

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Robert Broadbelt

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9 CONSUMER ADVOCACY GROUP, INC.

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF LOS ANGELES**

13 CONSUMER ADVOCACY GROUP, INC.,
14 in the public interest,

15 Plaintiff,

16 v.

17 FRY'S ELECTRONICS, INC., a California
18 Corporation;

19 SAKAR INTERNATIONAL, INC., a New
20 York Corporation;

21 VIACOM INTERNATIONAL, INC., a
22 Delaware Corporation;
23 and DOES 1-10,

24 Defendants.

CASE NO. **20STCV15821**

COMPLAINT FOR PENALTY AND
INJUNCTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

1 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
2 defendants FRY’S ELECTRONICS, INC.; SAKAR INTERNATIONAL, INC.; VIACOM
3 INTERNATIONAL, INC. and DOES 1-10 as follows:

4 **THE PARTIES**

- 5 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff” or “CAG”) is an
6 organization qualified to do business in the State of California. CAG is a person within
7 the meaning of Health and Safety Code Section 25249.11, subdivision (a). CAG, acting
8 as a private attorney general, brings this action in the public interest as defined under
9 Health and Safety Code Section 25249.7, subdivision (d).
- 10 2. Defendant FRY’S ELECTRONICS, INC. (“FRY’S”) is a California Corporation
11 qualified to do business in California, and doing business in the State of California at all
12 relevant times herein.
- 13 3. Defendant SAKAR INTERNATIONAL, INC. (“SAKAR”) is a New York Corporation,
14 doing business in the State of California at all relevant times herein.
- 15 4. Defendant VIACOM INTERNATIONAL, INC. (“VIACOM”) is a Delaware
16 Corporation, doing business in the State of California at all relevant times herein.
- 17 5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-
18 10, and therefore sues these defendants by such fictitious names. Plaintiff will amend
19 this Complaint to allege their true names and capacities when ascertained. Plaintiff is
20 informed, believes, and thereon alleges that each fictitiously named defendant is
21 responsible in some manner for the occurrences herein alleged and the damages caused
22 thereby.
- 23 6. At all times mentioned herein, the term “Defendants” includes FRY’S, SAKAR,
24 VIACOM, and DOES 1-10.
- 25 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
26 times mentioned herein have conducted business within the State of California.
- 27
28

- 1 8. Upon information and belief, at all times relevant to this action, each of the Defendants,
2 including DOES 1-10, was an agent, servant, or employee of each of the other
3 Defendants. In conducting the activities alleged in this Complaint, each of the
4 Defendants was acting within the course and scope of this agency, service, or
5 employment, and was acting with the consent, permission, and authorization of each of
6 the other Defendants. All actions of each of the Defendants alleged in this Complaint
7 were ratified and approved by every other Defendant or their officers or managing
8 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated
9 the alleged wrongful conduct of each of the other Defendants.
- 10 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
11 Defendants was a person doing business within the meaning of Health and Safety Code
12 Section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
13 employees at all relevant times.

14 **JURISDICTION**

- 15 10. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
16 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
17 those given by statute to other trial courts. This Court has jurisdiction over this action
18 pursuant to Health and Safety Code Section 25249.7, which allows enforcement of
19 violations of Proposition 65 in any Court of competent jurisdiction.
- 20 11. This Court has jurisdiction over Defendants named herein because Defendants either
21 reside or are located in this State or are foreign corporations authorized to do business
22 in California, are registered with the California Secretary of State, or who do sufficient
23 business in California, have sufficient minimum contacts with California, or otherwise
24 intentionally avail themselves of the markets within California through their
25 manufacture, distribution, promotion, marketing, or sale of their products within
26 California to render the exercise of jurisdiction by the California courts permissible
27 under traditional notions of fair play and substantial justice.

1 12. Venue is proper in the County of Los Angeles because one or more of the instances of
2 wrongful conduct occurred, and continues to occur, in the County of Los Angeles
3 and/or because Defendants conducted, and continue to conduct, business in the County
4 of Los Angeles with respect to the consumer product that is the subject of this action.

5 **BACKGROUND AND PRELIMINARY FACTS**

6 13. In 1986, California voters approved an initiative to address growing concerns about
7 exposure to toxic chemicals and declared their right “[t]o be informed about exposures
8 to chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
9 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
10 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code Sections
11 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
12 from contamination, to allow consumers to make informed choices about the products
13 they buy, and to enable persons to protect themselves from toxic chemicals as they see
14 fit.

15 14. Proposition 65 requires the Governor of California to publish a list of chemicals known
16 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*
17 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains
18 over 700 chemicals and chemical families. Proposition 65 imposes warning
19 requirements and other controls that apply to Proposition 65-listed chemicals.

20 15. All businesses with ten (10) or more employees that operate or sell products in
21 California must comply with Proposition 65. Under Proposition 65, businesses are: (1)
22 prohibited from knowingly discharging Proposition 65-listed chemicals into sources of
23 drinking water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear
24 and reasonable” warnings before exposing a person, knowingly and intentionally, to a
25 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

26 16. Proposition 65 provides that any person "violating or threatening to violate" the statute
27 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §
28

1 25249.7. "Threaten to violate" means "to create a condition in which there is a
2 substantial probability that a violation will occur." *Health & Safety Code* §
3 25249.11(e). Defendants are also liable for civil penalties of up to \$2,500.00 per day
4 per violation, recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

5 17. Plaintiff identified certain practices of manufacturers and distributors of Headphones of
6 exposing, knowingly and intentionally, persons in California to DEHP of such products
7 without first providing clear and reasonable warnings of such to the exposed persons
8 prior to the time of exposure. Plaintiff later discerned that Defendants engaged in such
9 practice.

10 18. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
11 known to the State to cause cancer (*Cal. Code Regs.* tit. 27, § 27001(b)). Pursuant to
12 Health and Safety Code Sections 25249.9 and 25249.10, twenty (20) months after
13 addition of DEHP to the list of chemicals known to the State to cause cancer, DEHP
14 became fully subject to Proposition 65 warning requirements and discharge
15 prohibitions.

16 19. On October 24, 2003, the Governor of California added DEHP to the list of chemicals
17 known to the State to cause developmental and reproductive toxicity (*Cal. Code Regs.*
18 tit. 27, § 27001(c)). DEHP is known to the State to cause developmental, and male
19 reproductive toxicity. Pursuant to Health and Safety Code Sections 25249.9 and
20 25249.10, twenty (20) months after addition of DEHP to the list of chemicals known to
21 the State to cause reproductive toxicity, DEHP became fully subject to Proposition 65
22 warning requirements and discharge prohibitions.

23 **SATISFACTION OF PRIOR NOTICE**

24 20. On or about October 30, 2019, Plaintiff gave notice of alleged violations of Health and
25 Safety Code Section 25249.6, concerning consumer products exposures subject to a
26 private action to FRY'S, SAKAR, VIACOM, and to the California Attorney General,
27 County District Attorneys, and City Attorneys for each city containing a population of
28

1 at least 750,000 people in whose jurisdictions the violations allegedly occurred,
2 concerning the Headphones with Plastic Components.

3 21. Before sending the notice of alleged violations, Plaintiff investigated the consumer
4 products involved, the likelihood that such products would cause users to suffer
5 significant exposures to DEHP, and the corporate structure of each of the Defendants.

6 22. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
7 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney
8 for Plaintiff who executed the certificate had consulted with at least one person with
9 relevant and appropriate expertise who reviewed data regarding the exposures to DEHP,
10 the subject Proposition 65-listed chemical of this action. Based on that information, the
11 attorney for Plaintiff who executed the Certificate of Merit believed there was a
12 reasonable and meritorious case for this private action. The attorney for Plaintiff
13 attached to the Certificate of Merit served on the Attorney General the confidential
14 factual information sufficient to establish the basis of the Certificate of Merit.

15 23. Plaintiff's notice of alleged violations also included a Certificate of Service and a
16 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
17 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

18 24. Plaintiff is commencing this action more than sixty (60) days from the dates that
19 Plaintiff gave notice of the alleged violations to FRY'S, SAKAR, VIACOM, and the
20 public prosecutors referenced in Paragraph 20.

21 25. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General,
22 nor any applicable district attorney or city attorney has commenced and is diligently
23 prosecuting an action against the Defendants.

24 **FIRST CAUSE OF ACTION**

25 **(By CONSUMER ADVOCACY GROUP, INC. and against FRY'S, SAKAR,**
26 **VIACOM, and DOES 1-10 for Violations of Proposition 65, The Safe Drinking**
27 **Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et***
28 ***seq.*))**

Headphones

- 1
- 2 26. Plaintiff repeats and incorporates by reference paragraphs 1 through 25 of this
- 3 complaint as though fully set forth herein.
- 4 27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
- 5 distributor, promoter, or retailer of Headphones with Plastic Components
- 6 (“Headphones”), including but not limited to “nickelodeon;” “TEENAGE MUTANT
- 7 NINJA;” “TURTLES;” “VOLUME-LIMITING HEADPHONES;” “SAKAR;” “Sakar
- 8 International 195 Carter Dr. Edison, NJ 08817;” www.sakar.com; “MID#2340618;”
- 9 “Made in China;” “Item # 30365-AMZ;” “0 21331 80881 3;” .
- 10 28. Headphones contains DEHP.
- 11 29. Defendants knew or should have known that DEHP has been identified by the State of
- 12 California as a chemical known to cause cancer and reproductive toxicity and therefore
- 13 was subject to Proposition 65 warning requirements. Defendants were also informed of
- 14 the presence of DEHP in Headphones within Plaintiff’s notice of alleged violations
- 15 further discussed above at Paragraph 20.
- 16 30. Plaintiff’s allegations regarding Headphones concerns “[c]onsumer products
- 17 exposure[s],” which “is an exposure that results from a person’s acquisition, purchase,
- 18 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
- 19 exposure that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, §*
- 20 *25602(b)*. Headphones are consumer products, and, as mentioned herein, exposures to
- 21 DEHP took place as a result of such normal and foreseeable consumption and use.
- 22 31. Plaintiff is informed, believes, and thereon alleges that between October 30, 2016 and
- 23 the present, each of the Defendants knowingly and intentionally exposed California
- 24 consumers and users of Headphones, which Defendants manufactured, distributed, or
- 25 sold as mentioned above, to DEHP, without first providing any type of clear and
- 26 reasonable warning of such to the exposed persons before the time of exposure.
- 27 Defendants have distributed and sold Headphones in California. Defendants know and
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1 intend that California consumers will use headphones, thereby exposing them to DEHP.
2 Defendants thereby violated Proposition 65.

3 32. The principal routes of exposure are through dermal contact, ingestion and inhalation.
4 Persons sustain exposures by using, handling or carrying Headphones without wearing
5 gloves or any other personal protective equipment, or by touching bare skin or mucous
6 membranes with or without gloves after handling Headphones, as well as through direct
7 and indirect hand to mouth contact, hand to mucous membrane, trans-dermal absorption
8 or breathing in particulate matter dispersed from Headphones during use as well as
9 through environmental mediums that carry the DEHP once contained in Headphones.

10 33. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations
11 of Proposition 65 as to Headphones have been ongoing and continuous, as Defendants
12 engaged and continue to engage in conduct which violates Health and Safety Code
13 Section 25249.6, including the manufacture, distribution, promotion, and sale of
14 Headphones, so that a separate and distinct violation of Proposition 65 occurred each
15 and every time a person was exposed to DEHP by Headphones as mentioned herein.

16 34. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
17 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
18 violations alleged herein will continue to occur into the future.

19 35. Based on the allegations herein, Defendants are liable for civil penalties of up to
20 \$2,500.00 per day per individual exposure to DEHP from Headphones, pursuant to
21 Health and Safety Code Section 25249.7(b).

22 36. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
23 filing this Complaint.

24 **PRAYER FOR RELIEF**

25 Plaintiff demands against each of the Defendants as follows:

- 26 1. A permanent injunction mandating Proposition 65-compliant warnings;
27 2. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);
28 3. Costs of suit;

- 1 4. Reasonable attorney fees and costs; and
- 2 5. Any further relief that the court may deem just and equitable.

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4 Dated: April 24, 2020

YEROUSHALMI & YEROUSHALMI*

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8 Reuben Yeroushalmi
9 Attorneys for Plaintiff,
10 CONSUMER ADVOCACY GROUP, INC.