

1 Clifford A. Chanler, State Bar No. 135534
2 CHANLER LAW GROUP
3 71 Elm Street, Suite 8
4 New Canaan, CT 06840
5 Tel: (203) 966-9911
6 Fax: (203) 801-5222

7 Stephen S. Sayad, State Bar No. 104866
8 Daniel M. Bornstein, State Bar No. 181711
9 Laralei S. Paras, State Bar No. 203319
10 PARAS LAW GROUP
11 655 Redwood Highway, Suite 216
12 Mill Valley, CA 94941
13 Tel: (415) 380-9222
14 Fax: (415) 380-9223

15 Attorneys for Plaintiff
16 RUSSELL BRIMER

ENDORSED
FILED
San Francisco County Superior Court

FEB 16 2005

GORDON PARK-LI, Clerk
BY: CRISTINA E. BAUTISTA
Deputy Clerk

CASE MANAGEMENT CONFERENCE SET

PLAN 1 JUL 22 2005 9:00 AM

DEPARTMENT 212

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
13 UNLIMITED CIVIL JURISDICTION
14

15 RUSSELL BRIMER,)

16 Plaintiff,)

17 v.)

18)
19 MCILHENNY COMPANY; and DOES 1)
20 through 150,)

21 Defendants.)
22)

No. ~~05-4389~~ 56

COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF

Health & Safety Code §25249

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

25 NATURE OF THE ACTION

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

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

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

8 4. The consumer products containing the LISTED CHEMICALS, and for which
9 defendants are responsible, are mugs and other tableware with colored artwork or designs
10 (containing lead) on the exterior, including but not limited to, Coffee Mug Gift Set, #9104 (#0
11 11210 08061 4), and mugs and other tableware with colored artwork or designs (containing
12 cadmium) on the exterior, including but not limited to, Coffee Mug Gift Set, #9104 (#0 11210
13 08061 4). All such consumer products containing the LISTED CHEMICALS shall hereafter be
14 referred to as the "PRODUCTS".

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

20 6. Beginning on October 1, 1992, the State of California officially listed lead (and lead
21 compounds) as a known carcinogen. On February 27, 1987, the State had listed lead as a chemical
22 known to cause birth defects and other reproductive harm. This chemical became subject to the
23 warning requirement one year later and was therefore subject to the "clear and reasonable warning"
24 requirements of Proposition 65, beginning on October 1, 1993 and February 27, 1988, respectively.
25 (22 Code of Regulations §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)

26 7. Beginning on October 1, 1987, the State of California officially listed cadmium as a
27

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

1 known carcinogen. On May 1, 1997, the State had listed cadmium as a chemical known to cause
2 birth defects and other reproductive harm. This chemical became subject to the warning
3 requirement one year later and was therefore subject to the "clear and reasonable warning"
4 requirements of Proposition 65, beginning on October 1, 1988 and May 1, 1998, respectively. (22
5 Code of Regulations §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)

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

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

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

15 PARTIES

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

20 12. Defendant MCILHENNY COMPANY ("MCILHENNY") is a person doing
21 business within the meaning of Health & Safety Code §25249.11.

22 13. MCILHENNY manufactures, distributes and/or offers the PRODUCTS for sale or
23 use in the State of California or implies by its conduct that it manufactures, distributes and/or offers
24 the PRODUCTS for sale or use in State of California.

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

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

1 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
2 one or more of the PRODUCTS in the State of California or for consumption or use in the State of
3 California.

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

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

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

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

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

18 21. MCILHENNY, MANUFACTURER DEFENDANTS, DISTRIBUTOR
19 DEFENDANTS and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
20 hereafter as "DEFENDANTS".

21 **VENUE AND JURISDICTION**

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

27 23. The California Superior Court has jurisdiction over this action pursuant to
28 California Constitution Article VI, Section 10, which grants the Superior Court "original

1 jurisdiction in all causes except those given by statute to other trial courts." The statute under
2 which this action is brought does not specify any other basis of jurisdiction.

3 24. The California Superior Court has jurisdiction over DEFENDANTS based on
4 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
5 association that either is a citizen of the State of California, has sufficient minimum contacts in the
6 State of California, or otherwise purposefully avails itself of the California market.
7 DEFENDANTS' purposeful availment renders the exercise of jurisdiction by California courts
8 consistent with traditional notions of fair play and substantial justice.

9
10 **FIRST CAUSE OF ACTION**

11 **(Violation of Proposition 65)**

12 25. Plaintiff realleges and incorporates by reference, as if specifically set forth herein,
13 Paragraphs 1 through 24, inclusive.

14 26. The citizens of the State of California have expressly stated in the Safe Drinking
15 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, et seq. ("Proposition
16 65") that they must be informed "about exposures to chemicals that cause cancer, birth defects and
17 other reproductive harm." (Proposition 65, §1(b).)

18 27. Proposition 65 further states that, "No person in the course of doing business shall
19 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer
20 or reproductive toxicity without first giving clear and reasonable warning to such individual...."

21 28. Based on information and good faith belief, plaintiff alleges that, at all times
22 relevant to this Complaint, DEFENDANTS have engaged in the sales of these PRODUCTS in
23 violation Health & Safety Code §25249.6, et seq., and that DEFENDANTS' offensive sale of these
24 PRODUCTS continues to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice of
25 Violation. Plaintiff also alleges and believes that such violations will also continue to occur into
26 the future.

27 29. Beginning on November 24, 2004, "60-Day Notices" of Proposition 65 violations
28 were provided to public enforcement agencies and to MCILHENNY stating that exposures to the
LISTED CHEMICALS were occurring in the State of California from the reasonably foreseeable

1 uses of the PRODUCTS, without the individual users first having been provided with a "clear and
2 reasonable warning" regarding such exposures.

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

6 31. At all times relevant to this action, the PRODUCTS contained the LISTED
7 CHEMICALS.

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

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

13 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
14 continues to cause an exposure to the LISTED CHEMICALS, as such exposure is defined by
15 22 C.C.R. §12601.

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

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

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

27 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
28 directly by California voters, individuals thus exposed to the LISTED CHEMICALS from the

1 PRODUCTS, without "clear and reasonable warning", have suffered and continue to suffer
2 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

3 39. As a consequence of the above-described acts, DEFENDANTS, and each of them,
4 are liable, pursuant to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500
5 per day for each violation.

6 40. As a consequence of the above-described acts, Health & Safety Code §25249.7
7 specifically also authorizes the grant of injunctive relief under Proposition 65.

8 Wherefore, plaintiff prays judgment against DEFENDANTS as set forth hereafter.

9 **PRAYER FOR RELIEF**

10 Wherefore, plaintiff prays for judgment against defendants as follows:

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


14 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
15 permanently enjoin DEFENDANTS from offering the PRODUCTS for sale or use in California,
16 without providing an identification of the LISTED CHEMICALS in the PRODUCTS as well as
17 "clear and reasonable warning[s]" as defined by 22 CCR §12601, as plaintiff shall specify in
18 further application to the Court;

19 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

20 4. That the Court grant such other and further relief as may be just and proper.

21 Dated: February 7, 2005

22 Respectfully Submitted,
23 PARAS LAW GROUP

24 

25 Daniel M. Bornstein
26 Attorneys for Plaintiff
27 RUSSELL BRIMER
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