

**ENDORSED
FILED
ALAMEDA COUNTY**

MAY 22 2007

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

14 WHITNEY R. LEEMAN, PH.D.,)
15)
16 Plaintiff)
17 v.)
18)
19 FRY'S ELECTRONICS, INC.; REAL SODA IN)
20 REAL BOTTLES, LTD., and DOES 1 through 50)
21 and 52-150, inclusive)
22)
23 Defendants.)

Case No. HG-06-253774

**SECOND AMENDED COMPLAINT
FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

*(Health & Safety Code §25249.6, et
seq.)*

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

3 **NATURE OF THE ACTION**

4 1. This Second Amended Complaint (“SAC”) is a representative action brought by
5 plaintiff WHITNEY R. LEEMAN, PH.D., on behalf of citizens of the State of California, to
6 enforce each citizen’s right to be informed of the presence of and nature of toxic chemicals in
7 consumer goods.

8 2. By this SAC, plaintiff seeks to remedy defendants’ continuing failure to warn the
9 citizens of the State of California about the presence of, the nature of, and such citizens’ actual
10 and potential exposure to, lead present in or on consumer products placed into the stream of
11 commerce by defendants.

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

15 4. The consumer products containing the LISTED CHEMICAL, and for which
16 defendants are responsible, are glass soda bottles with colored artwork or designs on the exterior
17 and/or the beverage found within. All such consumer products containing the LISTED
18 CHEMICAL shall hereafter be referred to as the “PRODUCTS”.

19 5. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
20 Health & Safety Code §25249.6 *et seq.* (hereafter “Proposition 65”), “No person in the course of
21 doing business shall knowingly and intentionally expose any individual to a chemical known to the
22 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
23 such individual....”

24 6. On February 27, 1987, the State listed lead as a chemical known to cause birth
25 defects and other reproductive harm. This chemical became subject to the warning requirement
26 one year later and was therefore subject to the “clear and reasonable warning” requirements of
27 Proposition 65, beginning on February 27, 1988. (22 CCR §12000(b)(c)).
28

1 in the State of California.

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

4 16. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
5 of California.

6 17. Defendant REAL SODA IN REAL BOTTLES, LTD. ("REAL SODA"), formerly
7 DOE 51, is the largest distributor of glass-bottled sodas in California and has been the sole supplier
8 of such PRODUCTS to numerous retailers such as Beverages & More, Inc., and to numerous
9 restaurants such as Fuddruckers, throughout the state. REAL SODA operates distribution hubs in
10 California.

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

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

18 20. Defendant REAL SODA maintains 16 "sodaphiliates" and other sub-distributors,
19 with at least six located in California. Anyone can access any of the network locations by way of
20 defendant REAL SODA's e-mail server hosted at www.realsoda.com. Plaintiff is informed and
21 believes that all "sodaphiliates" defer to Torrance-based REAL SODA President, Daniel Ginsburg,
22 for final decisions on unresolved purchasing, pricing and distribution matters. Plaintiff is further
23 informed and believes that REAL SODA President Ginsburg does not permit the "sodaphiliates" to
24 compete with one another within their respective geographic territories. Plaintiff is further
25 informed and believes that REAL SODA's warehouses are used as the storage and/or distribution
26 centers for REAL SODA and one or more of its "sodaphiliates". Plaintiff is further informed and
27 bases her belief on contracts reviewed REAL SODA negotiates the terms of the sale and delivery
28 contracts that are executed by certain "sodaphiliates" and has overseen the collection of delinquent

1 payments and/or returned checks.

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

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

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

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

12 25. MANUFACTURER DEFENDANTS engage in the process of research, testing,
13 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
14 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
15 one or more of the PRODUCTS for sale, consumption or use in the State of California.

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

22 27. FRY'S, REAL SODA, RETAIL DOES 1-50, DISTRIBUTOR DOES 52-100, and
23 MANUFACUTURER DOES 101 thought 150, shall, where appropriate, collectively be referred to
24 hereafter as "DEFENDANTS".

25 **VENUE AND JURISDICTION**

26 28. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
27 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one
28 or more instances of wrongful conduct occurred, and continues to occur, in the County of Alameda

1 and/or because DEFENDANTS conducted, and continue to conduct, business in this County with
2 respect to the PRODUCTS.

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

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

13 **FIRST CAUSE OF ACTION**

14 **(Violation of Proposition 65)**

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

17 32. The citizens of the State of California have expressly stated in the Safe Drinking
18 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* (“Proposition
19 65”) that they must be informed “about exposures to chemicals that cause cancer, birth defects and
20 other reproductive harm.” (Proposition 65, §1(b).)

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

25 34. Based on information and good faith belief, plaintiff alleges that, at all times
26 relevant to this SAC, DEFENDANTS have engaged in the manufacture, distribution and sale of
27 the PRODUCTS in violation Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS’
28 offensive manufacture, distribution and sale of the PRODUCTS has continued to occur beyond

1 DEFENDANTS' receipt of plaintiff's 60-Day Notice of Violation. Plaintiff also alleges and
2 believes that such violations will continue to occur into the future.

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

9 36. On September 15, 2006, a "60-Day Notice" of Proposition 65 violations, containing
10 a Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1), was provided
11 to public enforcement agencies and to REAL SODA stating that exposures to the LISTED
12 CHEMICAL were occurring in the State of California from the reasonably foreseeable uses of the
13 PRODUCTS, without the individual purchasers and users first having been provided with a "clear
14 and reasonable warning" regarding such exposure.

15 37. These "60-Day Notices" complied with 8 CCR §338 and were served to public
16 enforcement agencies with the statement set forth in 8 CCR §338(b). In addition, to the mailing
17 envelopes of the notices that were served upon the Public Prosecutors prominently stated "Hazard
18 Communication Standard/ Proposition 65 Supplemental Enforcement Matter." in compliance with
19 8 CCR §338(f).

20 38. DEFENDANTS have engaged in the manufacture, distribution and offering of the
21 PRODUCTS for sale and use in violation of Health and Safety Code §25249.6. DEFENDANTS'
22 manufacture, distribution and sale of the PRODUCTS have continued to occur following FRY'S
23 and REAL SODA'S respective receipt of a 60-day Notice of Violation from plaintiff. Plaintiff
24 further alleges and believes that such violations will continue to occur in the future.

25 39. DEFENDANTS' actions, in addition to exposing consumers, DEFENDANTS'
26 actions have also exposed their employees, as well as the employees at other workplaces, to the
27 LISTED CHEMICAL without appropriate warnings, including those provided in the general
28 hazard communication requirements of the California Occupational Safety and Health

1 Administration set forth in 8 CCR §5194.

2 40. Plaintiff is informed and believes that at all times relevant to this matter REAL
3 SODA has been a distributor and employer as defined in 8 CCR §5194(c).

4 41. Plaintiff is informed and believes that at all times relevant to this matter REAL
5 SODA failed to comply with 8 CCR §5194(f), and is liable for the exposures of its employees in
6 addition to the exposures of employees at other workplaces that received the PRODUCTS without
7 appropriate warning information.

8 42. Plaintiff is informed and believes that at all times relevant to this matter FRY'S has
9 been an employer as defined in 8 CCR §5194(c).

10 43. Plaintiff is further informed and believes that at all times relevant to this matter
11 FRY'S has not provided employees at its store locations with the appropriate health hazard
12 warnings as required by 8 CCR §5194(f).

13 44. Employees are exposed at the California business locations of the DEFENDANTS
14 where the PRODUCTS are, by way of example but not limitation, consumed, packed, unpacked,
15 labeled, arranged, displayed, cleaned, transferred, stocked, stored or otherwise handled.

16 45. These tasks cause employee exposure directly or indirectly though the routine
17 touching of the parts or portions of the PRODUCTS containing readily available surface amounts
18 of the LISTED CHEMICAL.

19 46. Additionally, exposure can occur through the routine touching and ingesting of
20 other materials that are contaminated with the LISTED CHEMICAL from the PRODUCTS as a
21 result of these tasks.

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

25 48. At all times relevant to this action, the PRODUCTS contained the LISTED
26 CHEMICAL.

27 49. At all times relevant to this action, the DEFENDANTS knew or should have known
28 that the PRODUCTS contained the LISTED CHEMICAL.

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

4 51. The normal and reasonably foreseeable use of the PRODUCTS has caused and
5 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by
6 22 CCR §12601.

7 52. Based on information and good faith belief, plaintiff alleges that at all times
8 relevant to this action, DEFENDANTS had knowledge that individuals' normal and reasonably
9 foreseeable use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL through
10 dermal contact, ingestion and indirect ingestion via hand-to-mouth activities which transfer lead
11 from the PORDUCTS to the lips and mouth.

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

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

20 55. Individuals thus exposed to the LISTED CHEMICAL from the PRODUCTS,
21 without "clear and reasonable warning", have suffered and continue to suffer irreparable harm, for
22 which harm they have no plain, speedy or adequate remedy at law.

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

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

28 Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as

1 **PRAYER FOR RELIEF**

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

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

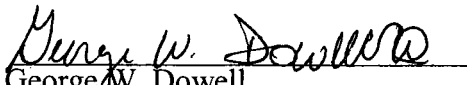
6 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
7 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for
8 distribution, sale or use in California, without providing an identification of the LISTED
9 CHEMICAL in the PRODUCTS as well as “clear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

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

12 4. That the Court grant such other and further relief as may be just and proper.

13 Dated: May 22, 2007

14 Respectfully Submitted,
HIRST & CHANLER, LLP

15 
16 George W. Dowell
17 Attorneys for Plaintiff
18 WHITNEY R. LEEMAN, PH.D.