

ENDORSED
FILED
ALAMEDA COUNTY

NOV 06 2007

CLERK OF THE SUPERIOR COURT
By C. Watkins
Deputy

1 Christopher M. Martin, State Bar No. 186021
2 HIRST & CHANLER LLP
3 566 W. Adams, Suite 450
4 Chicago, IL 60661
5 Telephone: (312) 376-1801
6 Facsimile: (312) 376-1804

7 Attorneys for Plaintiff
8 MICHAEL DIPIRRO

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION

12 MICHAEL DIPIRRO,
13 Plaintiff,

14 v.

15 BEST DATA PRODUCTS, INC.; DIAMOND
16 MULTIMEDIA; and DOES 1 through 150,
17 inclusive,
18 Defendants.

Case No. **RG07 354944**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

NATURE OF THE ACTION

1
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 modem cards manufactured
5 and sold by defendants in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to warn
7 California citizens about their exposure to lead present in or on certain modem cards 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 modem cards 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.* (Proposition 65), "No person in the course of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to the
16 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
17 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 modem cards with solder containing lead,
24 including, but not limited to, *Diamond SupraMax 56K PCI LE Fax Modem, SKU #90500031 (#0*
25 *18258 01244 7)*, which contain excessive levels of the LISTED CHEMICAL. All such modem
26 cards containing the LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

27 7. Defendants' failure to warn consumers; sole proprietors, employees, and other
28

1 persons engaged in the small business field of computer and/or other electronic device service and
2 repair whom the Occupational Safety Health Act (OSH ACT) does not cover; and/or other
3 individuals in the State of California about their exposure to the LISTED CHEMICAL in
4 conjunction with defendants' sale of the PRODUCTS is a violation of Proposition 65 and subjects
5 defendants to enjoinder of such conduct as well as civil penalties for each such violation.

6 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
7 and permanent injunctive relief to compel defendants to provide purchasers or users of the
8 PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL.
9 (*Cal. Health & Safety Code §25249.7(a).*)

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

12 **PARTIES**

13 10. Plaintiff MICHAEL DIPIRRO is a citizen of the City and County of San Francisco
14 in the State of California who is dedicated to protecting the health of California citizens through
15 the elimination or reduction of toxic exposures from consumer products, and brings this action in
16 the public interest pursuant to California Health & Safety Code §25249.7.

17 11. Defendant BEST DATA PRODUCTS, INC. (BEST DATA) is a person doing
18 business within the meaning of California Health & Safety Code §25249.11.

19 12. BEST DATA manufactures, distributes and/or offers the PRODUCTS for sale or
20 use in the State of California or implies by its conduct that it manufactures, distributes and/or
21 offers the PRODUCTS for sale or use in the State of California.

22 13. Defendant DIAMOND MULTIMEDIA (DIAMOND) is a person doing
23 business within the meaning of California Health & Safety Code §25249.11.

24 14. DIAMOND manufactures, distributes and/or offers the PRODUCTS for sale or use
25 in the State of California or implies by its conduct that it manufactures, distributes and/or offers the
26 PRODUCTS for sale or use in the State of California.

1 15. Defendants DOES 1-50 (MANUFACTURER DEFENDANTS) are each persons
2 doing business within the meaning of California Health & Safety Code §25249.11.

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

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

9 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
10 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
11 the State of California.

12 19. Defendants DOES 101-150 (RETAIL DEFENDANTS) are each persons doing
13 business within the meaning of California Health & Safety Code §25249.11.

14 20. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
15 of California.

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

21 22. BEST DATA, DIAMOND, MANUFACTURER DEFENDANTS, DISTRIBUTOR
22 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
23 hereinafter as "DEFENDANTS."

24 **VENUE AND JURISDICTION**

25 23. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
26 Procedure §§394, 395, 395.5, because this Court is a court of competent jurisdiction, because one
27 or more instances of wrongful conduct occurred, and continues to occur, in the County of Alameda
28

1 and/or because DEFENDANTS conducted, and continue to conduct, business in this County with
2 respect to the PRODUCTS.

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

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

13 FIRST CAUSE OF ACTION

14 (Violation of Proposition 65)

15 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
16 Paragraphs 1 through 25, inclusive.

17 27. The citizens of the State of California have expressly stated in the Safe Drinking
18 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.5, *et seq.*
19 (Proposition 65) that they must be informed "about exposures to chemicals that cause cancer, birth
20 defects and other reproductive harm." (*Cal. Health & Safety Code §25249.6.*)

21 28. Proposition 65 states, "No person in the course of doing business shall knowingly
22 and intentionally expose any individual to a chemical known to the state to cause cancer or
23 reproductive toxicity without first giving clear and reasonable warning to such individual. . . ."
24 (*Id.*)

25 29. On June 26, 2007, a sixty-day notice of violation, together with the requisite
26 certificate of merit, was provided to BEST DATA, DIAMOND, and various public enforcement
27 agencies stating that as a result of BEST DATA's and DIAMOND's sale of PRODUCTS,
28

1 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL
2 resulting from the reasonably foreseeable uses of the PRODUCTS, without the individual
3 purchasers and users first having been provided with a "clear and reasonable warning" regarding
4 such toxic exposures.

5 30. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
6 the PRODUCTS for sale or use in violation of California Health & Safety Code §25249.6 and
7 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale or use in
8 violation of California Health & Safety Code §25249.6 has continued to occur beyond BEST
9 DATA's and DIAMOND's receipt of plaintiff's sixty-day notice of violation. Plaintiff further
10 alleges and believes that such violations will continue to occur into the future.

11 29. After receipt of the claims asserted in the sixty-day notice of violation, the
12 appropriate public enforcement agencies have failed to commence and diligently prosecute a cause
13 of action against BEST DATA and DIAMOND under Proposition 65.

14 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
15 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
16 limits.

17 31. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
18 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED
19 CHEMICAL.

20 32. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as to
21 expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
22 inhalation during the reasonably foreseeable use of the PRODUCTS.

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

26 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
27 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact,
28

1 ingestion, and/or inhalation.

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

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

12 37. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
13 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
14 contact, ingestion, and/or inhalation resulting from the reasonably foreseeable use of the
15 PRODUCTS, sold by DEFENDANTS without "clear and reasonable warning," have suffered, and
16 continue to suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy
17 at law.

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

21 39. As a consequence of the above-described acts, California Health & Safety Code
22 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against
23 DEFENDANTS.

24 40. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
25 set forth hereinafter.

26 ////

27 ////

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRAYER FOR RELIEF

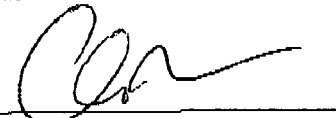
Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to California Health & Safety Code §25249.7(b), assess civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation alleged herein;
2. That the Court, pursuant to California Health & Safety Code §25249.7(a), preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing, distributing or offering the PRODUCTS for sale or use in California, without providing "clear and reasonable warnings" as defined by 22 CCR §12601, as to the harms associated with exposures to the LISTED CHEMICAL;
3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
4. That the Court grant such other and further relief as may be just and proper.

Dated: November 6, 2007

Respectfully Submitted,

HIRST & CHANLER LLP



Christopher M. Martin
Attorneys for Plaintiff
MICHAEL DIPIRRO

BY FAX