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ENDORSED  
FILED  
ALAMEDA COUNTY

MAY 25 2018

SUE PESKO

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

ANTHONY FERREIRO,

Plaintiff,

v.

ARSENAL GAMING, INC., FRY'S  
ELECTRONICS, INC.,

Defendants.

Case No.:

RG18906448

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the following cause of action in the public interest of the citizens of the State of California.

**BACKGROUND OF THE CASE**

1. Plaintiff brings this representative action on behalf of all California citizens to enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 *et seq* ("Proposition 65"), which reads, in relevant part, "[n]o 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 ...". Health & Safety Code § 25249.6.

2. This complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California to enforce the People's right to be informed of the health hazards caused by exposure to Diisononyl phthalate (DINP), a toxic chemical found in Arsenal Gaming Xbox 360 Headsets (the "Products") sold and/or distributed for sale in California by

1 defendants Arsenal Gaming, Inc. (“Arsenal”) and Fry’s Electronics, Inc. (“Fry’s Electronics”)  
2 (collectively, “Defendants”).

3 3. DINP is a harmful chemical known to the State of California to cause cancer. On  
4 December 20, 2013, the State of California listed DINP as a chemical known to the State to  
5 cause cancer thereby causing DINP to come under the purview of Proposition 65 regulations  
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &  
7 25249.10(b).

8 4. Proposition 65 requires all businesses with ten (10) or more employees that  
9 operate within California or sell products therein to comply with Proposition 65 regulations.  
10 Included in such regulations is the requirement that businesses must label any product containing  
11 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and  
12 intentionally” exposing any person to it.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
14 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety  
15 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin  
16 the actions of a defendant which “violate[s] or threaten[s] to violate” the statute. Health &  
17 Safety Code § 25249.7.

18 6. Plaintiff alleges that Defendants import, distribute, sell and/or offer for sale in  
19 California, without the required Proposition 65 exposure warning, the Products that contain  
20 DINP.

21 7. Defendants’ failure to warn consumers and other individuals in California of the  
22 health hazards associated with exposure to DINP in conjunction with the sale, manufacture,  
23 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendants to the  
24 enjoinder and civil penalties described herein.

25 8. Plaintiff seeks civil penalties against Defendants for their violations of  
26 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
28 Defendants to provide purchasers or users of the Products with the required exposure warnings

1 related to the dangers and health hazards associated with exposure to DINP pursuant to Health  
2 and Safety Code § 25249.7(a).

3 **PARTIES**

4 10. Plaintiff is a citizen of the State of California acting in the interest of the general  
5 public to promote awareness of exposures to toxic chemicals in products sold in California and  
6 to improve human health by reducing hazardous substances contained in such items. He brings  
7 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

8 11. Defendant Arsenal, through its business, effectively imports, distributes, sells,  
9 and/or offers the Products for sale or use in the State of California, or it implies by its conduct  
10 that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the  
11 State of California. Defendant Arsenal is alleged to be a “person” in the course of doing  
12 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

13 12. Defendant Fry’s Electronics, through its business, effectively imports, distributes,  
14 sells, and/or offers the Products for sale or use in the State of California, or it implies by its  
15 conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use  
16 in the State of California. Defendant Fry’s Electronics is alleged to be a “person” in the course  
17 of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

18 **VENUE AND JURISDICTION**

19 13. Venue is proper in the County of Alameda because one or more of the instances  
20 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants  
21 conducted, and continue to conduct, business in the County of Alameda with respect to the  
22 Product.

23 14. This Court has jurisdiction over this action pursuant to California Constitution  
24 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those  
25 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the  
26 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,  
27 this Court has jurisdiction over this lawsuit.



1           21.     Defendants have, at all times mentioned herein, acted as manufacturer, distributor,  
2 and/or retailer of the Products.

3           22.     The Products contain DINP, a hazardous chemical found on the Proposition 65  
4 list of chemicals known to be hazardous to human health.

5           23.     The Products do not comply with the Proposition 65 warning requirements.

6           24.     Plaintiff, based on his best information and belief, avers that at all relevant times  
7 herein, and at least since December 13, 2017, continuing until the present, that Defendants have  
8 continued to knowingly and intentionally expose California users and consumers of the Products  
9 to DINP without providing required warnings under Proposition 65.

10          25.     The exposures that are the subject of the Notice result from the purchase,  
11 acquisition, handling and recommended use of the product. Consequently, the primary route of  
12 exposure to these chemicals is through dermal absorption. Dermal absorption of DINP can occur  
13 through direct skin contact with the cord during routine use when the cord is manipulated with  
14 bare hands during use of the headphones. If the headphones are stored or transported in a carrier,  
15 DINP that leaches from the product may contaminate other articles contained within these closed  
16 spaces are subsequently hand, worn, mouthed, or consumed. Finally, while mouthing of the  
17 product does not seem likely, some amount of exposure through ingestion can occur by touching  
18 the product with subsequent touching of the user's hand to mouth.

19          26.     Plaintiff, based on his best information and belief, avers that such exposures will  
20 continue every day until clear and reasonable warnings are provided to the purchasers and users  
21 of the Products, or until these known toxic chemicals are removed from the Products.

22          27.     Defendants have knowledge that the normal and reasonably foreseeable use of the  
23 Products exposes individuals to DINP, and Defendants intend that exposures to DINP will occur  
24 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale  
25 and offering of the Products to consumers in California.

26          28.     Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
27 Complaint.  
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