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**ENDORSED
FILED
ALAMEDA COUNTY**

DEC 13 2006

CLERK OF THE SUPERIOR COURT
By Tasha Perry, Deputy

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
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13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 A & W BOTTLING COMPANY, INC.; and
17 DOES 1 through 150, inclusive,

18 Defendants.

Case No.:

RG 063 020 48

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

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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 are glass soda bottles with colored artwork or designs (containing lead) on the exterior surface
10 including, but not limited to, *Green River Soda, 12 fl. Oz. (UPC #0 73707 11300 7)*. All such
11 consumer products containing the LISTED CHEMICAL on the exterior shall hereafter be referred
12 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.

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

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 July 14, 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 A & W BOTTLING COMPANY, INC. 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.

