

DEC 14 2005

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MAY 19 2006 - 9 @ AM

DEPARTMENT 212

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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

17 RUSSELL BRIMER,)
18)
19 Plaintiff,)
20 v.)
21)
22 PEPSI-COLA BOTTLING COMPANY OF)
23 NEW BERN, INC.; and DOES 1 through 150,)
inclusive.)
Defendants.)

No. **CFC 05447641**

**COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF**

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

24
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
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 old fashioned syrup glasses and other glassware intended for the consumption of food or
14 beverages with colored artwork or designs on the exterior including, but not limited to, *Pepsi-Cola*
15 *Old Fashioned Syrup Glass*. All such consumer products containing the LISTED CHEMICAL
16 shall 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 PEPSI-COLA BOTTLING COMPANY OF NEW BERN, INC.
16 ("PEPSI") is a person doing business within the meaning of Health & Safety Code §25249.11.

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

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

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

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

28 15. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or

1 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of
2 California.

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

5 17. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
6 of California.

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

12 19. PEPSI, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS,
13 RETAIL DEFENDANTS, and Defendants DOES 1 through 150 shall, where appropriate,
14 collectively be referred to hereafter as "DEFENDANTS".

15 VENUE AND JURISDICTION

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

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

25 22. The California Superior Court has jurisdiction over DEFENDANTS based on
26 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
27 association that either is a citizen of the State of California, has sufficient minimum contacts in the
28 State of California, or otherwise purposefully avails itself of the California market.

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

3 **FIRST CAUSE OF ACTION**

4 **(Violation of Proposition 65)**

5 23. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
6 Paragraphs 1 through 22, inclusive.

7 24. The citizens of the State of California have expressly stated in the Safe Drinking
8 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* ("Proposition
9 65") that they must be informed "about exposures to chemicals that cause cancer, birth defects and
10 other reproductive harm." (Proposition 65, §1(b).)

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

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

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

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

1 29. At all times relevant to this action, the PRODUCTS contained the LISTED
2 CHEMICAL.

3 30. At all times relevant to this action, the DEFENDANTS knew or should have known
4 that the PRODUCTS contained the LISTED CHEMICAL.

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

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

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

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

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

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

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

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

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

5 **PRAYER FOR RELIEF**

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

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


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

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

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

17 Dated: December 12, 2005

18 Respectfully Submitted,
HIRST & CHANLER

19 
20 Daniel Bornstein
21 Attorneys for Plaintiff
RUSSELL BRIMER