

ENDORSED

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GORDON PARK-LI, Clerk

BY: _____ Deputy Clerk

DE LA VEGA MANABO, JUDY

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CASE MANAGEMENT CONFERENCE SET

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RUSSELL BRIMER

MAY 12 2006 09 AM

DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

CGC - 05 - 447546

18 RUSSELL BRIMER,)
19 Plaintiff,)
20 v.)
21 DELIVERY AGENT, INC.; SHOP THE)
22 SCENE; and DOES 1 through 150, inclusive.)
23 Defendants.)
24 _____)

No. _____

COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF

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

25
26 RUSSELL BRIMER, by and through his counsel, on behalf of himself, on behalf all others
27 similarly situated and on behalf of the general public, hereby alleges as follows:
28

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".

13 4. The consumer products containing lead, and for which defendant is responsible, are
14 mugs and other ceramic containers intended for the consumption of food or beverages with colored
15 artwork or designs on the exterior including, but not limited to, *All My Children Mug, #107-0679*.
16 The consumer products containing cadmium, and for which defendant is responsible, mugs and
17 other ceramic containers intended for the consumption of food or beverages with colored artwork
18 or designs on the exterior including, but not limited to, *All My Children Mug, #107-0679*. All such
19 consumer products containing one or more of the LISTED CHEMICALS shall hereafter be referred
20 to as the "PRODUCTS".

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

26 ///

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

1 6. On February 27, 1987, the State had listed lead as a chemical known to cause birth
2 defects and other reproductive harm. This chemical became subject to the warning requirement
3 one year later and was therefore subject to the "clear and reasonable warning" requirements of
4 Proposition 65, beginning on October 1, 1993 and February 27, 1988, respectively. (22 CCR
5 §12000(b)(c); Proposition 65)

6 7. Beginning on October 1, 1987, the State of California officially listed cadmium as a
7 known carcinogen. On May 1, 1997, the State had listed cadmium as a chemical known to cause
8 birth defects or other reproductive harm. This chemical became subject to the warning requirement
9 one year later and was therefore subject to the "clear and reasonable warning" requirements of
10 Proposition 65, beginning on October 1, 1988 and May 1, 1998, respectively. (22 CCR
11 §12000(b)(c); Proposition 65.)

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

16 9. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
17 and permanent injunctive relief to compel defendants to provide users of the PRODUCTS with the
18 appropriate Proposition 65 warning regarding the hazards of such LISTED CHEMICALS.

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

21 **PARTIES**

22 11. Plaintiff RUSSELL BRIMER is a citizen of the State of California and who is
23 dedicated to protecting the health of California citizens, including the elimination or reduction of
24 toxic exposures, and who brings this action on behalf of the general public pursuant to Health &
25 Safety Code §25249.7.

26 12. Defendant DELIVERY AGENT, INC. ("DELIVERY") is a person doing business
27 within the meaning of Health & Safety Code §25249.11.

28 13. DELIVERY distributes and/or offers the PRODUCTS for sale or use in the State of

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

3 14. Defendant SHOP THE SCENE ("SHOP") is a person doing business within the
4 meaning of Health & Safety Code §25249.11.

5 15. SHOP distributes and/or offers the PRODUCTS for sale or use in the State of
6 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use
7 in State of California.

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

10 17. MANUFACTURER DEFENDANTS engage in the process of research, testing,
11 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
12 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,
13 one or more of the PRODUCTS in the State of California or for consumption or use in the State of
14 California.

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

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

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

22 21. RETAIL DEFENDANTS offer one or more of the PRODUCTS for sale to
23 individuals in the State of California.

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

23. DELIVERY, SHOP, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to hereafter as "DEFENDANTS".

VENUE AND JURISDICTION

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

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

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

FIRST CAUSE OF ACTION

(Violation of Proposition 65)

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

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

29. Proposition 65 further states that, "No person in the course of doing business shall

1 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer
2 or reproductive toxicity without first giving clear and reasonable warning to such individual....”

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

9 31. On September 27, 2005, a “60-Day Notice” of Proposition 65 violations was
10 provided to public enforcement agencies and to DELIVERY AGENT, INC. and SHOP THE
11 SCENE stating that exposures to the LISTED CHEMICALS were occurring in the State of
12 California from the reasonably foreseeable uses of the PRODUCTS, without the individual users
13 first having been provided with a “clear and reasonable warning” regarding such exposure.

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

17 33. At all times relevant to this action, the PRODUCTS contained the LISTED
18 CHEMICALS.

19 34. At all times relevant to this action, the DEFENDANTS knew or should have known
20 that the PRODUCTS contained the LISTED CHEMICALS.

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

24 36. The normal and reasonably foreseeable use of the PRODUCTS has caused and
25 continues to cause an exposure to the LISTED CHEMICALS, as such exposure is defined by
26 22 CCR §12601.

27 37. Based on information and good faith belief, plaintiff alleges, that at all times
28 relevant to this action, DEFENDANTS had knowledge that individuals’ normal and reasonably

1 foreseeable use of the PRODUCTS would cause an exposure to the LISTED CHEMICALS.

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

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

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

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

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

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

21 **PRAYER FOR RELIEF**

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

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

26 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
27 permanently enjoin DEFENDANTS from offering the PRODUCTS for sale or use in California,
28 without providing an identification of the LISTED CHEMICALS in the PRODUCTS as well as

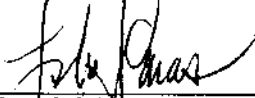
1 "clear and reasonable warning[s]" as defined by 22 CCR §12601, as plaintiff shall specify in
2 further application to the Court;

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

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

5 Dated: December 12, 2005

6 Respectfully Submitted,
HIRST & CHANLER

7 
8 Laralei S. Paras
9 Attorneys for Plaintiff
RUSSELL BRIMER