# SUPPLEMENTAL 60-DAY NOTICE OF VIOLATION

*SENT IN COMPLIANCE WITH CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)*

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Date: January 13, 2006

To: Ali Jenab, President – ThinkGeek, Inc.
Ali Jenab, President – OSTG, Inc.
Ali Jenab, President – VA Software Corporation

California Attorney General's Office;
District Attorney's Office for 58 Counties;
City Attorneys for San Francisco, San Diego, San Jose, Sacramento and Los Angeles;

From: Russell Brimer

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## I. INTRODUCTION

My name is Russell Brimer. I am a citizen of the State of California acting in the interest of the general public. I seek to promote awareness of exposures to toxic chemicals in products sold in California and, if possible, to improve human health by reducing hazardous substances contained in such items. This Notice is provided to the parties listed above pursuant to California Health & Safety Code §25249.6 et seq. ("Proposition 65") and supplements the notice sent on September 9, 2005. As noted above, notice is being provided to the violators, ThinkGeek, Inc., OSTG, Inc. and VA Software Corporation (the "Violators"). The violations covered by this Notice consist of the product exposures, routes of exposures, and types of harm potentially resulting from exposure to the toxic chemicals ("listed chemicals") identified below, as follows:

| | |
|---|---|
| Product Exposure: | See Section VI. Exhibit A |
| Listed Chemicals: | Lead; Cadmium |
| Routes of Exposure: | Ingestion, Dermal |
| Types of Harm: | Birth Defects and Other Reproductive Harm |

## II. NATURE OF ALLEGED VIOLATION (PRODUCT EXPOSURE)

The specific type or types of products (hereafter the "products") that are causing consumer and occupational exposures in violation of Proposition 65 (and that are covered by this Notice) are listed in Exhibit A in section VI below. The Violators' sales of these glassware and ceramic products have been occurring from at least January 13, 2005 to the present. As a result of the sales of these products, exposures to the listed chemicals have been occurring without clear and reasonable warnings as required by Proposition 65. Without proper warnings regarding the toxic effects of exposures to the listed chemicals produced by the products, California citizens lack the information necessary to make informed decisions on whether and how to eliminate (or reduce) the risk of exposure to the toxic chemicals from the reasonably foreseeable use of the products.

## A. CONSUMER PRODUCT EXPOSURE

California consumers, through the act of buying, acquiring or utilizing the products, are exposed to the listed chemicals. By way of example but not limitation, exposures occur when California citizens use (such as drink from the vessel), display, clean, repair, pack, unpack, arrange, store or otherwise handle the products. These tasks cause consumers to be exposed directly or indirectly through the routine touching of the parts or portions of the products containing readily available surface amounts of the listed chemicals. Additionally, exposure can occur through the routine touching and ingesting of other materials that become contaminated with the listed chemicals from the products as a result of these tasks. People likely to be exposed include both children and adults.

## B. OCCUPATIONAL EXPOSURE

Similarly, men and women in California use the products as a part of their jobs and are, therefore, subject to occupational exposures to the listed chemicals. Employees are exposed at the California business locations of the apparent manufacturer, distributor and retailer (and their agents, assigns and divisions) as well as all other California locations where the products, or the component parts thereof that include the listed chemicals are, by way of example but not limitation, used (such as drank from the vessel), packed, unpacked, labeled, arranged, displayed, cleaned, stocked, stored, repaired or otherwise handled. These tasks cause employee exposure directly or indirectly though the routine touching of the parts or portions of the products containing readily available surface amounts of the listed chemicals. Additionally, exposure can occur through the routine touching and ingesting of other materials that are contaminated with the listed chemicals from the products as a result of these tasks. These products are also used by sole proprietors and other persons in settings not covered by the Occupational Safety Health Act ("OSH Act"). This Notice alleges the violation of Proposition 65 with respect to occupational exposure governed by the California State Plan for Occupational Safety and Health. The State Plan incorporates the provisions of Proposition 65, as approved by Federal OSHA on June 6, 1997. This approval specifically placed certain conditions with regard to occupational exposures on Proposition 65, including that it does not apply to the conduct of manufacturers occurring outside the State of California. The approval also provides that an employer may use the means of compliance contained in the general hazard communication requirement to comply with Proposition 65. It also requires that supplemental enforcement is subject to the supervision of the California Occupational Safety and Health Administration. Accordingly, any settlement, civil complaint, or substantive court orders in this matter must be submitted to the California Attorney General.

# III. CONTACT INFORMATION

Please direct all questions concerning this notice to my counsel at the following addresses:


Clifford Chanler
Joshua Voorhees
Hirst & Chanler
71 Elm Street, Suite 8
New Canaan, CT 06840
Telephone: (203) 966-9911

Daniel Bornstein
Laralei Paras
Hirst & Chanler
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710
Telephone: (510) 848-8880

## IV. PROPOSITION 65 INFORMATION

For general information concerning the provisions of Proposition 65, please feel free to contact the Office of Environmental Health Hazard Assessment's ("OEHHA") Proposition 65 Implementation Office at (916) 445-6900. For the Violators' reference, I have attached a copy of "Proposition 65: A Summary" which has been prepared by OEHHA.

## V. ADDITIONAL NOTICE INFORMATION

*THIS INFORMATION IS NOT REQUIRED TO BE PROVIDED UNDER CAL. CODE REGS., TITLE 22 §12903(b)(4).*

Identified below is a specific example of one or more of the categories or types of offending products recently purchased and witnessed as being available for purchase or use in California. Based on publicly available information, the retailers, distributors and/or manufacturers of the example of the categories or types of products are also provided below. Brimer believes and alleges that the sale of the offending products also has occurred without the requisite Proposition 65 "clear and reasonable warnings" at other locations including, but not limited to, transactions made over-the-counter, business-to-business, through the internet and/or via a catalog by the Violators.

| *Product** | *Retailer(s)* | *Manufacturer(s)/Distributor(s)* |
|---|---|---|
| RTFM Mug – Black, #5299ABLK | ThinkGeek, Inc.; OSTG, Inc.; VA Software Corporation (http://www.thinkgeek.com) | |

## VI. EXHIBIT A

| *Product Category* | *Such As** | *Toxins* |
|---|---|---|
| Mugs and Other Ceramicware Intended for the Storage, Serving or Consumption of Food or Beverages with Colored Artwork, Designs and/or Markings (containing lead) on the Exterior Surface | RTFM Mug – Black, #5299ABLK | Lead |
| Ceramicware Intended for the Storage, Serving or Consumption of Food or Beverages with Colored Artwork, Designs and/or Markings (containing cadmium) on the Exterior Surface | | Cadmium |
| Glassware Intended for the Storage, Serving or Consumption of Food or Beverages with Colored Artwork, Designs and/or Markings (containing lead) on the Exterior Surface | | Lead |

| | | |
|---|---|---|
| Glassware Intended for the Storage, Serving or Consumption of Food or Beverages with Colored Artwork, Designs and/or Markings (containing cadmium) on the Exterior Surface | | Cadmium |

*Any specifically identified example of the types of products subject to this Notice is for the recipients' benefit to assist in their investigation of, among other things, the magnitude of potential exposure to the listed chemicals from other items within the product category listed in Exhibit A. It is important to note that this example is not meant to be an exhaustive or comprehensive identification of each specific offending product of the types listed under "Product Category" in Exhibit A. Further, it is this citizen's position that the alleged Violators are obligated to continue to conduct in good faith an investigation into other specific products within the types or categories described above that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the notice recipients' custody or control) during the relevant period so as to ensure that the requisite toxic warnings are provided to California citizens prior to purchase.

# CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7(d)

I, Clifford A. Chanler, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and Safety Code §25249.6 by failing to provide clear and reasonable warnings.

2. I am the attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the ***alleged*** exposure to the listed chemicals that is the subject of this action.

4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and the information did not prove that the alleged violators will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including information identified in Health and Safety Code §25249.7(h)(2) (*i.e.*, (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.)

Dated: 1/13/06

Clifford A. Chanler

# PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my business address is 2560 Ninth Street, Suite 214, Berkeley, CA 94710.

On January 13, 2006, I served the following document:

**SUPPLEMENTAL 60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH & SAFETY CODE §25249.7(d);**

**PROPOSITION 65: A SUMMARY;**

**CERTIFICATE OF MERIT; AND**

**CERTIFICATE OF MERIT ATTACHMENTS (SERVED ONLY ON THE ATTORNEY GENERAL)**

served on the Violators listed below via Standard Overnight Air Service by placing a true and correct copy in each sealed envelope, addressed to each Violator and placing each envelope in a Federal Express Drop-Off Box:

Ali Jenab, President
ThinkGeek, Inc.
c/o Rod Strickland
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050
Tel. (650) 320-4857

Ali Jenab, President
OSTG, Inc.
c/o Rod Strickland
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050
Tel. (650) 320-4857

Ali Jenab, President
VA Software Corporation
c/o Rod Strickland
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050
Tel. (650) 320-4857

as well as providing copies of the notice to the public enforcers by placing a true and correct copy in a sealed envelope, addressed to each party listed below, and served as follows:

| | |
|---|---|
| *Via Standard Overnight Air Service by placing such envelope in a Federal Express Drop-Off Box:* | The Attorney General of the State of California; |

| | |
|---|---|
| *By placing each envelope in a United States Postal Service mailbox, first class postage prepaid:* | The District Attorney for Each of the 58 counties in California; and<br><br>The City Attorney for Los Angeles, San Diego, San Jose, San Francisco and Sacramento; |

*A list of addresses for each of these recipients is attached.*

Executed on January 13, 2006, at Berkeley, California.

Joyce van Ginkel