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ENDORSED

2012 OCT 17 3: 56

Deputy Clerk  
County of Santa Clara, California

D. Wendt

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SANTA CLARA  
13 UNLIMITED CIVIL JURISDICTION

112CV234452

14 RUSSELL BRIMER,  
15 Plaintiff,

16 v.

17 SMART INNOVATIONS, INC.; and DOES 1-  
18 150, inclusive,  
19 Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

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

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 the exterior designs on coffee cups  
5 sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to  
7 warn California citizens about the risk of exposure to lead present in and on the exterior designs  
8 of coffee cups manufactured, distributed, and offered for sale or use to consumers throughout  
9 the state of California.

10 3. High levels of lead are commonly found in and on the exterior decorations of  
11 coffee cups that defendants manufacture, distribute, and offer for sale to consumers throughout  
12 the state of California.

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

18 5. On February 27, 1987, California identified and listed lead pursuant to  
19 Proposition 65 as a chemical known to cause birth defects and other reproductive harm. Lead  
20 became subject to the “clear and reasonable warning” requirements of the Act one year later on  
21 February 27, 1988. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &  
22 25249.10(b). Lead is referred to hereinafter as the “LISTED CHEMICAL.”

23 6. Defendants manufacture, distribute, and sell coffee cups with exterior designs that  
24 contain excessive levels of lead, including, but not limited to, the *SmartPlanet The Eco Coffee*  
25 *Cup, Item #EC-7WHDI (#8 31121 00820 6)*. All such coffee cups with exterior designs  
26 containing lead are referred to collectively hereinafter as “PRODUCTS.”  
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1 they engage in the process of researching, testing, designing, assembling, fabricating, and  
2 manufacturing, one or more of the PRODUCTS for sale or use in the state of California.

3 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons  
4 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

5 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and  
6 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use  
7 in the state of California.

8 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons in  
9 the course of doing business within the meaning of Health and Safety Code section 25249.11.

10 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the  
11 state of California.

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

17 20. SMART INNOVATIONS, MANUFACTURER DEFENDANTS,  
18 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,  
19 collectively be referred to as “DEFENDANTS.”

20 **VENUE AND JURISDICTION**

21 21. Venue is proper in the Santa Clara County Superior Court, pursuant to Code of  
22 Civil Procedure sections 394, 395, and 395.5, because this Court is a court of competent  
23 jurisdiction, because one or more instances of wrongful conduct occurred and continue to occur  
24 in Santa Clara County, and/or because DEFENDANTS conducted, and continue to conduct,  
25 business in this county with respect to the PRODUCTS.

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

3 23. The California Superior Court has jurisdiction over DEFENDANTS based on  
4 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or  
5 association that is a citizen of the state of California, has sufficient minimum contacts in the  
6 state of California, or otherwise purposefully avails itself of the California market.  
7 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by  
8 California courts consistent with traditional notions of fair play and substantial justice.

9 **FIRST CAUSE OF ACTION**

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

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

13 25. The citizens of the State of California have expressly stated in the Safe Drinking  
14 Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.*, that  
15 they must be informed “about exposures to chemicals that cause cancer, birth defects and other  
16 reproductive harm.” Health & Safety Code § 25249.6.

17 26. Proposition 65 states, “[n]o person in the course of doing business shall  
18 knowingly and intentionally expose any individual to a chemical known to the state to cause  
19 cancer or reproductive toxicity without first giving clear and reasonable warning to such  
20 individual ...” *Id.*

21 27. On or about May 24, 2012, plaintiff’s sixty-day notice of violation, together with  
22 the requisite certificate of merit, was provided to SMART INNOVATIONS and certain public  
23 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS  
24 containing the LISTED CHEMICAL, purchasers and users in the state of California were being  
25 exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable use of the  
26 PRODUCTS, without the individual purchasers and users first having been provided with a  
27 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.  
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1           28. DEFENDANTS have engaged in the manufacture, distribution, and offering of  
2 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and  
3 such violations have continued to occur beyond DEFENDANTS' receipt of plaintiff's sixty-day  
4 notice of violation. Plaintiff further alleges that DEFENDANTS' violations are ongoing and  
5 continuous in nature and, as such, will continue to occur in the future.

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

9           30. The PRODUCTS manufactured, distributed, and offered for sale or use in  
10 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the  
11 allowable state limits, such that they require a "clear and reasonable" warning under Proposition  
12 65.

13           31. DEFENDANTS knew or should have known that the PRODUCTS they  
14 manufactured, distributed, and offered for sale or use in California contain the LISTED  
15 CHEMICAL.

16           32. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to  
17 expose individuals through dermal contact and/or ingestion during reasonably foreseeable use.

18           33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and  
19 continues to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are  
20 defined by California Code of Regulations title 27, section 25602(b).

21           34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
22 the PRODUCTS exposes individuals to the LISTED CHEMICAL through dermal contact  
23 and/or ingestion.

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

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1           36. DEFENDANTS failed to provide a “clear and reasonable warning” to those  
2 consumers and other individuals in the state of California who were or who could become  
3 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the  
4 reasonably foreseeable use 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 the LISTED CHEMICAL through dermal  
7 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold  
8 by 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. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the  
11 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day  
12 for each violation.

13           39. As a consequence of the above-described acts, Health and Safety Code  
14 section 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 Health and Safety Code section 25249.7(b), assess  
19 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

20           2. That the Court, pursuant to Health and Safety Code section 25249.7(a),  
21 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or  
22 offering the PRODUCTS for sale or use in California without first providing “clear and  
23 reasonable warnings” as defined by California Code of Regulations title 27, section 25601 *et*  
24 *seq.*, as to the harms associated with exposures the LISTED CHEMICAL;

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

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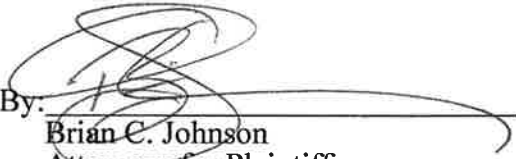
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4. That the Court grant such other and further relief as may be just and proper.

Dated: October 11, 2012

Respectfully Submitted,  
THE CHANLER GROUP

By:   
Brian C. Johnson  
Attorneys for Plaintiff  
RUSSELL BRIMER