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CASE MANAGEMENT CONFERENCE SET

JUL 07 2006 - 9 @ AM

DEPARTMENT 212

ENDORSED
FILED
San Francisco County Superior Court

FEB - 1 2006

GORDON PARK-LI, Clerk

BY: PARAM NATT
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE CITY AND COUNTY OF SAN FRANCISCO

10 UNLIMITED CIVIL JURISDICTION

11 RUSSELL BRIMER,)

12)
13)
14 Plaintiff,)

15 v.)

16 CONCORD ENTERPRISES, INC.; and DOES)
17 1 through 150,)

18 Defendants.)
19)

No. CGC - 06 449058

COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF

Health & Safety Code §25249

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

22 **NATURE OF THE ACTION**

23 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,
24 on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the
25 presence of and nature of toxic chemicals in consumer goods.

26 2. This Complaint seeks to remedy defendants' continuing failures to warn the citizens
27 of the State of California about the presence of, the nature of and such citizens' actual and potential

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COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

1 exposure to lead present in or on consumer products placed into the stream of commerce by
2 defendants.

3 3. Lead is a chemical that is identified within 22 C.C.R. §12000 and that is known to
4 the State of California to cause cancer and birth defects (and other reproductive harm). Lead shall
5 hereafter be referred to as "LISTED CHEMICALS".

6 4. The consumer products containing the LISTED CHEMICALS, and for which
7 defendants are responsible, are whisky glasses and other glassware intended for the consumption of
8 food or beverages with colored artwork or designs (containing lead) on the exterior including, but
9 not limited to, *Better Choice 4PC Whisky Glass (#0 89775 39789 8)*. All such consumer products
10 containing the LISTED CHEMICALS shall hereafter be referred to as the "PRODUCTS".

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

16 6. Beginning on February 27, 1987, the State had listed lead as a chemical known to
17 cause birth defects and other reproductive harm. This chemical became subject to the warning
18 requirement one year later and was therefore subject to the "clear and reasonable warning"
19 requirements of Proposition 65, beginning on February 27, 1988. (22 Code of Regulations
20 §12000(b)(c); Health and Safety Code §25249.5 *et seq.*)

21 7. Defendants' failure to provide proper mandatory warnings about exposure to the
22 LISTED CHEMICALS in conjunction with the sale of the PRODUCTS is a violation of
23 Proposition 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for
24 each such violation.

25 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
26 permanent injunctive relief to compel defendants to provide users of the PRODUCTS with the

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

1 appropriate Proposition 65 warning regarding the hazards of such LISTED CHEMICALS.

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

4 PARTIES

5 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who resides in
6 the County of ALAMEDA and who is dedicated to protecting the health of California citizens,
7 including the elimination or reduction of toxic exposures, and who brings this action on behalf of
8 the general public pursuant to Health & Safety Code §25249.7.

9 11. Defendant CONCORD ENTERPRISES, INC. ("CONCORD") is a person doing
10 business within the meaning of Health & Safety Code §25249.11.

11 12. CONCORD distributes and/or offers the PRODUCTS for sale or use in the State of
12 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use
13 in State of California.

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

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

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

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

26 17. DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each persons doing
27 business within the meaning of Health & Safety Code §25249.

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1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65)**

3 24. Plaintiff realleges and incorporates by reference, as if specifically set forth herein,
4 Paragraphs 1 through 23, inclusive.

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

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

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

18 28. Beginning on November 23, 2005, "60-Day Notices" of Proposition 65 violations
19 containing a Certificate of Merit pursuant to California Health & Safety Code § 25249.7(d)(1)
20 were provided to public enforcement agencies and to CONCORD stating that exposures to the
21 LISTED CHEMICALS were occurring in the State of California from the reasonably foreseeable
22 uses of the PRODUCTS, without the individual purchasers and users first having been provided
23 with a "clear and reasonable warning" regarding such exposure.

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

27 30. At all times relevant to this action, the PRODUCTS contained the LISTED
28 CHEMICALS.

1 31. At all times relevant to this action, the DEFENDANTS knew or should have known
2 that the PRODUCTS contained the LISTED CHEMICALS.

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

6 33. The normal and reasonably foreseeable use of the PRODUCTS has caused and
7 continues to cause an exposure to the LISTED CHEMICALS, as such exposure is defined by
8 22 C.C.R. §12601.

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

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

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

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

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

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

