

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

ENDORSED
FILED
ALAMEDA COUNTY

MAY 30 2018

CLERK OF THE SUPERIOR COURT
By CURTIS H. GANTER
Deputy

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,
12 Plaintiff,

13 v.

14 FRY'S ELECTRONICS, INC.,
15 Defendant.

Case No.: RG18906803

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

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

20 **BACKGROUND OF THE CASE**

21 1. Plaintiff brings this representative action on behalf of all California citizens to
22 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
23 at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
24 "[n]o person in the course of doing business shall knowingly and intentionally expose any
25 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
26 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

1 2. This complaint is a representative action brought by Plaintiff in the public interest
2 of the citizens of the State of California to enforce the People's right to be informed of the health
3 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
4 KidJamz Headphones distributed, offered for sale and/or sold by defendant Fry's Electronics,
5 Inc. ("Defendant") in California.

6 3. DEHP is a harmful chemical known to the State of California to cause cancer and
7 birth defects and other reproductive harm. On January 1, 1988, the State of California listed
8 DEHP as a chemical known to the State to cause cancer and DEHP has come under the purview
9 of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health &
10 Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed
11 DEHP as a chemical known to cause birth defects and other reproductive harm.

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

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

22 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
23 without the required exposure warning, KidJamz Headphones ("Product" or "Products") that
24 contain DEHP.

25 7. Defendant's failure to warn consumers and other individuals in California of the
26 health hazards associated with exposure to DEHP in conjunction with the sale, manufacture,
27 and/or distribution of the Product is a violation of Proposition 65 and subjects Defendant to the
28 enjoinder and civil penalties described herein.

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

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendant to provide purchasers or users of the Product with the required warnings related to the dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code § 25249.7(a).

PARTIES

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

11. Defendant through its business, effectively imports, distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California.

12. Plaintiff alleges that Defendant is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

VENUE AND JURISDICTION

13. Venue is proper in the County of Alameda because one or more of the instances of wrongful conduct occurred, and continue to occur in this county and/or because Defendant conducts, and continues to conduct, business in the County of Alameda with respect to the Product.

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

1 15. This Court has jurisdiction over Defendant because Defendant is either a citizen
2 of the State of California, has sufficient minimum contacts with the State of California, is
3 registered with the California Secretary of State as foreign corporations authorized to do business
4 in the State of California, and/or has otherwise purposefully availed itself of the California
5 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
6 consistent and permissible with traditional notions of fair play and substantial justice.

7 **SATISFACTION OF NOTICE REQUIREMENTS**

8 16. On February 27, 2018, Plaintiff gave notice of alleged violation of Health and
9 Safety Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California
10 citizens to DEHP contained in the Product without proper warning, subject to a private action to
11 Defendant and to the California Attorney General’s office and the offices of the County District
12 attorneys and City Attorneys for each city with a population greater than 750,000 persons
13 wherein the herein violations allegedly occurred.

14 17. The Notice complied with all procedural requirements of Proposition 65 including
15 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
16 least one person with relevant and appropriate expertise who reviewed relevant data regarding
17 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a
18 private action.

19 18. After receiving the Notice, and to Plaintiff’s best information and belief, none of
20 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
21 a cause of action against Defendant under Proposition 65 to enforce the alleged violations which
22 are the subject of Plaintiff’s notice of violation.

23 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
24 Notice to Defendant, as required by law.

25 **FIRST CAUSE OF ACTION**

26 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

27 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
28 this complaint as though fully set forth herein.

1 21. Defendant has, at all times mentioned herein, acted as either a distributor and/or
2 retailer of the Product.

3 22. The Product contains DEHP, a hazardous chemical found on the Proposition 65
4 list of chemicals known to be hazardous to human health.

5 23. The Product does 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 November 30, 2017, continuing until the present, that Defendant has
8 continued to knowingly and intentionally expose California users and consumers of the Product
9 to DEHP 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 exposure. DEHP can result in an increased
13 exposure risk to the user, which in the case of this Product, is children. The gas phase DEHP can
14 potentially be inhaled as the product is used in the vicinity of the user's facial area. The ear
15 cushion cover of these headphones is likely to be in constant contact with the user's ears during
16 normal expected use and direct dermal exposure to DEHP can occur. Dermal exposure through
17 direct contact with the user's hands is possible during application, removal, and manipulation of
18 the headphones. Should the wearer's skin perspire underneath the ear cushion or the ear
19 cushions become wet, aqueous DEHP skin permeation rates have been reported to be faster than
20 neat DEHP permeation. Although the association between HMWP phthalates such as DEHP and
21 atopic dermatitis has never been elucidated, as a multitude of chemicals are present in
22 headphones that come into contact with human skin, DEHP in headphones and hearing
23 protection aids has been reported to induce contact dermatitis. Gas phase DEHP emitted by the
24 ear covering into the ear canal can potentially permeate skin and membranes of the eardrum,
25 middle ear, and inner ear. If the headphones are stored or transported in a carrier, DEHP that
26 leaches from the product may contaminate other articles contained within these closed spaces are
27 subsequently handled, worn, mouthed, or consumed. Finally, while mouthing of the Product
28

1 does not seem likely, some amount of exposure through ingestion can occur by handling the
2 product with subsequent touching of the user's hand to mouth.

3 26. Plaintiff, based on his best information and belief, avers that such exposures will
4 continue every day until clear and reasonable warnings are provided to Product purchasers and
5 users or until this known toxic chemical is removed from the Product.

6 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
7 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur
8 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of
9 the Product to consumers in California

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

12 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
13 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

14 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
15 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
18 following relief:

- 19 A. That the court assess civil penalties against each Defendant in the amount
20 of \$2,500 per day for each violation in accordance with Health and Safety
21 Code § 25249.7(b);
- 22 B. That the court preliminarily and permanently enjoin Defendant mandating
23 Proposition 65 compliant warnings on the Product;
- 24 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 25 D. That the court grant any further relief as may be just and proper.

26
27 Dated: May 30, 2018

BRODSKY & SMITH, LLC

28 By: 

Evan J. Smith (SBN242352)
Ryan P. Cardona (SBN302113)
9595 Wilshire Boulevard, Suite 900
Beverly Hills, CA 90212
Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff