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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 RUSSELL BRIMER,

16 Plaintiff,

17 v.

18 CARDEOLOGIE, INC.; CARD DE A; and
19 DOES 1 through 150, inclusive.

20 Defendants.

ENDORSED
FILED
San Francisco County Superior Court
NOV 21 2005
NOV 18 2005
GORDON PARK-LI, Clerk
BY: CRISTINA E. BAUTISTA
Deputy Clerk

CASE MANAGEMENT CONFERENCE SET

APR 21 2006 9 00 AM

DEPARTMENT 212

21-05-346797
No. _____

COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF

(Health & Safety Code §25249, 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:
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24
25

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.

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

3. Lead and cadmium are chemicals that are identified within Title 22, California Code of Regulations ("CCR") §12000 and that are known to the State of California to cause birth defects and other reproductive harm. Lead and cadmium shall hereafter be referred to as "LISTED CHEMICALS". The consumer products containing the LISTED CHEMICALS, and for which defendant is responsible, are shot glasses and other glassware intended for the consumption of food or beverages with colored artwork or designs on the exterior including, but not limited to, *Shot Glasses, Set of 4 (Freshman Drinker, Sophomore Drinker, Junior Drinker, Senior Drinker) (#005404)*. All such consumer products containing the LISTED CHEMICALS shall hereafter be referred to as the "PRODUCTS".

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

5. On February 27, 1987, the State had listed lead as a chemical known to cause birth defects and other reproductive harm. This chemical became subject to the warning requirement one year later and was therefore subject to the "clear and reasonable warning" requirements of Proposition 65, beginning on October 1, 1993 and February 27, 1988, respectively. (22 CCR

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 CARDEOLOGIE, INC. ("CARDEOLOGIE") is a person doing business
23 within the meaning of Health & Safety Code §25249.11.

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

27 13. Defendant CARD DE A ("CARD DE A") is a person doing business within the
28 meaning of Health & Safety Code §25249.11.

1 14. CARD DE A distributes and/or offers the PRODUCTS for sale or use in the State of
2 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use
3 in State of California.

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

6 16. 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 in the State of California or for consumption or use in the State of
10 California.

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

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

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

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

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

25 22. CARDEOLOGIE, CARD DE A, MANUFACTURER DEFENDANTS,
26 DISTRIBUTOR DEFENDANTS and RETAIL DEFENDANTS shall, where appropriate,
27 collectively be referred to hereafter as "DEFENDANTS".
28

1 **VENUE AND JURISDICTION**

2 23. 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.

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

11 25. 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 jurisdiction by California courts
16 consistent with traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

18 **(Violation of Proposition 65)**

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

21 27. 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 28. 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 29. 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 these PRODUCTS in
2 violation Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS' offensive sale of these
3 PRODUCTS continues to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice of
4 Violation. Plaintiff also alleges and believes that such violations will continue to occur into the
5 future.

6 30. On September 9, 2005, a "60-Day Notice" of Proposition 65 violations was
7 provided to public enforcement agencies and to CARDEOLOGIE, INC. and CARD DE A stating
8 that exposures to the LISTED CHEMICALS were occurring in the State of California from the
9 reasonably foreseeable uses of the PRODUCTS, without the individual users first having been
10 provided with a "clear and reasonable warning" regarding such exposure.

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

14 32. At all times relevant to this action, the PRODUCTS contained the LISTED
15 CHEMICALS.

16 33. At all times relevant to this action, the DEFENDANTS knew or should have known
17 that the PRODUCTS contained the LISTED CHEMICALS.

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

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

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

27 37. At all times relevant to this action, DEFENDANTS, and each of them, intended that
28 such exposures to the LISTED CHEMICALS from the reasonably foreseeable use of the

1 PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture,
2 distribution and/or sale of PRODUCTS to individuals.

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

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

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

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

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

18 **PRAYER FOR RELIEF**

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

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

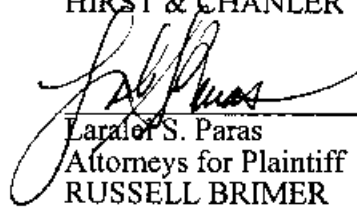
23 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
24 permanently enjoin DEFENDANTS from offering the PRODUCTS for sale or use in California,
25 without providing an identification of the LISTED CHEMICALS in the PRODUCTS as well as
26 "clear and reasonable warning[s]"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

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

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

2 Dated: November 21, 2005

3 Respectfully Submitted,
4 HIRST & CHANLER

5 
6 Loral S. Paras
7 Attorneys for Plaintiff
8 RUSSELL BRIMER