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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 FOR THE COUNTY OF ALAMEDA - OAKLAND
19 UNLIMITED CIVIL JURISDICTION

20 RUSSELL BRIMER,)

No. RG05217653

21 Plaintiff,)

**COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF**

22 v.)

23 EVERGREEN ENTERPRISES, INC.;)
24 EVERGREEN/CYPRESS ENTERPRISES,)
25 INC.; and DOES 1 through 150,)

Health & Safety Code §25249

26 Defendants.)

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

NATURE OF THE ACTION

1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,
on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the
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 defendants.

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 defendants are responsible, are gourmet bottles and other glassware intended for the storage or
10 consumption of food or beverages with colored artwork or designs (containing lead) on the
11 exterior, including but not limited to, *Gourmet Frosted Bottle, Tour d'Italia* (#3FB331, #7 46851
12 27715 3) and *Gourmet Bottle, Café Chef* (#3OB366, #7 46851 20203 2). All such consumer
13 products containing the LISTED CHEMICAL shall hereafter be referred to as the "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. On February 27, 1987, the State had listed lead as a chemical known to cause birth
20 defects and other reproductive harm. This chemical became subject to the warning requirement
21 one year later and was therefore subject to the "clear and reasonable warning" requirements of
22 Proposition 65, beginning on October 1, 1993 and February 27, 1988, respectively. (22 Code of
23 Regulations §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)

24 7. Defendants' failure to provide proper mandatory warnings about exposure to the
25 LISTED CHEMICALS in conjunction with the sale of the PRODUCTS is a violation of
26 Proposition 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for
27

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

1 each such violation.

2 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
3 and permanent injunctive relief to compel defendants to provide users of the PRODUCTS with the
4 appropriate Proposition 65 warning regarding the hazards of such LISTED CHEMICAL.

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

7 PARTIES

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

12 11. Defendant EVERGREEN ENTERPRISES, INC. ("EVERGREEN") is a person
13 doing business within the meaning of Health & Safety Code §25249.11.

14 12. EVERGREEN manufactures, distributes and/or offers the PRODUCTS for sale or
15 use in the State of California or implies by its conduct that it manufactures, distributes and/or offers
16 the PRODUCTS for sale or use in State of California.

17 13. Defendant EVERGREEN/CYPRESS ENTERPRISES, INC.
18 ("EVERGREEN/CYPRESS") is a person doing business within the meaning of Health & Safety
19 Code §25249.11.

20 14. EVERGREEN/CYPRESS manufactures, distributes and/or offers the PRODUCTS
21 for sale or use in the State of California or implies by its conduct that it manufactures, distributes
22 and/or offers the PRODUCTS for sale or use in State of California.

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

25 16. MANUFACTURER DEFENDANTS engage in the process of research, testing,
26 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
27 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
28 one or more of the PRODUCTS in the State of California or for consumption or use in the State of

1 California.

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

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

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

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

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

16 22. EVERGREEN, EVERGREEN/CYPRESS, MANUFACTURER DEFENDANTS,
17 DISTRIBUTOR DEFENDANTS and RETAIL DEFENDANTS shall, where appropriate,
18 collectively be referred to hereafter as "DEFENDANTS".

19 **VENUE AND JURISDICTION**

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

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

28 25. The California Superior Court has jurisdiction over DEFENDANTS based on

1 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
2 association that either is a citizen of the State of California, has sufficient minimum contacts in the
3 State of California, or otherwise purposefully avails itself of the California market.

4 DEFENDANTS' purposeful availment renders the exercise of jurisdiction by California courts
5 consistent with traditional notions of fair play and substantial justice.

6 **FIRST CAUSE OF ACTION**

7 **(Violation of Proposition 65)**

8 26. Plaintiff realleges and incorporates by reference, as if specifically set forth herein,
9 Paragraphs 1 through 25, inclusive.

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

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

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

23 30. Beginning on March 31, 2005, "60-Day Notices" of Proposition 65 violations were
24 provided to public enforcement agencies and to EVERGREEN and EVERGREEN/CYPRESS
25 stating that exposures to the LISTED CHEMICAL were occurring in the State of California from
26 the reasonably foreseeable uses of the PRODUCTS, without the individual users first having been
27 provided with a "clear and reasonable warning" regarding such exposure.

28 31. The appropriate public enforcement agencies have failed to commence and

1 diligently prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against
2 DEFENDANTS based on the claims asserted in Plaintiff's 60-Day Notices.

3 32. At all times relevant to this action, the PRODUCTS contained the LISTED
4 CHEMICAL.

5 33. At all times relevant to this action, the DEFENDANTS knew or should have known
6 that the PRODUCTS contained the LISTED CHEMICAL.

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

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

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

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

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

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

28 40. As a consequence of the above-described acts, DEFENDANTS, and each of them,

1 are liable, pursuant to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500
2 per day for each violation.

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

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

6 **PRAYER FOR RELIEF**

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

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

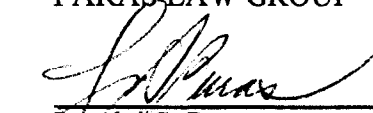
11 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
12 permanently enjoin DEFENDANTS from offering the PRODUCTS for sale or use in California,
13 without providing an identification of the LISTED CHEMICAL in the PRODUCTS as well as
14 "clear and reasonable warning[s]"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

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

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

18 Dated: June 10, 2005

19 Respectfully Submitted,
20 PARAS LAW GROUP

21 
22 Laralei S. Paras
23 Attorneys for Plaintiff
24 RUSSELL BRIMER