

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

Daniel Bornstein, State Bar No. 181711
Christopher Martin, State Bar No. 186021
Laralei S. Paras, State Bar No. 203319
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
RUSSELL BRIMER

FILED

MAR 19 2010

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: S. Hendrix, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

CVS PHARMACY, INC.; CVS CAREMARK
CORPORATION; and DOES 1-150, inclusive,

Defendants.

Case No. CIV ~~031101~~ ^{sh} 1001430

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER, in
3 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 flashlights sold in California.

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

8 3. High levels of lead are commonly found in and on flashlights that CVS and
9 CAREMARK manufacture, distribute and/or offer for sale to consumers throughout the State of
10 California.

11 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
12 California Health & Safety Code § 25249.6 *et seq.* (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. . . ." (*Cal. Health & Safety Code § 25249.6.*)

16 5. On February 27, 1987, California identified and listed lead as a chemical known to
17 cause birth defects and other reproductive harm. Lead became subject to the warning requirement
18 one year later and was therefore subject to the "clear and reasonable warning" requirements of
19 Proposition 65, beginning on February 27, 1988. (*27 CCR § 27001 (c); Cal. Health & Safety Code §*
20 *25249.8.*)

21 6. Lead shall be collectively referred to hereinafter as the "LISTED CHEMICAL."

22 7. Studies show that pregnant woman subject to high levels of lead exposure face
23 increased risks of spontaneous abortion and still birth. But even at low levels, lead exposure can
24 adversely affect a pregnancy, causing premature birth, shortened gestation, decreased fetal growth
25 and retarded fetal mental development. In a January 1997 report to Congress, United States
26 Department of Health and Human Services ("HHS") noted that the developing nervous system of a
27 fetus is particularly vulnerable to lead toxicity. Studies by HHS and the United States Agency for
28

1 Toxic Substances and Disease Registry report that the lead in the maternal blood can readily cross
2 the placenta barrier and enter the developing brain and nervous system of the fetus.

3 8. CVS and CAREMARK manufacture, distribute, and/or sell flashlights containing
4 excessive levels of lead including, but not limited to, the *Round The House 2-pk Torchlight, SKU*
5 *#463435 (#0 50428 13209 8)*. All such flashlights containing lead shall hereinafter be referred to as
6 the "PRODUCTS."

7 9. The allegations in this complaint are particularly significant where defendants'
8 PRODUCTS target teenagers and women in their reproductive years.

9 10. Defendants' failures to warn consumers and/or other individuals in the State of
10 California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale of
11 the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such
12 conduct as well as civil penalties for each such violation.

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

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

19 **PARTIES**

20 13. Plaintiff RUSSELL BRIMER, is a citizen of the State of California who is dedicated
21 to protecting the health of California citizens through the elimination or reduction of toxic exposures
22 from consumer products, and brings this action in the public interest pursuant to California Health &
23 Safety Code § 25249.7.

24 14. Defendant CVS is a person doing business within the meaning of California Health &
25 Safety Code § 25249.11.

26 15. Defendant CVS manufactures, distributes, and/or offers the PRODUCTS for sale or
27 use in the State of California or implies by its conduct that it manufactures, distributes, and/or offers
28 the PRODUCTS for sale or use in the State of California.

1 16. Defendant CAREMARK is a person doing business within the meaning of California
2 Health & Safety Code § 25249.11.

3 17. Defendant CAREMARK manufactures, distributes, and/or offers the PRODUCTS for
4 sale or 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 18. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
7 doing business within the meaning of California Health & Safety Code § 25249.11.

8 19. MANUFACTURER DEFENDANTS engage in the process of research, testing,
9 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage
10 in the process of research, testing, designing, assembling, fabricating and/or manufacturing, the
11 PRODUCTS for sale or use in the State of California.

12 20. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
13 doing business within the meaning of California Health & Safety Code § 25249.11.

14 21. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
15 transport the PRODUCTS to individuals, businesses or retailers for sale or use in the State of
16 California.

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

19 23. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State of
20 California.

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

26 25. CVS, CAREMARK, MANUFACTURER DEFENDANTS, DISTRIBUTOR
27 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
28 hereinafter as "DEFENDANTS."

1 **VENUE AND JURISDICTION**

2 26. Venue is proper in the Marin County Superior Court, pursuant to California Code of
3 Civil Procedure §§ 394, 395, 395.5, because this Court is a court of competent jurisdiction, because
4 one or more instances of wrongful conduct occurred, and continues to occur, in the County of Marin
5 and/or because DEFENDANTS conducted, and continue to conduct, business in this County with
6 respect to the PRODUCTS.

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

11 28. The California Superior Court has jurisdiction over DEFENDANTS based on
12 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
13 association that either are citizens of the State of California, have sufficient minimum contacts in the
14 State of California, or otherwise purposefully avail themselves of the California market.
15 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
16 courts consistent with traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

18 **(Violation of Proposition 65 - Against All Defendants)**

19 29. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 28, inclusive.

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

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

28

1 32. On September 30, 2009, a sixty-day notice of violation, together with the requisite
2 certificate of merit, was provided to CVS, CAREMARK and various public enforcement agencies
3 stating that as a result of the DEFENDANTS' sales of certain PRODUCTS, purchasers and users in
4 the State of California were being exposed to lead resulting from the reasonably foreseeable uses of
5 the PRODUCTS, without the individual purchasers and users first having been provided with a
6 "clear and reasonable warning" regarding such toxic exposures.

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

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

16 35. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
17 California by DEFENDANTS contained lead above the allowable state limits.

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

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

24 38. The normal and reasonably foreseeable use of the PRODUCTS has caused and
25 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined by
26 27 CCR § 25602(b).

27 ///

28 ///

1 39. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of the
2 PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact and/or
3 ingestion.

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

8 41. DEFENDANTS failed to provide a "clear and reasonable warning" to those
9 consumers and/or other individuals in the State of California who were or who could become
10 exposed to one or more the LISTED CHEMICAL through dermal contact and/or ingestion during
11 the reasonably foreseeable use of the PRODUCTS.

12 42. 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 and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold by
15 DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to suffer,
16 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

22 45. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
23 hereinafter.

24 **PRAYER FOR RELIEF**

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

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

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

2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or offering
the PRODUCTS for sale or use in California, without providing "clear and reasonable warnings" as
defined by 27 CCR § 25601, as to the harms associated with exposures to the LISTED CHEMICAL;

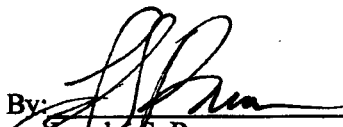
3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

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

Respectfully Submitted,

THE CHANLER GROUP

Dated: March 18, 2009

By: 
Karalee S. Paras
Attorneys for Plaintiff
RUSSELL BRIMER