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ENDORSED  
FILED

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David H. ... Superior Court  
County of Santa Clara  
By: \_\_\_\_\_  
S. Smith  
Clerk/Clerk

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF SANTA CLARA  
14 UNLIMITED CIVIL JURISDICTION

15 DR. WHITNEY R. LEEMAN,

16 Plaintiff,

17 v.

18 ENERMAX USA CORPORATION, FRY'S  
19 ELECTRONICS, INC.; and DOES 1-150,  
20 inclusive,

21 Defendants.

) Case No. 16CV290343

) **FIRST AMENDED COMPLAINT FOR**  
) **CIVIL PENALTIES AND INJUNCTIVE**  
) **RELIEF**

) (Health & Safety Code § 25249.5 *et seq.*)

1 **NATURE OF THE ACTION**

2 1. This First Amended Complaint is a representative action brought by Plaintiff DR.  
3 WHITNEY R. LEEMAN (“Plaintiff”) in the public interest of the citizens of the State of  
4 California to enforce the People’s right to be informed of the health hazards caused by  
5 exposures to di(2-ethylhexyl)phthalate (“DEHP”), a toxic chemical found in and on the  
6 vinyl/PVC earphone cords sold by defendants in California.

7 2. By this First Amended Complaint, Plaintiff seeks to remedy defendants’  
8 continuing failure to warn individuals not covered by California’s Occupational Safety Health  
9 Act, Labor Code section 6300 et seq., who purchase, use or handle defendants’ products, about  
10 the risks of exposure to DEHP present in and on the vinyl/PVC earphone cords manufactured,  
11 distributed, and offered for sale or use throughout the State of California. Individuals not  
12 covered by California’s Occupational Safety Health Act, Labor Code section 6300 et seq., who  
13 purchase, use or handle defendants’ products, are referred to hereinafter as “consumers.”

14 3. Detectable levels of DEHP are found in and on the vinyl/PVC earphone cords that  
15 defendants manufacture, distribute, and offer for sale to consumers throughout the State of  
16 California.

17 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at  
18 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of  
19 doing business shall knowingly and intentionally expose any individual to a chemical known to  
20 the state to cause cancer or reproductive toxicity without first giving clear and reasonable  
21 warning to such individual . . .” Health & Safety Code § 25249.6.

22 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed  
23 DEHP as a chemical known to cause birth defects (and reproductive harm). DEHP became  
24 subject to the “clear and reasonable warning” requirements of the act one year later on October  
25 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &  
26 25249.10(b).



1 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the  
2 State of California.

3 13. Defendant FRY'S ELECTRONICS, INC. ("FRY'S") is a person in the course of  
4 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

5 14. FRY'S manufactures, imports, distributes, sells, and/or offers the PRODUCTS for  
6 sale or use in the State of California, or implies by its conduct that it manufactures, imports,  
7 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

8 15. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each a  
9 person in the course of doing business within the meaning of Health and Safety Code sections  
10 25249.6 and 25249.11.

11 16. MANUFACTURER DEFENDANTS, and each of them, research, test, design,  
12 assemble, fabricate, and manufacture, or each implies by its conduct that it researches, tests,  
13 designs, assembles, fabricates, and manufactures one or more of the PRODUCTS offered for  
14 sale or use in California.

15 17. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person  
16 in the course of doing business within the meaning of Health and Safety Code sections 25249.6  
17 and 25249.11.

18 18. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,  
19 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or  
20 retailers for sale or use in the State of California, or each implies by its conduct that it  
21 distributes, exchanges, transfers, processes, and transports one or more of the PRODUCTS to  
22 individuals, businesses, or retailers for sale or use in the State of California.

23 19. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in  
24 the course of doing business within the meaning of Health and Safety Code sections 25249.6  
25 and 25249.11.

26 20. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to  
27 individuals in the State of California.  
28

1 21. At this time, the true names of defendants DOES 1 through 150, inclusive, are  
 2 unknown to Plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to  
 3 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis  
 4 allege, that each of the fictitiously named defendants is responsible for the acts and occurrences  
 5 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

6 22. ENERMAX, FRY'S, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
 7 DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter, where appropriate, be  
 8 referred to collectively as the "DEFENDANTS."

9 **VENUE AND JURISDICTION**

10 23. Venue is proper in the Superior Court for the County of Santa Clara, pursuant to  
 11 Code of Civil Procedure sections 393, 395, and 395.5, because this Court is a court of  
 12 competent jurisdiction, because Plaintiff seeks civil penalties against DEFENDANTS, because  
 13 one or more instances of wrongful conduct occurred, and continue to occur, in this county,  
 14 and/or because DEFENDANTS conducted, and continue to conduct, business in Santa Clara  
 15 with respect to the PRODUCTS.

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

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

1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65 - Against All Defendants)**

3 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
4 Paragraphs 1 through 25, inclusive.

5 27. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic  
6 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be  
7 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive  
8 harm.”

9 28. Proposition 65 states, “[n]o person in the course of doing business shall  
10 knowingly and intentionally expose any individual to a chemical known to the state to cause  
11 cancer or reproductive toxicity without first giving clear and reasonable warning to such  
12 individual . . . .” Health & Safety Code § 25249.6.

13 29. On October 28, 2015, Plaintiff served a sixty-day notice of violation, together  
14 with the accompanying certificate of merit, on FRY’S, California Attorney General’s Office,  
15 and the requisite public enforcement agencies alleging that, as a result of DEFENDANTS’ sales  
16 of the PRODUCTS, consumers in the State of California are being exposed to DEHP resulting  
17 from their reasonably foreseeable use of the PRODUCTS, without the consumers first receiving  
18 a “clear and reasonable warning” regarding the harms associated with exposures to DEHP, as  
19 required by Proposition 65.

20 30. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS  
21 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS’  
22 violations have continued beyond their receipt of Plaintiff’s sixty-day notice of violation. As  
23 such, DEFENDANTS’ violations are ongoing and continuous in nature and, unless enjoined  
24 will continue in the future.

25 31. After receiving Plaintiff’s sixty-day notice of violation, no public enforcement  
26 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS  
27  
28

1 under Proposition 65 to enforce the alleged violations that are the subject of Plaintiff's notice of  
2 violation.

3 32. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and  
4 offer for sale or use in California cause exposures to DEHP as a result of the reasonably  
5 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by  
6 consumers in California are not exempt from the "clear and reasonable" warning requirements  
7 of Proposition 65, yet DEFENDANTS provide no clear & reasonable warning.

8 33. DEFENDANTS knew or should have known that the PRODUCTS they  
9 manufacture, import, distribute, sell, and offer for sale in California contain DEHP.

10 34. DEHP is present in or on the PRODUCTS in such a way as to expose consumers  
11 through dermal contact and/or ingestion during reasonably foreseeable use.

12 35. The normal and reasonably foreseeable use of the PRODUCTS has caused, and  
13 continues to cause, consumer exposures to DEHP, as defined by title 27 of the California Code  
14 of Regulations, section 25602(b).

15 36. DEFENDANTS know that the normal and reasonably foreseeable use of the  
16 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

17 37. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable  
18 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the  
19 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to  
20 consumers in California.

21 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those  
22 consumers in California who have been, or who will be, exposed to DEHP through dermal  
23 contact and/or ingestion resulting from their use of the PRODUCTS.

24 39. Contrary to the express policy and statutory prohibition of Proposition 65 enacted  
25 directly by California voters, consumers exposed to DEHP through dermal contact and/or  
26 ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold without a "clear  
27 and reasonable" health hazard warning, have suffered, and continue to suffer, irreparable harm  
28

1 for which they have no plain, speedy, or adequate remedy at law.

2 40. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the  
3 above-described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty  
4 of \$2,500 per day for each violation.

5 41. As a consequence of the above-described acts, Health and Safety Code  
6 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
7 DEFENDANTS.

8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiff prays for judgment against DEFENDANTS as follows:

10 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess  
11 civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for  
12 each violation;

13 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),  
14 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or  
15 offering the PRODUCTS for sale or use in California without first providing a “clear and  
16 reasonable warning” in accordance with title 27 of the California Code of Regulations, section  
17 25601 *et seq.*, regarding the harms associated with exposures to DEHP;

18 3. That the Court, Pursuant to Health and Safety Code section 25249.7(a), issue  
19 preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS  
20 currently in the chain of commerce in California without a “clear and reasonable warning” as  
21 defined by California Code of Regulations title 27, section 25601 *et seq.*;

22 4. That the Court grant Plaintiff her reasonable attorneys’ fees and costs of suit; and

23 5. That the Court grant such other and further relief as may be just and proper.

24 Dated: February 5, 2016

Respectfully submitted,  
THE CHANLER GROUP

25  
26 By:   
27 Christopher Tuttle  
Attorneys for Plaintiff  
28 DR. WHITNEY R. LEEMAN