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ENDORSED
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ALAMEDA COUNTY
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CLERK (DR COURT
By **M. Salcido**
Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

13 RUSSELL BRIMER,
14 Plaintiff,

15 v.

16 P.W. SUPERMARKETS, INC.; PW
17 MARKETS; and DOES 1 through 150,
18 inclusive,

18 Defendants.

Case No.: HG0628767

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

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

25 **NATURE OF THE ACTION**

26 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,
27 on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the
28 presence of and nature of toxic chemicals in consumer goods.

1 2. This Complaint seeks to remedy defendants' continuing failures to warn the citizens
2 of the State of California about the presence of, the nature of, and such citizens' actual and
3 potential exposure to lead present in or on consumer products placed into the stream of commerce
4 by defendants.

5 3. Lead is a chemical that is identified in Title 22, California Code of Regulations
6 ("CCR") §12000 that is known to the State of California to cause birth defects and other
7 reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL." The
8 consumer products containing the LISTED CHEMICAL, and for which defendants are responsible,
9 glass bottles and other glassware intended for the consumption of food or beverages with colored
10 artwork or designs on the exterior including, but not limited to, *Rhinegeld German Mustard 8 oz.*
11 *(#0 11209 00366 7)*. All such consumer product containing the LISTED CHEMICAL on the
12 exterior shall hereafter be referred to as the "PRODUCTS."

13 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
14 Health & Safety Code §25249.5 *et seq.*¹ (hereafter "Proposition 65"), "No person in the course of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to the
16 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
17 such individual...."

18 5. On February 27, 1987, the State listed lead as a chemical known to cause birth
19 defects and other reproductive harm. This chemical became subject to the warning requirement
20 one year later and was therefore subject to the "clear and reasonable warning" requirements of
21 Proposition 65, beginning on February 27, 1988. (22 CCR §12000(b)(c); Proposition 65.)

22 6. Defendants' failures to provide proper mandatory warnings about exposure to the
23 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition
24 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such
25 violation.

26 ///

27 _____
28 ¹ Unless specifically noted, all statutory citations refer to California law.

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

7
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 of Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS' offensive sale of
22 the PRODUCTS has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day
23 Notice of Violation. Plaintiff also alleges and believes that such violations will continue to occur
24 into the future.

25 29. On September 27, 2005, a "60-Day Notice" of Proposition 65 violations containing
26 a Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1) was provided to
27 public enforcement agencies and to P.W. SUPERMARKETS, INC. and PW MARKETS stating
28 that exposures to LISTED CHEMICAL were occurring in the State of California from the

1 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
2 having been provided with a “clear and reasonable warning” regarding such exposure.

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

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

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

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

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

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

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

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

27 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
28 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the

1 PRODUCTS, without "clear and reasonable warning," have suffered and continue to suffer
2 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

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

10 **PRAYER FOR RELIEF**

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

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


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

20 3. That the Court grant plaintiff his reasonable attorney's fees and costs of suit; and

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

22
23 Dated: August 30, 2006

24 Respectfully Submitted,
HIRST & CHANLER, LLP

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26 

27 Keith G. Adams
Attorneys for Plaintiff
RUSSELL BRIMER