

ENDORSED
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San Francisco County Superior Court
DEC 1 - 2005

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CASE MANAGEMENT CONFERENCE SET

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

16
17 RUSSELL BRIMER,)
18)
19 Plaintiff,)
20 v.)
21)
22 THINKGEEK, INC.; OSTG, INC.; VA)
23 SOFTWARE CORPORATION; and DOES 1)
24 through 150, inclusive.)
25)
26 Defendants.)

~~05-05-047209~~
No. 05-05-047209

COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF

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

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:

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
7 potential exposure to lead present in or on consumer products placed into the stream of commerce
8 by defendants.

9 3. Lead is a chemical that is identified in Title 22, California Code of Regulations
10 ("CCR") §12000 that is known to the State of California to cause birth defects and other
11 reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL". The
12 consumer products containing the LISTED CHEMICAL, and for which defendants are responsible,
13 are mugs and other ceramic containers intended for the consumption of food or beverages with
14 colored artwork or designs on the exterior including, but not limited to, *RTFM Mug – Black,*
15 *#5299ABLK*. All such consumer products containing the LISTED CHEMICAL shall hereafter be
16 referred to as the "PRODUCTS".

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

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

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

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

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

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

11 **PARTIES**

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

16 10. Defendant THINKGEEK, INC. ("THINKGEEK") is a person doing business within
17 the meaning of Health & Safety Code §25249.11.

18 11. THINKGEEK distributes and/or offers the PRODUCTS for sale or use in the State
19 of California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or
20 use in the State of California.

21 12. Defendant OSTG, INC. ("OSTG") is a person doing business within the meaning of
22 Health & Safety Code §25249.11.

23 13. OSTG distributes and/or offers the PRODUCTS for sale or use in the State of
24 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use
25 in the State of California.

26 14. Defendant VA SOFTWARE CORPORATION ("VA SOFTWARE") is a person
27 doing business within the meaning of Health & Safety Code §25249.11.

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1 15. VA SOFTWARE distributes and/or offers the PRODUCTS for sale or use in the
2 State of California or implies by its conduct that it distributes and/or offers the PRODUCTS for
3 sale or use in the State of California.

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

6 17. MANUFACTURER DEFENDANTS engage in the process of research, testing,
7 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
8 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
9 one or more of the PRODUCTS for sale, consumption or use in the State of California.

10 18. Defendants DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each
11 persons doing business within the meaning of Health & Safety Code §25249.11.

12 19. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
13 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of
14 California.

15 20. Defendants DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each persons
16 doing business within the meaning of Health & Safety Code §25249.11.

17 21. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
18 of California.

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

24 23. THINKGEEK, OSTG, VA SOFTWARE, MANUFACTURER DEFENDANTS,
25 DISTRIBUTOR DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 thought 150
26 shall, where appropriate, collectively be referred to hereafter as "DEFENDANTS".

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1 **VENUE AND JURISDICTION**

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

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

11 26. The California Superior Court has jurisdiction over DEFENDANTS based on
12 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
13 association that either is a citizen of the State of California, has sufficient minimum contacts in the
14 State of California, or otherwise purposefully avails itself of the California market.
15 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
16 courts consistent with traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

18 **(Violation of Proposition 65)**

19 27. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 26, inclusive.

21 28. The citizens of the State of California have expressly stated in the Safe Drinking
22 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* (“Proposition
23 65”) that they must be informed “about exposures to chemicals that cause cancer, birth defects and
24 other reproductive harm.” (Proposition 65, §1(b).)

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

28 30. Based on information and good faith belief, plaintiff alleges that, at all times

1 relevant to this Complaint, DEFENDANTS have engaged in the sales of the PRODUCTS in
2 violation Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS' offensive sale of the
3 PRODUCTS has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice
4 of Violation. Plaintiff also alleges and believes that such violations will continue to occur into the
5 future.

6 31. On September 9, 2005, a "60-Day Notice" of Proposition 65 violations was
7 provided to public enforcement agencies and to THINKGEEK, INC., OSTG, INC., and VA
8 SOFTWARE CORPORATION stating that exposures to the LISTED CHEMICAL were occurring
9 in the State of California from the reasonably foreseeable uses of the PRODUCTS, without the
10 individual purchasers and users first having been provided with a "clear and reasonable warning"
11 regarding such exposure.

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

15 33. At all times relevant to this action, the PRODUCTS contained the LISTED
16 CHEMICAL.

17 34. At all times relevant to this action, the DEFENDANTS knew or should have known
18 that the PRODUCTS contained the LISTED CHEMICAL.

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

22 36. The normal and reasonably foreseeable use of the PRODUCTS has caused and
23 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by
24 22 CCR §12601.

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

28 38. At all times relevant to this action, DEFENDANTS, and each of them, intended that

1 such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the
2 PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture,
3 distribution and/or sale of PRODUCTS to individuals in the State of California.

4 39. At all times relevant to this action, DEFENDANTS failed to provide a “clear and
5 reasonable warning” of reproductive toxicity (as defined by 22 CCR §12601) to those consumers or
6 other individuals in the State of California who were or could become exposed to the PRODUCTS
7 and the LISTED CHEMICAL contained therein.

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

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

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

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

19 **PRAYER FOR RELIEF**

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

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

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

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- 3. That the Court grant plaintiff his reasonable attorney's fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: November 2, 2005

Respectfully Submitted,
HIRST & CHANLER



Laralei S. Paras
Attorneys for Plaintiff
RUSSELL BRIMER