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CASE MANAGEMENT CONFERENCE SET

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MAY 12 2006 09 AM

DEPARTMENT 212

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

CGC - 05 - 447595

17 RUSSELL BRIMER, )  
18 )  
19 Plaintiff, )  
20 v. )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )  
FAYGO BEVERAGES, INC.; NEWBEVCO, )  
INC.; and DOES 1 through 150, inclusive. )  
Defendants. )

No. \_\_\_\_\_

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 glass 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 Black*  
15 *Raspberry* (#0 73800 00492 9) and *Faygo Original Rock & Rye* (#0 78300 00520 9). All such  
16 consumer products containing the LISTED CHEMICAL 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.*<sup>1</sup> (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 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 February 27, 1988. (22 CCR §12000(b)(c); Proposition 65)

27 \_\_\_\_\_  
28 <sup>1</sup> Unless specifically noted, all statutory citations refer to California law.



1 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they  
2 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,  
3 one or more of the PRODUCTS for sale, consumption or use in the State of California.

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

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

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

11 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State  
12 of California.

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

18 21. FAYGO, NEWBEVCO, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
19 DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 through 150 shall, where  
20 appropriate, collectively be referred to hereafter as "DEFENDANTS".

### 21 VENUE AND JURISDICTION

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

27 23. The California Superior Court has jurisdiction over this action pursuant to  
28 California Constitution Article VI, §10, which grants the Superior Court "original jurisdiction in all

1 causes except those given by statute to other trial courts.” The statute under which this action is  
2 brought does not specify any other basis of subject matter jurisdiction.

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

9 **FIRST CAUSE OF ACTION**

10 **(Violation of Proposition 65)**

11 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
12 Paragraphs 1 through 24, inclusive.

13 26. The citizens of the State of California have expressly stated in the Safe Drinking  
14 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* (“Proposition  
15 65”) that they must be informed “about exposures to chemicals that cause cancer, birth defects and  
16 other reproductive harm.” (Proposition 65, §1(b).)

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

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

26 29. On September 27, 2005, a “60-Day Notice” of Proposition 65 violations was  
27 provided to public enforcement agencies and to FAYGO BEVERAGES, INC. and NEWBEVCO,  
28 INC. stating that exposures to the LISTED CHEMICAL were occurring in the State of California

1 from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and  
2 users first having been provided with a “clear and reasonable warning” regarding such exposure.

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

6 31. At all times relevant to this action, the PRODUCTS contained the LISTED  
7 CHEMICAL.

8 32. At all times relevant to this action, the DEFENDANTS knew or should have known  
9 that the PRODUCTS contained the LISTED CHEMICAL.

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

13 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and  
14 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by  
15 22 CCR §12601.

16 35. Based on information and good faith belief, plaintiff alleges that at all times relevant  
17 to this action, DEFENDANTS had knowledge that individuals’ normal and reasonably foreseeable  
18 use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL.

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

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

27 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
28 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the

1 PRODUCTS, without "clear and reasonable warning", have suffered and continue to suffer  
2 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

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

10 **PRAYER FOR RELIEF**

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

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


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

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

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

22 Dated: December 12, 2005

23 Respectfully Submitted,  
HIRST & CHANLER

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25 \_\_\_\_\_  
26 Laralei S. Paras  
27 Attorneys for Plaintiff  
28 RUSSELL BRIMER