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ENDORSED
FILED
San Francisco County Superior Court
JUL 29 2005
GORDON PARK-LI, Clerk
BY: CRISTINA E. BAUTISTA
Deputy Clerk
CASE MANAGEMENT CONFERENCE SET
PLAN 1 DEC 30 2005 9:00AM
DEPARTMENT 212

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

15 RUSSELL BRIMER,)

16)
17 Plaintiff,)

18 v.)

19 AMERICAN GIFT CORPORATION; and)
20 DOES 1 through 150,)

21 Defendants.)
22)

No. 05-443550

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 shot glasses and other glassware intended for the consumption of
10 food or beverages with colored artwork or designs (containing lead) on the exterior, including but
11 not limited to, *AG 08XX Shot Glass (#8 20392 18414 6)*, and shot glasses and other glassware
12 intended for the consumption of food or beverages with colored artwork or designs (containing
13 cadmium) on the exterior, including but not limited to, *AG 08XX Shot Glass (#8 20392 18414 6)*.
14 All such consumer products containing the LISTED CHEMICALS shall hereafter be referred to as
15 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. On February 27, 1987, the State had listed lead as a chemical known to cause birth
22 defects and other reproductive harm. This chemical became subject to the warning requirement
23 one year later and was therefore subject to the "clear and reasonable warning" requirements of
24 Proposition 65, beginning on October 1, 1993 and February 27, 1988, respectively. (22 Code of
25 Regulations §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)

26 7. On May 1, 1997, the State had listed cadmium as a chemical known to cause birth
27

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

1 defects or other reproductive harm. This chemical became subject to the warning requirement one
2 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 County of ALAMEDA and who is dedicated to protecting the health of California citizens,
17 including the elimination or reduction of toxic exposures, and who brings this action on behalf of
18 the general public pursuant to Health & Safety Code §25249.7.

19 12. Defendant AMERICAN GIFT CORPORATION ("AMERICAN GIFT") is a person
20 doing business within the meaning of Health & Safety Code §25249.11.

21 13. AMERICAN GIFT manufactures, distributes and/or offers the PRODUCTS for sale
22 or use in the State of California or implies by its conduct that it manufactures, distributes and/or
23 offers the 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. AMERICAN GIFT, MANUFACTURER DEFENDANTS, DISTRIBUTOR
18 DEFENDANTS and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
19 hereafter as "DEFENDANTS".

20 VENUE AND JURISDICTION

21 22. Venue is proper in the San Francisco 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 San
24 Francisco and/or because DEFENDANTS conducted, and continue to conduct, business in this
25 County.

26 23. The California Superior Court has jurisdiction over this action pursuant to
27 California Constitution Article VI, Section 10, which grants the Superior Court "original
28 jurisdiction in all causes except those given by statute to other trial courts." The statute under

1 which this action is brought does not specify any other basis of jurisdiction.

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

8 **FIRST CAUSE OF ACTION**

9 **(Violation of Proposition 65)**

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

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

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

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

25 29. Beginning on March 31, 2005, "60-Day Notices" of Proposition 65 violations were
26 provided to public enforcement agencies and to AMERICAN GIFT stating that exposures to the
27 LISTED CHEMICALS were occurring in the State of California from the reasonably foreseeable
28 uses of the PRODUCTS, without the individual users first having been provided with a "clear and

1 reasonable warning" regarding such exposure.

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

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

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

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

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

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

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

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

26 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
27 directly by California voters, individuals thus exposed to the LISTED CHEMICALS from the
28 PRODUCTS, without "clear and reasonable warning", have suffered and continue to suffer

1 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

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

8 **PRAYER FOR RELIEF**

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

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

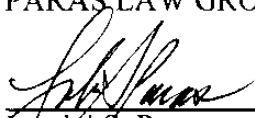
13 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
14 permanently enjoin DEFENDANTS from offering the PRODUCTS for sale or use in California,
15 without providing an identification of the LISTED CHEMICALS in the PRODUCTS as well as
16 "clear and reasonable warning[s]"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

18 3. That the Court grant plaintiff his reasonable attorney's fees and costs of suit; and

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

20 Dated: July 28, 2005

21 Respectfully Submitted,
22 PARAS LAW GROUP

23 
24 Laralei S. Paras
25 Attorneys for Plaintiff
26 RUSSELL BRIMER
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