

1 Stephen S. Sayad, State Bar No. 104866
2 Daniel M. Bornstein, State Bar No. 181711
3 Laralei S. Paras, State Bar No. 203319
4 PARAS LAW GROUP
5 655 Redwood Highway, Suite 216
6 Mill Valley, CA 94941
7 Tel: (415) 380-9222
8 Fax: (415) 380-9223

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

MAR 16 2005

GORDON PARK-LI, CLERK
BY: PARAM NATT
Deputy Clerk

6 Clifford A. Chanler, State Bar No. 135534
7 CHANLER LAW GROUP
8 71 Elm Street, Suite 8
9 New Canaan, CT 06840
10 Tel: (203) 966-9911
11 Fax: (203) 801-5222

CASE MANAGEMENT CONFERENCE SET

PLAN I AUG 19 2005 9:00AM

DEPARTMENT 212

*Attorneys for Plaintiff
RUSSELL BRIMER

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 IN AND FOR THE COUNTY OF SAN FRANCISCO

13 UNLIMITED CIVIL JURISDICTION

14 RUSSELL BRIMER,

15)
16)
17) Plaintiff,

18) v.

19) THE ENCORE GROUP, INC.; XPRES
20) CORPORATION; and DOES 1 through 150,

21) Defendants.
22)

No. 05-05-439570

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 beer steins, shot glasses and other glassware with colored artwork
10 or designs (containing lead) on the exterior, including but not limited to, *Golf Beer Stein Cheers to*
11 *the 19th Hole* (#7 46193 93312 0) and *Irish Shot Glass* (#7 46193 18179 8), and beer steins, shot
12 glasses and other glassware with colored artwork or designs (containing cadmium) on the exterior,
13 including but not limited to, *Golf Beer Stein Cheers to the 19th Hole* (#7 46193 93312 0) and *Irish*
14 *Shot Glass* (#7 46193 18179 8). All such consumer products containing the LISTED
15 CHEMICALS shall hereafter be referred to as the "PRODUCTS".

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

21 6. Beginning on October 1, 1992, the State of California officially listed lead (and lead
22 compounds) as a known carcinogen. On February 27, 1987, the State had listed lead as a chemical
23 known to cause birth defects and other reproductive harm. This chemical became subject to the
24 warning requirement one year later and was therefore subject to the "clear and reasonable warning"
25 requirements of Proposition 65, beginning on October 1, 1993 and February 27, 1988, respectively.
26 (22 Code of Regulations §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)
27

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

1 the State of California or implies by its conduct that it manufactures, distributes and/or offers the
2 PRODUCTS for sale or use in State of California.

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

5 17. MANUFACTURER DEFENDANTS engage in the process of research, testing,
6 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
7 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
8 one or more of the PRODUCTS in the State of California or for consumption or use in the State of
9 California.

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

12 19. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
13 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of
14 California.

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

17 21. RETAIL DEFENDANTS offer one or more of the PRODUCTS for sale to
18 individuals in the State of California.

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

24 23. ENCORE, XPRES, MANUFACTURER DEFENDANTS, DISTRIBUTOR
25 DEFENDANTS and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
26 hereafter as "DEFENDANTS".

27 **VENUE AND JURISDICTION**

28 24. Venue is proper in the San Francisco Superior Court, pursuant to Code of Civil

1 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or
2 more instances of wrongful conduct occurred, and continues to occur, in the County of San
3 Francisco and/or because DEFENDANTS conducted, and continue to conduct, business in this
4 County.

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

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

15 **FIRST CAUSE OF ACTION**

16 **(Violation of Proposition 65)**

17 27. Plaintiff realleges and incorporates by reference, as if specifically set forth herein,
18 Paragraphs 1 through 26, inclusive.

19 28. The citizens of the State of California have expressly stated in the Safe Drinking
20 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, et seq. ("Proposition
21 65") that they must be informed "about exposures to chemicals that cause cancer, birth defects and
22 other reproductive harm." (Proposition 65, §1(b).)

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

26 30. Based on information and good faith belief, plaintiff alleges that, at all times
27 relevant to this Complaint, DEFENDANTS have engaged in the sales of these PRODUCTS in
28 violation Health & Safety Code §25249.6, et seq., and that DEFENDANTS' offensive sale of these

1 PRODUCTS continues to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice of
2 Violation. Plaintiff also alleges and believes that such violations will continue to occur into the
3 future.

4 31. Beginning on December 17, 2004, "60-Day Notices" of Proposition 65 violations
5 were provided to public enforcement agencies and to ENCORE and XPRES stating that exposures
6 to the LISTED CHEMICALS were occurring in the State of California from the reasonably
7 foreseeable uses of the PRODUCTS, without the individual users first having been provided with a
8 "clear and reasonable warning" regarding such exposure.

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

12 33. At all times relevant to this action, the PRODUCTS contained the LISTED
13 CHEMICALS.

14 34. At all times relevant to this action, the DEFENDANTS knew or should have known
15 that the PRODUCTS contained the LISTED CHEMICALS.

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

19 36. The normal and reasonably foreseeable use of the PRODUCTS has caused and
20 continues to cause an exposure to the LISTED CHEMICALS, as such exposure is defined by
21 22 C.C.R. §12601.

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

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

1 Dated: March 14, 2005

2 Respectfully Submitted,
3 PARAS LAW GROUP

4 

5 Daniel M. Bornstein
6 Attorneys for Plaintiff
7 RUSSELL BRIMER

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28