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ENDORSED

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CLERK OF SUPERIOR COURT
SANTA CLARA COUNTY

Clark Sakai

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE CITY AND COUNTY OF SANTA CLARA
10 UNLIMITED CIVIL JURISDICTION
11

12
13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 GOLDEN PHOENIX SUPERMARKET; and
17 DOES 1 through 150, inclusive,

18 Defendants.

Case No.: 106CV068421

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

BY FAX

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22
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 tumblers 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, *Value 3 Pack Set, 10 oz. Glass*
11 *Tumblers with print Designs, Item #: 1001-3WP1 (#7 06792 85167 6)*. All such consumer product
12 containing the LISTED CHEMICAL on the exterior shall hereafter be referred to as the
13 “PRODUCTS.”

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

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

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

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

1 doing business within the meaning of Health & Safety Code §25249.11.

2 17. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
3 of California.

4 18. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
5 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code
6 of Civil Procedure §474. Plaintiff is informed and believes, and on that basis alleges, that each of
7 the fictitiously named defendants is responsible for the acts and occurrences herein alleged. When
8 ascertained, their true names shall be reflected in an amended complaint.

9 19. GOLDEN PHOENIX, MANUFACTURER DEFENDANTS, DISTRIBUTOR
10 DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 through 150 shall, where
11 appropriate, collectively be referred to hereafter as “DEFENDANTS”.

12 **VENUE AND JURISDICTION**

13 20. Venue is proper in the Santa Clara County Superior Court, pursuant to Code of
14 Civil Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because
15 one or more instances of wrongful conduct occurred, and continues to occur, in the County of
16 Santa Clara and/or because DEFENDANTS conducted, and continue to conduct, business in this
17 County with respect to the PRODUCTS.

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

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

28

1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65)**

3 23. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 22, inclusive.

5 24. The citizens of the State of California have expressly stated in the Safe Drinking
6 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* (“Proposition
7 65”) that they must be informed “about exposures to chemicals that cause cancer, birth defects and
8 other reproductive harm.” (Proposition 65, §1(b).)

9 25. Proposition 65 further states that, “No person in the course of doing business shall
10 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer
11 or reproductive toxicity without first giving clear and reasonable warning to such individual....”

12 26. Based on information and good faith belief, plaintiff alleges that, at all times
13 relevant to this Complaint, DEFENDANTS have engaged in the sales of the PRODUCTS in
14 violation of Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS’ offensive sale of
15 the PRODUCTS has continued to occur beyond DEFENDANTS’ receipt of plaintiff’s 60-Day
16 Notice of Violation. Plaintiff also alleges and believes that such violations will continue to occur
17 into the future.

18 27. On January 13, 2006, a “60-Day Notice” of Proposition 65 violations containing a
19 Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1) was provided to
20 public enforcement agencies and to GOLDEN PHOENIX SUPERMARKET stating that exposures
21 to LISTED CHEMICAL were occurring in the State of California from the reasonably foreseeable
22 uses of the PRODUCTS, without the individual purchasers and users first having been provided
23 with a “clear and reasonable warning” regarding such exposure.

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

27 29. At all times relevant to this action, the PRODUCTS contained the LISTED
28 CHEMICAL.

1 30. At all times relevant to this action, the DEFENDANTS knew or should have known
2 that the PRODUCTS contained the LISTED CHEMICAL.

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

6 32. The normal and reasonably foreseeable use of the PRODUCTS has caused and
7 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by 22
8 CCR §12601.

9 33. Based on information and good faith belief, plaintiff alleges that at all times
10 relevant to this action, DEFENDANTS had knowledge that individuals' normal and reasonably
11 foreseeable use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL.

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

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

20 36. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
21 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the
22 PRODUCTS, without "clear and reasonable warning," have suffered and continue to suffer
23 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

