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(ENDORSED)
FILED

2012 DEC 10 PM 3:48

David H. Yencovich, District Superior Court
County of Santa Clara, California
By: S. Smith
Deputy Clerk

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

RUSSELL BRIMER,

Plaintiff,

v.

SMART INNOVATIONS, INC.; and DOES 1-
150, inclusive,

Defendants.

Case No. 112CV234452

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

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

1 **NATURE OF THE ACTION**

2 1. This First Amended Complaint is a representative action brought by plaintiff
3 RUSSELL BRIMER in the public interest of the citizens of the State of California to enforce
4 the People’s right to be informed of the presence of lead, a toxic chemical the exterior designs
5 on coffee cups sold in California.

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

10 3. Detectable levels of lead are commonly found in and on the exterior decorations
11 of coffee cups that defendants manufacture, distribute, and offer for sale to consumers
12 throughout 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 import, manufacture, sell, and/or distribute for sale without warning
24 in California, certain coffee cups with exterior designs containing lead. The cups sold by
25 defendants without warning in California are known as the “Smart Planet Eco Coffee Cup,”
26 including but not limited to, the following: Item #EC-7DS17 (UPC# 8 31121 00527 4); Item
27 #EC-7DS18 (UPC#8 31121 00527 4); Item #EC-7DS19 (#8 31121 00527 4); Item #EC-7DS20
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1 (UPC# 8 31121 00527 4); Item #EC-7PA (UPC#8 31121 00516 8); Item #EC-7GF (UPC#8
2 31121 00523 6); Item # EC-7WHDI (#8 31121 00820 6); and Item #EC-7RP (#8 31121 00515
3 1). All such Eco Coffee Cups with exterior designs containing lead are referred to collectively
4 hereinafter as “PRODUCTS.”

5 7. Defendants’ failure to warn consumers and other individuals in the State of
6 California about their exposure to the LISTED CHEMICAL in conjunction with defendants’
7 sales of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder
8 of such conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a)
9 & (b)(1).

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

14 9. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
15 penalties against defendants for their violations of Proposition 65.

16 **PARTIES**

17 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is
18 dedicated to protecting the health of California citizens through the elimination or reduction of
19 toxic exposures from consumer products; and he brings this action in the public interest
20 pursuant to Health and Safety Code section 25249.7(d).

21 11. Defendant SMART INNOVATIONS, INC. (“SMART INNOVATIONS”) is a
22 person in the course of doing business within the meaning of Health and Safety Code section
23 25249.11.

24 12. SMART INNOVATIONS manufactures, distributes, and/or offers the
25 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
26 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.
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1 13. Defendant WALGREEN CO. (“WALGREEN’S”) is a person in the course of
2 doing business within the meaning of Health and Safety Code section 25249.11.

3 14. WALGREEN’S manufactures, distributes, and/or offers the PRODUCTS for sale
4 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 15. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
7 person in the course of doing business within the meaning of Health and Safety Code section
8 25249.11.

9 16. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
10 and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate,
11 and manufacture one or more of the PRODUCTS offered for sale or use in the State of
12 California.

13 17. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
14 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

15 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and
16 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
17 in the State of California.

18 19. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
19 the course of doing business within the meaning of Health and Safety Code section 25249.11.

20 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
21 State of California.

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

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1 28. Proposition 65 states, “[n]o person in the course of doing business shall
2 knowingly and intentionally expose any individual to a chemical known to the state to cause
3 cancer or reproductive toxicity without first giving clear and reasonable warning to such
4 individual” Health & Safety Code § 25249.6.

5 29. On or about May 24, 2012, plaintiff’s sixty-day notice of violation, together with
6 the requisite certificate of merit, was provided to SMART INNOVATIONS and certain public
7 enforcement agencies stating that, as a result of DEFENDANT’S sales of the PRODUCTS
8 containing the LISTED CHEMICAL, purchasers and users in the State of California were being
9 exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable use of the
10 PRODUCTS, without the individual purchasers and users first having been provided with a
11 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.

12 30. On or about September 25, 2012, plaintiff’s supplemental sixty-day notice of
13 violation, together with the requisite certificate of merit was provided to SMART
14 INNOVATIONS, WALGREEN’S and the same requisite public enforcement agencies stating
15 that, as a result of DEFENDANT’S sales of the PRODUCTS containing the LISTED
16 CHEMICAL, purchasers and users in the State of California were being exposed to the LISTED
17 CHEMICAL resulting from the reasonably foreseeable use of the PRODUCTS, without the
18 individual purchasers and users first having been provided with a “clear and reasonable
19 warning” regarding such toxic exposures, as required by Proposition 65.

20 31. DEFENDANTS have engaged in the manufacture, distribution, and offering of
21 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
22 such violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s sixty-day
23 notice of violation. Plaintiff further alleges that DEFENDANTS’ violations are ongoing and
24 continuous in nature and, as such, will continue to occur in the future.

25 32. After receiving the claims asserted in plaintiff’s sixty-day notice of violation, the
26 appropriate public enforcement agencies have failed to commence and diligently prosecute a
27 cause of action against DEFENDANTS under Proposition 65.

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1 33. The PRODUCTS manufactured, distributed, and offered for sale or use in
2 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the
3 allowable state limits, such that they require a “clear and reasonable” warning under Proposition
4 65.

5 34. DEFENDANTS knew or should have known that the PRODUCTS they
6 manufactured, distributed, and offered for sale or use in California contain the LISTED
7 CHEMICAL.

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

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

13 37. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
14 the PRODUCTS exposes individuals to the LISTED CHEMICAL through dermal contact
15 and/or ingestion.

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

20 39. DEFENDANTS failed to provide a “clear and reasonable warning” to those
21 consumers and other individuals in the State of California who were or who would become
22 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
23 reasonably foreseeable use of the PRODUCTS.

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

3 41. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
4 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
5 for each violation.

6 42. As a consequence of the above-described acts, Health and Safety Code
7 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
8 DEFENDANTS.

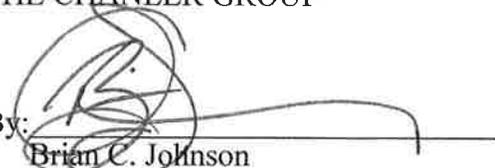
9 **PRAYER FOR RELIEF**

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

- 11 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
12 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;
13 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
14 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
15 offering the PRODUCTS for sale or use in California without first providing purchasers and
16 other users of the PRODUCTS with a "clear and reasonable warning" as defined by California
17 Code of Regulations title 27, section 25601 *et seq.*, regarding the harms associated with
18 exposures the LISTED CHEMICAL;
19 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
20 4. That the Court grant such other and further relief as may be just and proper.

21 Dated: December 7, 2012

22 Respectfully Submitted,
23 THE CHANLER GROUP

24 By: 
25 Brian C. Johnson
26 Attorneys for Plaintiff
27 RUSSELL BRIMER
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