

2005 MAR 16 PM 2:37

GORDON PARK - LL CLERK

MARY ANN MORAN

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

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

9 *Attorneys for Plaintiff
10 RUSSELL BRIMER

CASE MANAGEMENT CONFERENCE SET

PLAN! AUG 19 2005 9:00 AM

DEPARTMENT 212

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE CITY AND COUNTY OF SAN FRANCISCO

13 UNLIMITED CIVIL JURISDICTION

15 RUSSELL BRIMER,

16 Plaintiff,

17 v.

19 JELLY BELLY CANDY COMPANY; and
20 DOES 1 through 150,

21 Defendants.

No. _____

CGC - 05 - 439566

COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF

Health & Safety Code §25249

22
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 present in or on consumer products placed into the stream of commerce by
4 defendant.

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

8 4. The consumer products containing the LISTED CHEMICAL, and for which
9 defendant is responsible, are mugs with colored artwork or designs (containing lead) on the
10 exterior, including but not limited to, *Bistro Scene Mug (#0 71567 89820 1)*. All such consumer
11 products containing the LISTED CHEMICAL shall hereafter be referred to as the "PRODUCTS".

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

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

23 7. Defendant's failure to provide proper mandatory warnings about exposure to the
24 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition
25 65 and subjects defendant to enjoinder of such conduct as well as civil penalties for each such
26 violation.

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

1 business within the meaning of Health & Safety Code §25249.

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

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

9 20. JBCC, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS and
10 RETAIL DEFENDANTS shall, where appropriate, collectively be referred to hereafter as
11 "DEFENDANTS".

12 VENUE AND JURISDICTION

13 21. Venue is proper in the San Francisco Superior Court, pursuant to Code of Civil
14 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or
15 more instances of wrongful conduct occurred, and continues to occur, in the County of San
16 Francisco and/or because DEFENDANTS conducted, and continue to conduct, business in this
17 County.

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

22 23. The California Superior Court has jurisdiction over DEFENDANTS based on
23 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
24 association that either is a citizen of the State of California, has sufficient minimum contacts in the
25 State of California, or otherwise purposefully avails itself of the California market.
26 DEFENDANTS' purposeful availment renders the exercise of jurisdiction by California courts
27 consistent with traditional notions of fair play and substantial justice.
28

FIRST CAUSE OF ACTION

(Violation of Proposition 65)

24. Plaintiff realleges and incorporates by reference, as if specifically set forth herein, Paragraphs 1 through 23, inclusive.

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

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

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

28. Beginning on January 3, 2005, "60-Day Notices" of Proposition 65 violations were provided to public enforcement agencies and to JBCC stating that exposures to the LISTED CHEMICALS were occurring in the State of California from the reasonably foreseeable uses of the PRODUCTS, without the individual users first having been provided with a "clear and reasonable warning" regarding such exposure.

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

30. At all times relevant to this action, the PRODUCTS contained the LISTED CHEMICALS.

31. At all times relevant to this action, the DEFENDANTS knew or should have known

1 that the PRODUCTS contained the LISTED CHEMICALS.

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

5 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
6 continues to cause an exposure to the LISTED CHEMICALS, as such exposure is defined by
7 22 C.C.R. §12601.

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

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

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

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

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

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

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

1 **PRAYER FOR RELIEF**

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

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

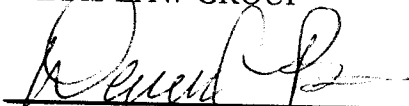
6 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
7 permanently enjoin DEFENDANTS from offering the PRODUCTS for sale or use in California,
8 without providing an identification of the LISTED CHEMICALS in the PRODUCTS as well as
9 ."clear and reasonable warning[s]"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

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

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

13 Dated: March 14, 2005

14 Respectfully Submitted,
15 PARAS LAW GROUP

16 
17 Daniel M. Bornstein
18 Attorneys for Plaintiff
19 RUSSELL BRIMER
20
21
22
23
24
25
26
27
28