or offers the PRODUCTS for sale or use in the State of
20 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use
21 in the State of California.

22 15. Defendants DOES 1-50 (hereafter "RETAIL DEFENDANTS") are each persons
23 doing business within the meaning of Health & Safety Code §25249.11.

24 16. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
25 of California.

26 17. Defendant REAL SODA IN REAL BOTTLES, LTD. ("REAL SODA"), formerly
27 DOE 51, is the largest distributor of glass-bottled sodas in California and has been the sole supplier
28 of such products to numerous retailers such as Beverages & More, Inc., and to numerous

1 restaurants such as Fuddruckers, throughout the state. REAL SODA operates distribution hubs in
2 California.

3 18. Plaintiff is informed and believes that at all relevant times defendant REAL SODA
4 has maintained at least ten employees and is a person doing business within the meaning of Health
5 & Safety Code §25249.11.

6 19. Counsel for plaintiff have conducted interviews and discovery in other actions
7 involving REAL SODA's customers, who confirm that REAL SODA's Torrance headquarters and
8 warehouse is the hub to the REAL SODA network and governs the conduct of all REAL SODA
9 sales, distributions, prices and purchasing throughout the state.

10 20. Defendant REAL SODA maintains 16 "sodaphiliates" and other sub-distributors,
11 with at least six located in California. Anyone can access any of the network locations by way of
12 defendant REAL SODA's e-mail server hosted at www.realsoda.com. Plaintiff is informed and
13 believes that all defer to Torrance-based REAL SODA President Daniel Ginsburg for final
14 decisions on unresolved purchasing, pricing and distribution matters. Plaintiff is further informed
15 and believes that REAL SODA President Ginsburg does not permit the "sodaphiliates" to compete
16 with one another within their respective geographic territories.

17 21. Defendant REAL SODA distributes and/or offers the PRODUCTS for sale or use in
18 the State of California or implies by its conduct that it distributes and/or offers the PRODUCTS for
19 sale or use in the State of California.

20 22. Defendants DOES 52-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each
21 persons doing business within the meaning of Health & Safety Code §25249.11.

22 23. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
23 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of
24 California.

25 24. Defendants DOES 101-150 (hereafter "MANUFACTURER DEFENDANTS") are
26 each persons doing business within the meaning of Health & Safety Code §25249.11.

27 25. MANUFACTURER DEFENDANTS engage in the process of research, testing,
28 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they

1 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
2 one or more of the PRODUCTS for sale, consumption or use in the State of California.

3 26. At this time, the true names of Defendants DOES 1 through 50 and 52-150,
4 inclusive, are unknown to plaintiff, who therefore sues said defendants by their fictitious name
5 pursuant to Code of Civil Procedure §474. Plaintiff is informed and believes, and on that basis
6 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
7 herein alleged. When ascertained, their true names shall be reflected in a further amended
8 complaint.

9 27. FRY'S, REAL SODA, RETAIL DOES 1-50, DISTRIBUTOR DOES 52-100, and
10 MANUFACTURER DOES 101 through 150, shall, where appropriate, collectively be referred to
11 hereafter as "DEFENDANTS".

12 VENUE AND JURISDICTION

13 28. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
14 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or
15 more instances of wrongful conduct occurred, and continues to occur, in the County of Alameda
16 and/or because DEFENDANTS conducted, and continue to conduct, business in this County with
17 respect to the PRODUCTS.

18 29. The California Superior Court has jurisdiction over this action pursuant to
19 California Constitution Article VI, §10, which grants the Superior Court "original jurisdiction in all
20 causes except those given by statute to other trial courts." The statute under which this action is
21 brought does not specify any other basis of subject matter jurisdiction.

22 30. The California Superior Court has jurisdiction over DEFENDANTS based on
23 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
24 association that either is a citizen of the State of California, has sufficient minimum contacts in the
25 State of California, or otherwise purposefully avails itself of the California market.
26 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
27 courts consistent with traditional notions of fair play and substantial justice.

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1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65)**

3 31. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 30, inclusive.

5 32. The citizens of the State of California have expressly stated in the Safe Drinking
6 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* (“Proposition
7 65”) that they must be informed “about exposures to chemicals that cause cancer, birth defects and
8 other reproductive harm.” (Proposition 65, §1(b).)

9 33. Proposition 65 further states that, “No person in the course of doing business shall
10 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer
11 or reproductive toxicity without first giving clear and reasonable warning to such individual....”

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

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

24 36. On September 15, 2006, a “60-Day Notice” of Proposition 65 violations, containing
25 a Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1), was provided to
26 public enforcement agencies and to REAL SODA stating that exposures to the LISTED
27 CHEMICAL were occurring in the State of California from the reasonably foreseeable uses of the
28 PRODUCTS, without the individual purchasers and users first having been provided with a “clear

1 and reasonable warning” regarding such exposure.

2 37. DEFENDANTS have engaged in the distribution and offering of the PRODUCTS
3 for sale and use in violation of Health and Safety Code §25249.6. DEFENDANTS’ distribution
4 and sale of the PRODUCTS has continued to occur following each defendant’s receipt of a 60-day
5 Notice of Violation from plaintiff. Plaintiff further alleges and believes that such violations will
6 continue to occur in the future.

7 38. The appropriate public enforcement agencies have failed to commence and
8 diligently prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against
9 DEFENDANTS based on the claims asserted in Plaintiff’s 60-Day Notice of Violation.

10 39. At all times relevant to this action, the PRODUCTS contained the LISTED
11 CHEMICAL.

12 40. At all times relevant to this action, the DEFENDANTS knew or should have known
13 that the PRODUCTS contained the LISTED CHEMICAL.

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

17 42. The normal and reasonably foreseeable use of the PRODUCTS has caused and
18 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by
19 22 CCR §12601.

20 43. Based on information and good faith belief, plaintiff alleges that at all times relevant
21 to this action, DEFENDANTS had knowledge that individuals’ normal and reasonably foreseeable
22 use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL through dermal
23 contact and ingestion.

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

28 45. At all times relevant to this action, DEFENDANTS failed to provide a “clear and

1 reasonable warning” of reproductive toxicity (as defined by 22 CCR §12601) to those consumers,
2 employees and other individuals in the State of California who were or could become exposed to
3 the PRODUCTS and the LISTED CHEMICAL contained thereon and therein.

4 46. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
5 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the
6 PRODUCTS, without “clear and reasonable warning”, have suffered and continue to suffer
7 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

8 47. As a consequence of the above-described acts, DEFENDANTS, and each of them,
9 are liable, pursuant to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500
10 per day for each violation.

11 48. As a consequence of the above-described acts, Health & Safety Code §25249.7 also
12 specifically authorizes the grant of injunctive relief under Proposition 65 against DEFENDANTS.

13 Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
14 set forth hereafter.

15 **PRAYER FOR RELIEF**

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

17 1. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil penalties
18 against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation
19 alleged herein;

20 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
21 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for
22 distribution, sale or use in California, without providing an identification of the LISTED
23 CHEMICAL in the PRODUCTS as well as “clear and reasonable warning[s]” as defined by 22
24 CCR §12601, as plaintiff shall specify in further application to the Court;

25 3. That the Court grant plaintiff her reasonable attorney’s fees and costs of suit; and

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