

**ENDORSED**

**SUMMONS ISSUED**  
**FILED**  
*San Francisco County Superior Court*

NOV 08 2005

GORDON PARK-LI, Clerk

BY: \_\_\_\_\_ Deputy Clerk

DE LA VEGA-NAVARRO, ~~Rossaty~~

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CASE MANAGEMENT CONFERENCE SET

APR 07 2006 09 AM

DEPARTMENT 212

10 Attorneys for Plaintiff  
11 RUSSELL BRIMER

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE CITY AND COUNTY OF SAN FRANCISCO

14 UNLIMITED CIVIL JURISDICTION

15 CGC - 05 - 446477

16  
17 RUSSELL BRIMER, )  
18 Plaintiff, )  
19 v. )  
20 THE KROGER CO.; FOODS CO.; and DOES )  
21 1 through 150, inclusive. )  
22 Defendants. )  
23 \_\_\_\_\_ )

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

**COMPLAINT FOR CIVIL  
PENALTIES AND INJUNCTIVE  
RELIEF**

*(Health & Safety Code §25249, et seq.)*

24  
25  
26 RUSSELL BRIMER, by and through his counsel, on behalf of himself, on behalf all others  
27 similarly situated and on behalf of the general public, hereby alleges as follows:  
28

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

1 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition  
2 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such  
3 violation.

4 7. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive  
5 and permanent injunctive relief to compel defendants to provide purchasers of the PRODUCTS  
6 with the appropriate Proposition 65 warning regarding the health hazards of the LISTED  
7 CHEMICAL.

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

### 10 PARTIES

11 9. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated  
12 to protecting the health of California citizens, including the elimination or reduction of toxic  
13 exposures from consumer products, and who brings this action on behalf of the general public  
14 pursuant to Health & Safety Code §25249.7.

15 10. Defendant THE KROGER CO. ("KROGER") is a person doing business within the  
16 meaning of Health & Safety Code §25249.11.

17 11. KROGER distributes and/or offers the PRODUCTS for sale or use in the State of  
18 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use  
19 in the State of California.

20 12. Defendant FOODS CO. ("FOODS CO.") is a person doing business within the  
21 meaning of Health & Safety Code §25249.11.

22 13. FOODS CO. distributes and/or offers the PRODUCTS for sale or use in the State of  
23 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use  
24 in the State of California.

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

27 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,  
28 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they

1 engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing,  
2 one or more of the PRODUCTS for sale, consumption or use in the State of California.

3 16. Defendants DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each  
4 persons doing business within the meaning of Health & Safety Code §25249.11.

5 17. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or  
6 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of  
7 California.

8 18. Defendants DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each persons  
9 doing business within the meaning of Health & Safety Code §25249.11.

10 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State  
11 of California.

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

17 21. KROGER, FOODS CO., MANUFACTURER DEFENDANTS, DISTRIBUTOR  
18 DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 through 150 shall, where  
19 appropriate, collectively be referred to hereafter as "DEFENDANTS".

20 **VENUE AND JURISDICTION**

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

26 23. The California Superior Court has jurisdiction over this action pursuant to  
27 California Constitution Article VI, §10, which grants the Superior Court "original jurisdiction in all  
28 causes except those given by statute to other trial courts." The statute under which this action is

1 brought does not specify any other basis of subject matter jurisdiction.

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

8 **FIRST CAUSE OF ACTION**

9 **(Violation of Proposition 65)**

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

12 26. The citizens of the State of California have expressly stated in the Safe Drinking  
13 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* ("Proposition  
14 65") that they must be informed "about exposures to chemicals that cause cancer, birth defects and  
15 other reproductive harm." (Proposition 65, §1(b).)

16 27. Proposition 65 further states that, "No person in the course of doing business shall  
17 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer  
18 or reproductive toxicity without first giving clear and reasonable warning to such individual...."

19 28. Based on information and good faith belief, plaintiff alleges that, at all times  
20 relevant to this Complaint, DEFENDANTS have engaged in the sales of the PRODUCTS in  
21 violation Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS' offensive sale of the  
22 PRODUCTS has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice  
23 of Violation. Plaintiff also alleges and believes that such violations will continue to occur into the  
24 future.

25 29. On September 2, 2005, a "60-Day Notice" of Proposition 65 violations was  
26 provided to public enforcement agencies and to THE KROGER CO. and FOODS CO. stating that  
27 exposures to the LISTED CHEMICAL were occurring in the State of California from the  
28 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first

1 having been provided with a “clear and reasonable warning” regarding such exposure.

2 30. The appropriate public enforcement agencies have failed to commence and  
3 diligently prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against  
4 DEFENDANTS based on the claims asserted in Plaintiff’s 60-Day Notice.

5 31. At all times relevant to this action, the PRODUCTS contained the LISTED  
6 CHEMICAL.

7 32. At all times relevant to this action, the DEFENDANTS knew or should have known  
8 that the PRODUCTS contained the LISTED CHEMICAL.

9 33. At all times relevant to this action, the LISTED CHEMICAL was present in or on  
10 the PRODUCTS in such a way as to be available for transfer or release from PRODUCTS to  
11 individuals during the reasonably foreseeable use of the PRODUCTS.

12 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and  
13 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by  
14 22 CCR §12601.

15 35. Based on information and good faith belief, plaintiff alleges that at all times relevant  
16 to this action, DEFENDANTS had knowledge that individuals’ normal and reasonably foreseeable  
17 use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL.

18 36. At all times relevant to this action, DEFENDANTS, and each of them, intended that  
19 such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the  
20 PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture,  
21 distribution and/or sale of PRODUCTS to individuals in the State of California.

22 37. At all times relevant to this action, DEFENDANTS failed to provide a “clear and  
23 reasonable warning” of reproductive toxicity (as defined by 22 CCR §12601) to those consumers or  
24 other individuals in the State of California who were or could become exposed to the PRODUCTS  
25 and the LISTED CHEMICAL contained therein.

26 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
27 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the  
28 PRODUCTS, without “clear and reasonable warning”, have suffered and continue to suffer

1 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

2 39. As a consequence of the above-described acts, DEFENDANTS, and each of them,  
3 are liable, pursuant to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500  
4 per day for each violation.

5 40. As a consequence of the above-described acts, Health & Safety Code §25249.7 also  
6 specifically authorizes the grant of injunctive relief under Proposition 65 against DEFENDANTS.

7 Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as  
8 set forth hereafter.

9 **PRAYER FOR RELIEF**

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

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

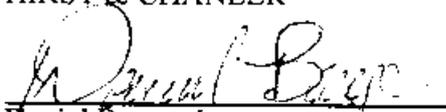
14 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and  
15 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for sale or  
16 use in California, without providing an identification of the LISTED CHEMICAL in the  
17 PRODUCTS as well as "clear and reasonable warning[s]" as defined by 22 CCR §12601, as  
18 plaintiff shall specify in further application to the Court;

19 3. That the Court grant plaintiff his reasonable attorney's 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: November 7, 2005

22 Respectfully Submitted,  
HIRST & CHANLER

23   
24 Daniel Bornstein  
25 Attorneys for Plaintiff  
26 RUSSELL BRIMER  
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