

ENDORSED
FILED
ALAMEDA COUNTY

JUL 11 2007

CLERK OF THE SUPERIOR COURT
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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION

16 MICHAEL DIPIRRO,

17 Plaintiff,

18 v.

19 GATEWAY, INC.; DELL, INC.;
20 COMPGEEKS.COM; GENICA
21 CORPORATION; and DOES 1 through 150,
22 inclusive,

23 Defendants.

Case No.

RG07334992

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Cal. Health & Safety Code §25249.6 et seq.)

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff MICHAEL DIPIRRO,
3 in the public interest of the citizens of the State of California, to enforce the People’s right to be
4 informed of the presence of lead (a toxic chemical) found in certain motherboards manufactured
5 and sold by defendants in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to warn
7 California citizens about their exposure to lead present in or on certain motherboards that
8 defendants manufacture, distribute and/or offer for sale to consumers throughout the State of
9 California.

10 3. High levels of lead are commonly found in the solder in and on motherboards that
11 defendants manufacture, distribute and/or offer for sale to consumers throughout the State of
12 California.

13 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code §25249.6 *et seq.* (hereinafter Proposition 65), “No person in the
15 course of doing business shall knowingly and intentionally expose any individual to a chemical
16 known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual” (*Cal. Health & Safety Code* §25249.6.)

18 5. On February 27, 1987, California identified and listed lead as a chemical known to
19 cause birth defects and other reproductive harm. Lead became subject to the warning requirement
20 one year later and was therefore subject to the “clear and reasonable warning” requirements of
21 Proposition 65, beginning on February 27, 1988. (*22 CCR §12000(c); Cal. Health & Safety Code*
22 *§25249.8.*) Lead shall hereinafter be referred to as the “LISTED CHEMICAL.”

23 6. Defendants manufacture and sell motherboards with lead solder including, but not
24 limited to, *Gateway 7210 Server Motherboard, #4000690; Dell GX100 Motherboard, #91XJP;*
25 *PCPartner Socket 754 MB Kit, Part #A-PCP3000-K1*, which contain excessive levels of the
26 LISTED CHEMICAL. All such motherboards containing the LISTED CHEMICAL shall
27 hereinafter be referred to as the “PRODUCTS.”
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1 15. Defendant COMPGEEKS.COM (“COMPGEEKS”) is a person doing business
2 within the meaning of California Health & Safety Code §25249.11.

3 16. COMPGEEKS manufactures, distributes and/or offers the PRODUCTS for sale or
4 use in the State of California or implies by its conduct that it manufactures, distributes and/or
5 offers the PRODUCTS for sale or use in the State of California.

6 17. Defendant GENICA CORPORATION (“GENICA”) is a person doing business
7 within the meaning of California Health & Safety Code §25249.11.

8 18. GENICA manufactures, distributes and/or offers the PRODUCTS for sale or use in
9 the State of California or implies by its conduct that it manufactures, distributes and/or offers the
10 PRODUCTS for sale or use in the State of California.

11 19. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons
12 doing business within the meaning of California Health & Safety Code §25249.11.

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

17 21. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
18 doing business within the meaning of California Health & Safety Code §25249.11.

19 22. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
20 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
21 the State of California.

22 23. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing
23 business within the meaning of California Health & Safety Code §25249.11.

24 24. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
25 of California.

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

4 26. GATEWAY, DELL, COMPGEEKS, GENICA, MANUFACTURER
5 DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where
6 appropriate, collectively be referred to hereinafter as “DEFENDANTS.”

7 **VENUE AND JURISDICTION**

8 27. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
9 Procedure §§394, 395, 395.5, because this Court is a court of competent jurisdiction, because one
10 or more instances of wrongful conduct occurred, and continues to occur, in the County of Alameda
11 and/or because DEFENDANTS conducted, and continue to conduct, business in this County with
12 respect to the PRODUCTS.

13 28. The California Superior Court has jurisdiction over this action pursuant to
14 California Constitution Article VI, §10, which grants the Superior Court “original jurisdiction in all
15 causes except those given by statute to other trial courts.” The statute under which this action is
16 brought does not specify any other basis of subject matter jurisdiction.

17 29. The California Superior Court has jurisdiction over DEFENDANTS based on
18 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
19 association that either are citizens of the State of California, have sufficient minimum contacts in
20 the State of California, or otherwise purposefully avail themselves of the California market.
21 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
22 courts consistent with traditional notions of fair play and substantial justice.
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1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65)**

3 30. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 29, inclusive.

5 31. The citizens of the State of California have expressly stated in the Safe Drinking
6 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.5, *et seq.*
7 (“Proposition 65”) that they must be informed “about exposures to chemicals that cause cancer,
8 birth defects and other reproductive harm.” (*Cal. Health & Safety Code §25249.6.*)

9 32. Proposition 65 states, “No person in the course of doing business shall knowingly
10 and intentionally expose any individual to a chemical known to the state to cause cancer or
11 reproductive toxicity without first giving clear and reasonable warning to such individual”
12 (*Id.*)

13 33. On April 30, 2007, sixty-day notices of violation, together with the requisite
14 certificates of merit, was provided to each GATEWAY, DELL, COMPGEEKS, GENICA, and to
15 various public enforcement agencies stating that as a result of DEFENDANTS’ sale of
16 PRODUCTS, purchasers and users in the State of California were being exposed to the LISTED
17 CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS, without the
18 individual purchasers and users first having been provided with a “clear and reasonable warning”
19 regarding such toxic exposures.

20 34. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
21 the PRODUCTS for sale or use in violation of California Health & Safety Code §25249.6 and
22 DEFENDANTS’ manufacture, distribution and/or offering of the PRODUCTS for sale or use in
23 violation of California Health & Safety Code §25249.6 has continued to occur beyond
24 DEFENDANTS’ receipt of plaintiff’s sixty-day notices of violation. Plaintiff further alleges and
25 believes that such violations will continue to occur into the future.

26 35. After receipt of the claims asserted in the sixty-day notices of violation, the
27 appropriate public enforcement agencies have failed to commence and diligently prosecute a cause
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1 of action against DEFENDANTS under Proposition 65.

2 36. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
3 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
4 limits.

5 37. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
6 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED
7 CHEMICAL.

8 38. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as to
9 expose individuals to the LISTED CHEMICAL through dermal contact, ingestion and/or
10 inhalation during the reasonably foreseeable use of the PRODUCTS.

11 39. The normal and reasonably foreseeable use of the PRODUCTS has caused and
12 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
13 by 22 CCR §12601(b).

14 40. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
15 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact,
16 ingestion and/or inhalation.

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

21 42. DEFENDANTS failed to provide a "clear and reasonable warning" to those
22 consumers; sole proprietors, employees, and other persons engaged in the small business field of
23 computer service and repair whom the Occupational Safety Health Act ("OSH ACT") does not
24 cover; and/or other individuals in the State of California who were or who could become exposed
25 to the LISTED CHEMICAL through dermal contact, ingestion and/or inhalation during the
26 reasonably foreseeable use of the PRODUCTS.

27 43. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
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1 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
2 contact, ingestion and/or inhalation resulting from the reasonably foreseeable use of the
3 PRODUCTS, sold by DEFENDANTS without “clear and reasonable warning,” have suffered, and
4 continue to suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy
5 at law.

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

9 45. As a consequence of the above-described acts, California Health & Safety Code
10 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against
11 DEFENDANTS.

12 46. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
13 set forth hereinafter.

14 **PRAYER FOR RELIEF**

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

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

19 2. That the Court, pursuant to California Health & Safety Code §25249.7(a),
20 preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing,
21 distributing or offering the PRODUCTS for sale or use in California, without providing “clear and
22 reasonable warnings” as defined by 22 CCR §12601, as to the harms associated with exposures to
23 the LISTED CHEMICAL;

24 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

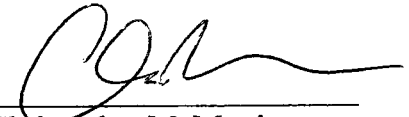
25 4. That the Court grant such other and further relief as may be just and proper.
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Dated: July 10, 2007

Respectfully Submitted,

HIRST & CHANLER LLP



Christopher M. Martin
Attorney for Plaintiff
MICHAEL DIPIRRO