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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,)
)
Plaintiff,)
)
v.)
)
FUDDRUCKERS, INC.; and DOES 1 through)
150, inclusive.)
)
Defendants.)

No. ~~1606~~ 250344
**COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF**
(Health & Safety Code §25249, et seq.)

RUSSELL BRIMER, by and through his counsel, on behalf of himself, on behalf all others
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 and 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 soda bottles and other glassware intended for the consumption of food or beverages with
14 colored artwork or designs on the exterior including, but not limited to, *Faygo Original Rock &*
15 *Rye (# 0 78300 00520 9)*. All such consumer products containing the LISTED CHEMICAL shall
16 hereafter be 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)

26 6. Defendants' failures to provide proper mandatory warnings about exposure to the
27

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

1 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition
2 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such
3 violation.

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

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

10 PARTIES

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

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

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

20 12. FUDDRUCKERS exercises significant control over local franchise owners by
21 requiring consistent operating standards, and by retaining a royalty from each franchise for some or
22 all sales, including sales of the PRODUCTS.

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

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

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

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

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

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

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

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

18 **VENUE AND JURISDICTION**

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

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

28 23. The California Superior Court has jurisdiction over DEFENDANTS based on

1 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
2 association that either is a citizen of the State of California, has sufficient minimum contacts in the
3 State of California, or otherwise purposefully avails itself of the California market.

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

6 **FIRST CAUSE OF ACTION**

7 **(Violation of Proposition 65)**

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

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

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

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

23 28. On September 27, 2005, a "60-Day Notice" of Proposition 65 violations was
24 provided to public enforcement agencies and to FUDDRUCKERS, INC. stating that exposures to
25 the LISTED CHEMICAL were occurring in the State of California from the reasonably foreseeable
26 uses of the PRODUCTS, without the individual purchasers and users first having been provided
27 with a "clear and reasonable warning" regarding such exposure.

28 29. The appropriate public enforcement agencies have failed to commence and

1 diligently prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against
2 DEFENDANTS based on the claims asserted in Plaintiff's 60-Day Notice.

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

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

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

10 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
11 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by
12 22 CCR §12601.

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

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

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

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

28 38. As a consequence of the above-described acts, DEFENDANTS, and each of them,

1 are liable, pursuant to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500
2 per day for each violation.

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

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

7 **PRAYER FOR RELIEF**

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

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

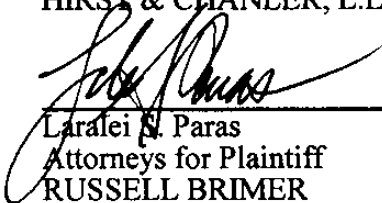
12 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
13 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for sale or
14 use in California, without providing an identification of the LISTED CHEMICAL in the
15 PRODUCTS as well as "clear and reasonable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

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

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

19 Dated: January 11, 2006

20 Respectfully Submitted,
HIRST & CHANLER, L.L.P.

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22 Laralei N. Paras
23 Attorneys for Plaintiff
RUSSELL BRIMER