

AUG 23 2006

GORDON PARK-LI, Clerk
JUN P. PANELO
Deputy Clerk

1 Laralei S. Paras, State Bar No. 203319
2 Christopher L. Brooke, State Bar No. 238747
3 Keith G. Adams, State Bar No. 240497
4 HIRST & CHANLER LLP
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710-2565
8 Telephone: (510) 848-8880
9 Facsimile: (510) 848-8118

CASE MANAGEMENT CONFERENCE SET

JAN 26 2007 -9:00 AM

6 Attorneys for Plaintiff
7 RUSSELL BRIMER

DEPARTMENT 212

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL DIVISION

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 AUSTRAM, INC.; ARMSTRONG GARDEN
17 CENTERS, INC.; and DOES 1 through 150,
18 inclusive,

18 Defendants.

No. CGC-06-455487

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

(Health & Safety Code §25249.6, et seq.)

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

23 NATURE OF THE ACTION

24 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,
25 on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the
26 presence of and nature of toxic chemicals in consumer goods.

27 2. This Complaint seeks to remedy defendants' continuing failures to warn the
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1 potential exposure to lead present in or on consumer products placed into the stream of commerce
2 by defendants. Lead shall hereafter be referred to as the "LISTED CHEMICAL."

3 3. The consumer products containing the LISTED CHEMICAL, and for which
4 defendants are responsible, are decorative stained glass extension/garden hooks, including, but not
5 limited to, *12" Extension Hook W/Butterfly, #412629 (#0 25626 14629 1)*. All such consumer
6 product containing the LISTED CHEMICAL on the exterior shall hereafter be referred to as the
7 "PRODUCTS."

8 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
9 Health & Safety Code §25249.6 *et seq*¹ (hereinafter "Proposition 65"), "No person in the course of
10 doing business shall knowingly and intentionally expose any individual to a chemical known to the
11 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
12 such individual...."

13 5. On February 27, 1987, the State listed lead as a chemical known to cause birth
14 defects and other reproductive harm. This chemical became subject to the Proposition 65 warning
15 requirement one-year after being listed as a chemical known to the State of California to cause
16 cancer. (*Cal. Health & Safety Code §25249.10(b)*).

17 6. Defendants' failures to provide proper mandatory warnings about exposure to the
18 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition
19 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such
20 violation.

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

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

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

PARTIES

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2 9. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated
3 to protecting the health of California citizens, including the elimination or reduction of toxic
4 exposures from consumer products, and who brings this action on behalf of the general public
5 pursuant to Health & Safety Code §25249.7.

6 10. Defendant AUSTRAM, INC. (“AUSTRAM”) is a person doing business within the
7 meaning of Health & Safety Code §25249.11.

8 11. AUSTRAM manufactures, distributes and/or offers the PRODUCTS for sale or use
9 in the State of California or implies by its conduct that it manufactures, distributes and/or offers
10 the PRODUCTS for sale or use in the State of California.

11 12. Defendant ARMSTRONG GARDEN CENTERS, INC. (“ARMSTRONG”) is a
12 person doing business within the meaning of Health & Safety Code §25249.11.

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

16 14. Defendants DOES 1-50 (hereafter “MANUFACTURER DEFENDANTS”) are
17 each persons doing business within the meaning of Health & Safety Code §25249.11.

18 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,
19 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
20 engage in the process of research, testing, designing, assembling, fabricating and/or
21 manufacturing, one or more of the PRODUCTS for sale, consumption or use in the State of
22 California.

23 16. Defendants DOES 51-100 (hereafter “DISTRIBUTOR DEFENDANTS”) are each
24 persons doing business within the meaning of Health & Safety Code §25249.11.

25 17. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
26 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of
27 California.

28 18. Defendants DOES 101-150 (hereafter “RETAIL DEFENDANTS”) are each

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

2 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
3 of California.

4 20. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
5 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code
6 of Civil Procedure §474. Plaintiff is informed and believes, and on that basis alleges, that each of
7 the 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 21. AUSTRAM, ARMSTRONG, MANUFACTURER DEFENDANTS,
10 DISTRIBUTOR DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 through 150
11 shall, where appropriate, collectively be referred to hereafter as "DEFENDANTS".

12 **VENUE AND JURISDICTION**

13 22. Venue is proper in the San Francisco County Superior Court, pursuant to Code of
14 Civil Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because
15 one or 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 with respect to the PRODUCTS.

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

22 24. 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 personal jurisdiction by California
27 courts consistent with traditional notions of fair play and substantial justice.

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1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65)**

3 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 24, inclusive.

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

11 29. On September 2, 2005 a "60-Day Notice of Violation" containing the requisite
12 Certificate of Merit pursuant to Health & Safety Code §25249.7(d)(1) was provided to all required
13 public enforcement agencies and to AUSTRAM, INC. and ARMSTRONG GARDEN CENTERS,
14 INC. stating that exposures to the LISTED CHEMICAL were occurring in the State of California
15 from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
16 users of the PRODUCTS first having been provided with a "clear and reasonable warning"
17 regarding such exposure.

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

21 31. At all times relevant to this action, the PRODUCTS contained the LISTED
22 CHEMICAL.

23 32. At all times relevant to this action, the DEFENDANTS knew or should have known
24 that the PRODUCTS contained the LISTED CHEMICAL.

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

28 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and

1 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by 22
2 CCR §12601 *et seq.*

3 35. Based on information and good faith belief, plaintiff alleges that at all times
4 relevant to this action, DEFENDANTS had knowledge that the normal and reasonably foreseeable
5 use of the PRODUCTS would expose individuals to the LISTED CHEMICAL.

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

10 37. At all times relevant to this action, DEFENDANTS failed to provide a “clear and
11 reasonable warning” of reproductive toxicity (as defined by 22 CCR §12601 *et seq.*) to those
12 consumers or other individuals in the State of California who were or could become exposed to the
13 PRODUCTS and to the LISTED CHEMICAL contained therein.

14 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
15 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the
16 PRODUCTS, without “clear and reasonable warning,” have suffered and continue to suffer
17 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

23 Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as set forth
24 hereafter.

25 **PRAYER FOR RELIEF**

26 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

27 1. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil
28 penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each

1 violation alleged herein;

2 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
3 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for sale or
4 use in California, without providing an identification of the LISTED CHEMICAL in the
5 PRODUCTS as well as “clear and reasonable warning[s]” as defined by 22 CCR §12601 *et seq.*,
6 as plaintiff shall specify in further application to the Court;

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

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

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Dated: August 23, 2006

Respectfully Submitted,
HIRST & CHANLER, LLP



Christopher L. Brooke
Attorneys for Plaintiff
RUSSELL BRIMER