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ENDORSED  
FILED  
San Francisco County Superior Court

SEP 13 2005

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CASE MANAGEMENT CONFERENCE SET

FEB 10 2006 - 9 AM

10 Attorneys for Plaintiff  
11 RUSSELL BRIMER

DEPARTMENT 212

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 FOR THE CITY AND COUNTY OF SAN FRANCISCO  
15  
16 UNLIMITED CIVIL JURISDICTION

17 RUSSELL BRIMER, ) No. CGC 05444838  
18 )  
19 Plaintiff, )  
20 v. ) COMPLAINT FOR CIVIL  
21 BLUEFLY, INC.; and DOES 1 through 150, ) PENALTIES AND INJUNCTIVE  
22 inclusive. ) RELIEF  
23 Defendants. ) (Health & Safety Code §25249, et seq.)

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

27 NATURE OF THE ACTION

28 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,

1 on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the  
2 presence of and nature of toxic chemicals in consumer goods.

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

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

10 4. The consumer products containing the LISTED CHEMICAL, and for which  
11 defendants are responsible, are double old fashion glasses, martini glasses, and other glassware  
12 intended for the consumption of food or beverages with colored artwork or designs (containing  
13 lead) on the exterior, including but not limited to, *set of four yellow and red 'rectangle' double old*  
14 *fashioned glasses, (#891925895488), set of four double old fashion glasses with orange circular*  
15 *designs (#891927772480), and set of four martini glasses with red retro design (# 891927772473).*

16 All such consumer products containing the LISTED CHEMICAL shall hereafter be referred to as  
17 the "PRODUCTS".

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

23 6. On February 27, 1987, the State listed lead as a chemical known to cause birth  
24 defects and other reproductive harm. This chemical became subject to the warning requirement  
25 one year later and was therefore subject to the "clear and reasonable warning" requirements of  
26 Proposition 65, beginning on February 27, 1988. (22 Code of Regulations §12000(b)(c); Health &  
27

28 <sup>1</sup> Unless specifically noted, all statutory citations refer to California law.

1 Safety Code §25249.5 *et seq.*)

2 7. Defendants' failures to provide proper mandatory warnings about exposure to the  
3 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition  
4 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such  
5 violation.

6 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive  
7 and permanent injunctive relief to compel defendants to provide purchasers of the PRODUCTS  
8 with the appropriate Proposition 65 warning regarding the health hazards of the LISTED  
9 CHEMICAL.

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

12 PARTIES

13 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who resides in  
14 the County of Alameda and who is dedicated to protecting the health of California citizens,  
15 including the elimination or reduction of toxic exposures from consumer products, and who brings  
16 this action on behalf of the general public pursuant to Health & Safety Code §25249.7.

17 11. Defendants BLUEFLY, INC. ("BLUEFLY") is a person doing business within the  
18 meaning of Health & Safety Code §25249.11.

19 12. BLUEFLY distributes and/or offers the PRODUCTS for sale or use in the State of  
20 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use  
21 in the State of California.

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

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

28 15. Defendants DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each

1 persons doing business within the meaning of Health & Safety Code §25249.11.

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

5 17. Defendants DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each persons  
6 doing business within the meaning of Health & Safety Code §25249.

7 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State  
8 of California.

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

14 20. BLUEFLY, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
15 DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 through 150 shall, where  
16 appropriate, collectively be referred to hereafter as "DEFENDANTS".

#### 17 VENUE AND JURISDICTION

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

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

27 23. The California Superior Court has jurisdiction over DEFENDANTS based on  
28 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or

1 association that either is a citizen of the State of California, has sufficient minimum contacts in the  
2 State of California, or otherwise purposefully avails itself of the California market.

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

5 **FIRST CAUSE OF ACTION**

6 **(Violation of Proposition 65)**

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

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

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

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

22 28. Beginning on July 8, 2005, "60-Day Notices" of Proposition 65 violations were  
23 provided to public enforcement agencies and to BLUEFLY stating that exposures to the LISTED  
24 CHEMICAL were occurring in the State of California from the reasonably foreseeable uses of the  
25 PRODUCTS, without the individual purchasers and users first having been provided with a "clear  
26 and reasonable warning" regarding such exposure.

27 29. The appropriate public enforcement agencies have failed to commence and  
28 diligently prosecute a cause of action, under Health & Safety Code §25249.6, et seq., against

1 DEFENDANTS based on the claims asserted in Plaintiff's 60-Day Notices.

2 30. At all times relevant to this action, the PRODUCTS contained the LISTED  
3 CHEMICAL.

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

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

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

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

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

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

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

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

1 per day for each violation.

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

4 Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as  
5 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;

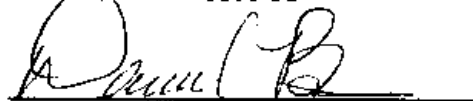
11 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and  
12 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for sale or  
13 use in California, without providing an identification of the LISTED CHEMICAL in the  
14 PRODUCTS as well as "clear and reasonable warning[s]" as defined by 22 CCR §12601, as  
15 plaintiff shall specify in 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: September 13 2005

19 Respectfully Submitted,  
PARAS LAW GROUP

20 

21 Daniel Bornstein  
22 Attorneys for Plaintiff  
RUSSELL BRIMER