

DEC 14 2005

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CASE MANAGEMENT CONFERENCE SET

MAY 19 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 UNLIMITED CIVIL JURISDICTION

17 RUSSELL BRIMER,)
18)
19 Plaintiff,)
20 v.)
21 CITY MERCHANDISE, INC.; and DOES 1)
22 through 150, inclusive.)
23 Defendants.)

No. **CGC 05447640**

**COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF**

(Health & Safety Code §25249, et seq.)

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25
26
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:

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

1 NATURE OF THE ACTION

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

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

9 3. Lead and cadmium are chemicals that are identified within Title 22, California Code
10 of Regulations ("CCR") §12000 and that are known to the State of California to cause birth defects
11 and other reproductive harm. Lead and cadmium shall hereafter be referred to as "LISTED
12 CHEMICALS". The consumer products containing the LISTED CHEMICALS, and for which
13 defendant is responsible, are shooters, shot glasses and other glassware intended for the
14 consumption of food or beverages with colored artwork or designs on the exterior including, but
15 not limited to, *Shooter* (#906537; #7 80450 96537 0), and *Shot Glass* (# 7 80450 96517 2). All
16 such consumer products containing the LISTED CHEMICALS shall hereafter be referred to as the
17 "PRODUCTS".

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

23 5. On February 27, 1987, the State had 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 October 1, 1993 and February 27, 1988, respectively. (22 CCR
27

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

1 §12000(b)(c); Proposition 65)

2 6. Beginning on October 1, 1987, the State of California officially listed cadmium as a
3 known carcinogen. On May 1, 1997, the State had listed cadmium as a chemical known to cause
4 birth defects or other reproductive harm. This chemical became subject to the warning requirement
5 one year later and was therefore subject to the "clear and reasonable warning" requirements of
6 Proposition 65, beginning on October 1, 1988 and May 1, 1998, respectively. (22 CCR

7 §12000(b)(c); Proposition 65)

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

12 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
13 and permanent injunctive relief to compel defendants to provide users of the PRODUCTS with the
14 appropriate Proposition 65 warning regarding the hazards of such LISTED CHEMICALS.

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

17 **PARTIES**

18 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California and who is
19 dedicated to protecting the health of California citizens, including the elimination or reduction of
20 toxic exposures, and who brings this action on behalf of the general public pursuant to Health &
21 Safety Code §25249.7.

22 11. Defendant CITY MERCHANDISE, INC. ("CITY MERCHANDISE") is a person
23 doing business within the meaning of Health & Safety Code §25249.11.

24 12. CITY MERCHANDISE manufactures, distributes and/or offers the PRODUCTS for
25 sale or use in the State of California or implies by its conduct that it manufactures, distributes
26 and/or offers the PRODUCTS for sale or use in State of California.

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

1 provided to public enforcement agencies and to CITY MERCHANDISE, INC. stating that
2 exposures to the LISTED CHEMICALS were occurring in the State of California from the
3 reasonably foreseeable uses of the PRODUCTS, without the individual users first having been
4 provided with a "clear and reasonable warning" regarding such exposure.

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

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

10 31. At all times relevant to this action, the DEFENDANTS knew or should have known
11 that the PRODUCTS contained the LISTED CHEMICALS.

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

15 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
16 continues to cause an exposure to the LISTED CHEMICALS, as such exposure is defined by
17 22 CCR §12601.

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

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

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

