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**ENDORSED  
FILED**  
San Francisco County Superior Court

JAN 16 2007

GORDON PAH-K-LI, Clerk  
PARAMNATT

JUN 15 2007 -9<sup>00</sup>AM BY: \_\_\_\_\_  
Deputy Clerk

6 Attorneys for Plaintiff  
RUSSELL BRIMER

DEPARTMENT 212

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE CITY AND COUNTY OF SAN FRANCISCO  
10 UNLIMITED CIVIL JURISDICTION

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 MAX'S RESTAURANTS; MAX'S DINER OF  
17 SAN RAMON, INC.; and DOES 1 through  
150, inclusive,

18 Defendants.

CGC -07-459609

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

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

(Cal. Health & Safety Code §25249.6 et seq.)

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,  
3 in the public interest of the citizens of the State of California, to enforce the People’s right to be  
4 informed of the presence of lead (a toxic chemical) found in certain pint glasses and other glass  
5 containers intended for the consumption of food or beverages with colored artwork or designs on  
6 the exterior manufactured, distributed and/or sold by defendants in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to warn  
8 California citizens about their exposure to lead present in or on certain pint glasses and other glass  
9 containers intended for the consumption of food or beverages with colored artwork or designs on  
10 the exterior that defendants manufacture, distribute and/or offer for sale to consumers throughout  
11 the State of California.

12 3. High levels of lead are commonly found in and on the colored artwork or designs on  
13 the exterior of the pint glasses and other glass containers intended for the consumption of food or  
14 beverages that defendants manufacture, distribute and/or offer for sale to consumers throughout the  
15 State of California.

16 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,  
17 California Health & Safety Code §25249.6 *et seq.* (hereinafter Proposition 65), “No person in the  
18 course of doing business shall knowingly and intentionally expose any individual to a chemical  
19 known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable  
20 warning to such individual....” (*Cal. Health & Safety Code §25249.6.*)

21 5. On February 27, 1987, California identified and listed lead as a chemical known to  
22 cause birth defects and other reproductive harm. Lead became subject to the warning requirement  
23 one year later and was therefore subject to the “clear and reasonable warning” requirements of  
24 Proposition 65, beginning on February 27, 1988. (*22 CCR §12000(c); Cal. Health & Safety Code*  
25 *§25249.8.*) Lead shall hereinafter be referred to as the “LISTED CHEMICAL.”

26 6. Defendants manufacture, distribute, and/or sell pint glasses and other glass  
27 containers intended for the consumption of food or beverages with colored artwork or designs on  
28 the exterior containing lead including, but not limited to, *Max’s Logo Glass*, which contain

1 excessive levels of the LISTED CHEMICAL. All such pint glasses and other glass containers  
2 intended for the consumption of food or beverages with colored artwork or designs on the exterior  
3 containing the LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

4 7. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive  
5 and permanent injunctive relief to compel defendants to provide purchasers or users of the  
6 PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL.  
7 (*Cal. Health & Safety Code §25249.7(a).*)

8 8. Plaintiff also seeks civil penalties against defendants for their violations of  
9 Proposition 65, as provided for by California 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 through the elimination or reduction of toxic  
13 exposures from consumer products, and brings this action in the public interest pursuant to  
14 California Health & Safety Code §25249.7.

15 10. Defendant MAX'S RESTAURANTS ("MAX'S RESTAURANTS") is a person  
16 doing business within the meaning of California Health & Safety Code §25249.11.

17 11. MAX'S RESTAURANTS manufactures, distributes and/or offers the PRODUCTS  
18 for sale or use in the State of California or implies by its conduct that it manufactures, distributes  
19 and/or offers the PRODUCTS for sale or use in the State of California.

20 12. Defendant MAX'S DINER OF SAN RAMON ("MAX'S DINER") is a person  
21 doing business within the meaning of California Health & Safety Code §25249.11.

22 13. MAX'S DINER manufactures, distributes and/or offers the PRODUCTS for sale or  
23 use in the State of California or implies by its conduct that it manufactures, distributes and/or  
24 offers the PRODUCTS for sale or use in the State of California.

25 14. Defendants DOES 1-50 (hereinafter MANUFACTURER DEFENDANTS) are each  
26 persons doing business within the meaning of California 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 or use in the State of California.

3 16. Defendants DOES 51-100 (hereinafter DISTRIBUTOR DEFENDANTS) are each  
4 persons doing business within the meaning of California 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 for sale or use in  
7 the State of California.

8 18. Defendants DOES 101-150 (hereinafter RETAIL DEFENDANTS) are each persons  
9 doing business within the meaning of California 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. MAX'S RESTAURANTS, MAX'S DINER, MANUFACTURER DEFENDANTS,  
18 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS, shall, where appropriate,  
19 collectively be referred to hereinafter as "DEFENDANTS."

20 **VENUE AND JURISDICTION**

21 22. Venue is proper in the San Francisco County Superior Court, pursuant to Code of  
22 Civil Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because  
23 one or 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, California Health & Safety Code §25249.5, *et seq.*  
14 (Proposition 65) that they must be informed "about exposures to chemicals that cause cancer, birth  
15 defects and other reproductive harm." (*Cal. Health & Safety Code §25249.6.*)

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

19 28. On November 7, 2006, a sixty-day notice of violation, together with the requisite  
20 certificate of merit, was provided to MAX'S RESTAURANTS, MAX'S DINER, and various  
21 public enforcement agencies stating that as a result of MAX'S RESTAURANTS and MAX'S  
22 DINER'S sale of PRODUCTS, purchasers and users in the State of California were being exposed  
23 to the LISTED CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS,  
24 without the individual purchasers and users first having been provided with a "clear and reasonable  
25 warning" regarding such toxic exposures.

26 29. DEFENDANTS have engaged in the manufacture, distribution and/or offering of  
27 the PRODUCTS for sale or use in violation of California Health & Safety Code §25249.6 and  
28 DEFENDANTS' manufacture, distribution and/or offering of the PRODUCTS for sale or use in

1 violation of California Health & Safety Code §25249.6 has continued to occur beyond MAX'S  
2 RESTAURANTS and MAX'S DINER'S receipt of plaintiff's sixty-day notice of violation.  
3 Plaintiff further alleges and believes that such violations will continue to occur into the future.

4 30. After receipt of the claims asserted in the sixty-day notice of violation, the  
5 appropriate public enforcement agencies have failed to commence and diligently prosecute a cause  
6 of action against MAX'S RESTAURANT and MAX'S DINER under Proposition 65.

7 31. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
8 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state  
9 limits.

10 32. DEFENDANTS knew or should have known that the PRODUCTS manufactured,  
11 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED  
12 CHEMICAL.

13 33. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as to  
14 expose individuals to the LISTED CHEMICAL through ingestion and/or dermal contact during the  
15 reasonably foreseeable use of the PRODUCTS.

16 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and  
17 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined  
18 by 22 CCR §12601(b).

19 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of  
20 the PRODUCTS would expose individuals to the LISTED CHEMICAL through ingestion and/or  
21 dermal contact.

22 36. DEFENDANTS, and each of them, intended that such exposures to the LISTED  
23 CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their  
24 deliberate, non-accidental participation in the manufacture, distribution and/or offer for sale or use  
25 of PRODUCTS to individuals in the State of California.

26 37. DEFENDANTS failed to provide a "clear and reasonable warning" to those  
27 consumers and/or other individuals in the State of California who were or who could become  
28 exposed to the LISTED CHEMICAL through ingestion and/or dermal contact during the

1 reasonably foreseeable use of the PRODUCTS.

2 38. Contrary to the express policy and statutory prohibition of Proposition 65, enacted  
3 directly by California voters, individuals exposed to the LISTED CHEMICAL through ingestion  
4 and/or dermal contact resulting from the reasonably foreseeable use of the PRODUCTS, sold by  
5 DEFENDANTS without “clear and reasonable warning,” have suffered, and continue to suffer,  
6 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

10 40. As a consequence of the above-described acts, California Health & Safety Code  
11 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
12 DEFENDANTS.

13 41. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as  
14 set forth hereinafter.

15 **PRAYER FOR RELIEF**

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

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

20 2. That the Court, pursuant to California Health & Safety Code §25249.7(a),  
21 preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing,  
22 distributing or offering the PRODUCTS for sale or use in California, without providing “clear and  
23 reasonable warnings” as defined by 22 CCR §12601, as to the harms associated with exposures to  
24 the LISTED CHEMICAL;

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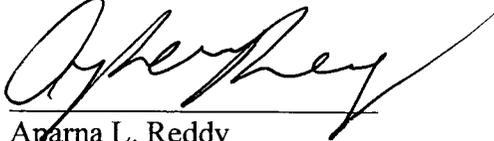
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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: January 16, 2007

Respectfully Submitted,  
HIRST & CHANLER, LLP



Aparna L. Reddy  
Attorneys for Plaintiff  
RUSSELL BRIMER