

**FILED**

**FEB 10 2012**

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

*By: D. Taylor, Deputy*

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF MARIN  
10 UNLIMITED CIVIL JURISDICTION

12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 NATIONAL ENTERTAINMENT  
16 COLLECTIBLES ASSOCIATION, INC.; and  
17 DOES 1-150, inclusive,

18 Defendants.

Case No. CIV1200562

**FIRST AMENDED COMPLAINT FOR  
CIVIL PENALTIES AND INJUNCTIVE  
RELIEF**

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

BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff, RUSSELL  
3 BRIMER, in the public interest of the citizens of the state of California, to enforce the People's  
4 right to be informed of the presence of lead, a toxic chemical found in mugs with colored  
5 artwork or designs on the exterior sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to  
7 warn California citizens about reproductive toxicity associated with their exposure to lead  
8 present in or on certain mugs with colored artwork or designs on the exterior that defendants  
9 manufacture, import, distribute, and/or offer for sale to consumers throughout the state of  
10 California.

11 3. High levels of lead are commonly found in and on the mugs with colored artwork  
12 or designs on the exterior that defendants manufacture, distribute, and/or offer for sale to  
13 consumers throughout the state of California.

14 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,  
15 California Health & Safety Code § 25249.6 *et seq.* ("Proposition 65"), "[n]o person in the  
16 course of doing business shall knowingly and intentionally expose any individual to a chemical  
17 known to the state to cause cancer or reproductive toxicity without first giving clear and  
18 reasonable warning to such individual ..." (Cal. Health & Safety Code, § 25249.6.)

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

24 6. Defendants manufacture, distribute, and/or offer for sale mugs with colored  
25 artwork or designs on the exterior containing excessive levels of lead including, but not limited  
26 to, *The Twilight Saga Eclipse "Jacob in Tattoo" Mug (#6 34482 22332 1)*. All such mugs with  
27 colored artwork or designs on the exterior containing lead shall hereinafter be referred to as the  
28 "PRODUCTS."

1 7. Defendants' failure to warn consumers and/or other individuals in the state of  
2 California not covered by California's Occupational Safety Health Act, Labor Code § 6300 *et*  
3 *seq.* about their exposure to lead and its potential to cause birth defects and other reproductive  
4 harm in conjunction with Defendants' distribution, importation, manufacturing, and/or sale of  
5 the PRODUCTS is a violation of Proposition 65 and subjects Defendants to enjoinder of such  
6 conduct as well as civil penalties for each such violation.

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

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

13 **PARTIES**

14 10. Plaintiff, RUSSELL BRIMER, is a citizen of the state of California who is  
15 dedicated to protecting the health of California citizens through the elimination or reduction of  
16 toxic exposures from consumer products; he brings this action in the public interest pursuant to  
17 California Health & Safety Code § 25249.7(d).

18 11. Defendant NATIONAL ENTERTAINMENT COLLECTIBLES ASSOCIATION,  
19 INC. ("NATIONAL ENTERTAINMENT") is a person in the course of doing business within  
20 the meaning of California Health & Safety Code § 25249.11.

21 12. Defendant NATIONAL ENTERTAINMENT, manufactures, distributes, and/or  
22 offers the PRODUCTS for sale or use in the state of California, or implies by its conduct that it  
23 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of  
24 California.

25 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each  
26 persons in the course of doing business within the meaning of California Health & Safety Code  
27 § 25249.11.

1 14. MANUFACTURER DEFENDANTS engage in the process of researching,  
2 testing, designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that  
3 they engage in the process of researching, testing, designing, assembling, fabricating, and/or  
4 manufacturing, one or more of the PRODUCTS offered for sale or use in the state of California.

5 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons  
6 in the course of doing business within the meaning of California Health & Safety Code §  
7 25249.11.

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

11 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons in  
12 the course of doing business within the meaning of California Health & Safety Code §  
13 25249.11.

14 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the  
15 state of California.

16 19. 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  
18 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that  
19 each of the fictitiously named defendants is responsible for the acts and occurrences alleged  
20 herein. When ascertained, their true names shall be reflected in an amended complaint.

21 20. NATIONAL ENTERTAINMENT, MANUFACTURER DEFENDANTS,  
22 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,  
23 collectively be referred to as “DEFENDANTS.”

24 **VENUE AND JURISDICTION**

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

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

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

7 23. 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,  
9 or association that 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  
12 California courts consistent with traditional notions of fair play and substantial justice.

13 **FIRST CAUSE OF ACTION**

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

15 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
16 Paragraphs 1 through 23, inclusive.

17 25. 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 § 25249.6 *et seq.*  
19 that they must be informed “about exposures to chemicals that cause cancer, birth defects and  
20 other reproductive harm.” (Cal. Health & Safety Code, § 25249.6.)

21 26. Proposition 65 states, “[n]o person in the course of doing business shall  
22 knowingly and intentionally expose any individual to a chemical known to the state to cause  
23 cancer or reproductive toxicity without first giving clear and reasonable warning to such  
24 individual...” (*Ibid.*)

25 27. On or about October 11, 2011, a sixty-day notice of violation, together with the  
26 requisite certificate of merit, was provided to NATIONAL ENTERTAINMENT and various  
27 public enforcement agencies stating that, as a result of the DEFENDANTS’ sales of the  
28 PRODUCTS, purchasers and users in the state of California were being exposed to lead

1 resulting from the reasonably foreseeable use of the PRODUCTS, without the individual  
2 purchasers and users first having been provided with a “clear and reasonable warning”  
3 regarding such toxic exposures.

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

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

13 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
14 California by DEFENDANTS contained lead in an amount above the allowable state limits.

15 31. DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
16 distributed, and/or offered for sale or use in California contained lead.

17 32. Lead was present in or on the PRODUCTS in such a way as to expose individuals  
18 to lead through dermal contact and/or ingestion during the reasonably foreseeable use of the  
19 PRODUCTS.

20 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and  
21 continues to cause, consumer exposures to lead, as such exposure is defined by Title 27 CCR §  
22 25602(b).

23 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
24 the PRODUCTS would expose individuals to lead through dermal contact and/or ingestion.

25 35. DEFENDANTS intended that such exposures to lead from the reasonably  
26 foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation  
27 in the manufacture, distribution, and/or offering of the PRODUCTS for sale or use to  
28 individuals in the state of California.

1           36.   DEFENDANTS failed to provide a “clear and reasonable warning” to those  
 2 consumers and/or other individuals in the state of California who were, or who could become  
 3 exposed to lead through dermal contact and/or ingestion during the reasonably foreseeable use  
 4 of the PRODUCTS.

5           37.   Contrary to the express policy and statutory prohibition of Proposition 65 enacted  
 6 directly by California voters, individuals exposed to lead through dermal contact and/or  
 7 ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by  
 8 DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to  
 9 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

13           39.   As a consequence of the above-described acts, California Health & Safety Code  
 14 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
 15 DEFENDANTS.

16                                   **PRAYER FOR RELIEF**

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

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

21           2.    That the Court, pursuant to California Health & Safety Code § 25249.7(a),  
 22 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, and/or  
 23 offering the PRODUCTS for sale or use in California, without providing “clear and reasonable  
 24 warnings” as defined by 27 CCR § 25601, as to the harms associated with exposure to lead;

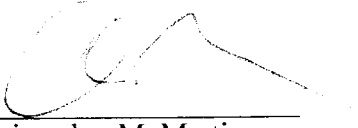
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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: February 1, 2012

Respectfully Submitted,

THE CHANLER GROUP

By: 

Christopher M. Martin  
Attorney for Plaintiff  
RUSSELL BRIMER