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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 IN AND FOR THE COUNTY OF SANTA CLARA

18 UNLIMITED CIVIL JURISDICTION

19 RUSSELL BRIMER,)

20 Plaintiff,)

21 v.)

22 DAVE & BUSTER'S, INC.; and DOES 1)
23 through 150,)

24 Defendants.)
25 _____)

26 No. 105 CV 03 4242

27 **COMPLAINT FOR CIVIL
28 PENALTIES AND INJUNCTIVE
RELIEF**

Health & Safety Code §25249

29 RUSSELL BRIMER, by and through his counsel, on behalf of himself, on behalf all others
30 similarly situated and on behalf of the general public, hereby alleges as follows:

31 **NATURE OF THE ACTION**

32 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,
33 on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the
34 presence of and nature of toxic chemicals in consumer goods.

35 2. This Complaint seeks to remedy defendants' continuing failures to warn the citizens

1 of the State of California about the presence of, the nature of and such citizens' actual and potential
2 exposure to lead and cadmium present in or on consumer products placed into the stream of
3 commerce by defendants.

4 3. Lead and cadmium are chemicals that are identified within 22 C.C.R. §12000 and
5 that are known to the State of California to cause birth defects and other reproductive harm. Lead
6 and cadmium shall hereafter be referred to as "LISTED CHEMICALS".

7 4. The consumer products containing the LISTED CHEMICALS, and for which
8 defendants are responsible, are shot glasses and other glassware intended to hold beverages with
9 colored artwork or designs (containing lead) on the exterior, including but not limited to, *City Shot*
10 *Glass*, and shot glasses and other glassware intended to hold beverages with colored artwork or
11 designs (containing cadmium) on the exterior, including but not limited to, *City Shot Glass*. All
12 such consumer products containing the LISTED CHEMICALS shall hereafter be referred to as the
13 "PRODUCTS".

14 5. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, Health
15 & Safety Code §25249.5 *et seq.*¹ (hereafter "Proposition 65"), "No person in the course of doing
16 business shall knowingly and intentionally expose any individual to a chemical known to the state
17 to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
18 individual...."

19 6. Beginning on October 1, 1992, the State of California officially listed lead (and lead
20 compounds) as a known carcinogen. On February 27, 1987, the State had listed lead as a chemical
21 known to cause birth defects and other reproductive harm. This chemical became subject to the
22 warning requirement one year later and was therefore subject to the "clear and reasonable warning"
23 requirements of Proposition 65, beginning on October 1, 1993 and February 27, 1988, respectively.
24 (22 Code of Regulations §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)

25 7. Beginning on October 1, 1987, the State of California officially listed cadmium as a
26 known carcinogen. On May 1, 1997, the State had listed cadmium as a chemical known to cause

27 _____
28 ¹ Unless specifically noted, all statutory citations refer to California law.

1 birth defects or other reproductive harm. This chemical became subject to the warning requirement
2 one year later and was therefore subject to the "clear and reasonable warning" requirements of
3 Proposition 65, beginning on October 1, 1988 and May 1, 1998, respectively. (22 Code of
4 Regulations §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)

5 8. Defendants' failure to provide proper mandatory warnings about exposure to the
6 LISTED CHEMICALS in conjunction with the sale of the PRODUCTS is a violation of
7 Proposition 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for
8 each such violation.

9 9. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
10 and permanent injunctive relief to compel defendants to provide users of the PRODUCTS with the
11 appropriate Proposition 65 warning regarding the hazards of such LISTED CHEMICALS.

12 10. Plaintiff also seeks civil penalties against defendants for their violations of
13 Proposition 65, as provided for by Health & Safety Code §25249.7(b).

14 PARTIES

15 11. Plaintiff RUSSELL BRIMER is a citizen of the State of California who resides in
16 the City and County of ALAMEDA and who is dedicated to protecting the health of California
17 citizens, including the elimination or reduction of toxic exposures, and brings this action on behalf
18 of the general public pursuant to Health & Safety Code §25249.7.

19 12. Defendant DAVE & BUSTER'S, INC. ("D&B'S") is a person doing business
20 within the meaning of Health & Safety Code §25249.11.

21 13. D&B'S manufactures, distributes and/or offers the PRODUCTS for sale or use in
22 the State of California or implies by its conduct that it manufactures, distributes and/or offers the
23 PRODUCTS for sale or use in State of California.

24 14. DOES 1-50 (hereafter "MANUFACTURER DEFENDANTS") are each persons
25 doing business within the meaning of Health & Safety Code §25249.11.

26 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,
27 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
28 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,

1 one or more of the PRODUCTS in the State of California or for consumption or use in the State of
2 California.

3 16. DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each persons
4 doing business within the meaning of Health & Safety Code §25249.11.

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

8 18. DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each persons doing
9 business within the meaning of Health & Safety Code §25249.

10 19. RETAIL DEFENDANTS offer one or more of the PRODUCTS for sale to
11 individuals in the State of California.

12 20. At this time, the true names of DOES 1 through 150, inclusive, are unknown to
13 plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code of Civil
14 Procedure §474. Plaintiff is informed and believes, and on that basis alleges, that each of the
15 fictitiously named defendants is responsible for the acts and occurrences herein alleged. When
16 ascertained, their true names shall be reflected in an amended complaint.

17 21. D&B'S, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS
18 and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to hereafter as
19 "DEFENDANTS".

20 VENUE AND JURISDICTION

21 22. Venue is proper in the Santa Clara County Superior Court, pursuant to Code of Civil
22 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or
23 more instances of wrongful conduct occurred, and continues to occur, in the County of Santa Clara
24 and/or because DEFENDANTS conducted, and continue to conduct, business in this County.

25 23. The California Superior Court has jurisdiction over this action pursuant to
26 California Constitution Article VI, Section 10, which grants the Superior Court "original
27 jurisdiction in all causes except those given by statute to other trial courts." The statute under
28 which this action is brought does not specify any other basis of jurisdiction.

1 30. The appropriate public enforcement agencies have failed to commence and
2 diligently prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against
3 DEFENDANTS based on the claims asserted in Plaintiff's 60-Day Notices.

4 31. At all times relevant to this action, the PRODUCTS contained the LISTED
5 CHEMICALS.

6 32. At all times relevant to this action, the DEFENDANTS knew or should have known
7 that the PRODUCTS contained the LISTED CHEMICALS.

8 33. At all times relevant to this action, the LISTED CHEMICALS were present in or on
9 the PRODUCTS in such a way as to be available for transfer or release from PRODUCTS to
10 individuals during the reasonably foreseeable use of PRODUCTS.

11 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
12 continues to cause an exposure to the LISTED CHEMICALS, as such exposure is defined by
13 22 C.C.R. §12601.

14 35. Based on information and good faith belief, plaintiff alleges, that at all times
15 relevant to this action, DEFENDANTS had knowledge that individuals' normal and reasonably
16 foreseeable use of the PRODUCTS would cause an exposure to the LISTED CHEMICALS.

17 36. At all times relevant to this action, DEFENDANTS, and each of them, intended that
18 such exposures to the LISTED CHEMICALS from the reasonably foreseeable use of the
19 PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture,
20 distribution and/or sale of PRODUCTS to individuals.

21 37. At all times relevant to this action, DEFENDANTS failed to provide a "clear and
22 reasonable warning" of reproductive toxicity (as defined by 22 C.C.R. §12601) to those consumers
23 or other individuals in the State of California who were or could become exposed to the
24 PRODUCTS and the LISTED CHEMICALS contained therein.

25 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
26 directly by California voters, individuals thus exposed to the LISTED CHEMICALS from the
27 PRODUCTS, without "clear and reasonable warning", have suffered and continue to suffer
28 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

