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ENDORSED
FILED
San Francisco County Superior Court

AUG - 3 2006

GORDON PARK-LI, Clerk
BY: PARAM NATT
Deputy Clerk

Attorneys for Plaintiff
RUSSELL BRIMER

JAN - 5 2007 - 9⁰⁰ AM

DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

ETS EXPRESS, INC.; THE VERNON
COMPANY; and DOES 1 through 150,
inclusive,

Defendants.

No. CGC - 06 - 454813

**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:

NATURE OF THE ACTION

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

2. This Complaint seeks to remedy defendants' continuing failures to warn the

1 citizens of the State of California about the presence of, the nature of, and such citizens' actual and
2 potential exposure to lead present in or on consumer products placed into the stream of commerce
3 by defendants.

4 3. Lead is a chemical that is identified in Title 22, California Code of Regulations
5 ("CCR") §12000 that is known to the State of California to cause birth defects and other
6 reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL." The
7 consumer products containing the LISTED CHEMICAL, and for which defendants are
8 responsible, are mugs and other ceramic containers intended for the consumption of food or
9 beverages with colored artwork or designs on the exterior including, but not limited to, *White*
10 *Coffee Mug, Club One Casino*. All such consumer product containing the LISTED CHEMICAL
11 on the exterior shall hereafter be referred to as the "PRODUCTS."

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

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

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

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

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

1 with the appropriate Proposition 65 warning regarding the health hazards of the LISTED
2 CHEMICAL.

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

5 **PARTIES**

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

10 10. Defendant ETS EXPRESS, INC. (“ETS”) is a person doing business within the
11 meaning of Health & Safety Code §25249.11.

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

15 12. Defendant THE VERNON COMPANY (“VERNON”) is a person doing business
16 within the meaning of Health & Safety Code §25249.11.

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

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

22 15. 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
25 manufacturing, one or more of the PRODUCTS for sale, consumption or use in the State of
26 California.

27 16. Defendants DOES 51-100 (hereafter “DISTRIBUTOR DEFENDANTS”) are each
28 persons doing business within the meaning of Health & Safety Code §25249.11.

1 State of California, or otherwise purposefully avails itself of the California market.

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

4 **FIRST CAUSE OF ACTION**

5 **(Violation of Proposition 65)**

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

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

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

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

22 29. On May 24, 2006, a "60-Day Notice" of Proposition 65 violations containing a
23 Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1) was provided to
24 public enforcement agencies and to ETS EXPRESS, INC. and THE VERNON COMPANY.
25 stating that exposures to LISTED CHEMICAL were occurring in the State of California from the
26 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
27 having been provided with a "clear and reasonable warning" regarding such exposure.

28 ///

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

4 31. At all times relevant to this action, the PRODUCTS contained the LISTED
5 CHEMICAL.

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

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

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

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

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

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

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

