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FRESNO SUPERIOR COURT
By _____ GAC DEPUTY

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

This case has been assigned to
Judge Donald S. Black for all purposes

13 RUSSELL BRIMER,
14 Plaintiff,

15 v.

16 FIESTA FOOD WAREHOUSE; FIESTA
17 MEXICANA MARKET, L.P.; and DOES 1
18 through 150, inclusive,

18 Defendants.

Case No. 07 CE CG 00997 **DSB**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

NATURE OF THE ACTION

1
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 mugs an other ceramic
5 containers intended for the consumption of food or beverages with colored artwork or designs on
6 the exterior manufactured and 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 certain mugs an other
9 ceramic containers intended for the consumption of food or beverages with colored artwork or
10 designs on the exterior that defendants manufacture and sell to consumers throughout the State of
11 California.

12 3. High levels of lead are commonly found in the artwork or designs in and/or on
13 mugs and ceramic containers that defendants manufacture, distribute and/or sell to consumers
14 throughout the State of California.

15 4 Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
16 California Health & Safety Code §25249.6 *et seq.* (hereafter “Proposition 65”), “No person in the
17 course of doing business shall knowingly and intentionally expose any individual to a chemical
18 known to the state to cause cancer or reproductive toxicity without first giving clear and
19 reasonable warning to such individual....” (*Cal. Health & Safety Code §25249.6.*)

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

25 6. Defendants manufacture and sell certain mugs an other ceramic containers intended
26 for the consumption of food or beverages with colored artwork or designs on the exterior
27 including, but not limited to, *Porcelain Coffee Mug (#8 35148 00723 5)*, which contain excessive
28 levels of the LISTED CHEMICAL a quantity set forth in Health & Safety Code §25249.10(c). All

1 such mugs and other ceramic containers containing the LISTED CHEMICAL shall hereafter be
2 referred to as the "PRODUCTS."

3 7. Defendants' failure to warn consumers about their exposure to the LISTED
4 CHEMICAL in conjunction with defendants' sale of the PRODUCTS is a violation of Proposition
5 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such
6 violation.

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

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

13 **PARTIES**

14 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated
15 to protecting the health of California citizens through the elimination or reduction of toxic
16 exposures from consumer products, and brings this action in the public interest pursuant to
17 California Health & Safety Code §25249.7.

18 11. Defendant FIESTA FOOD WAREHOUSE ("FIESTA WAREHOUSE") is a person
19 doing business within the meaning of California Health & Safety Code §25249.11.

20 12. FIESTA WAREHOUSE offers the PRODUCTS for sale or use in the State of
21 California or implies by its conduct that it offers the PRODUCTS for sale or use in the State of
22 California.

23 13. Defendant FIESTA MEXICANA MARKET, L.P. ("FIESTA MARKET") is a
24 person doing business within the meaning of California Health & Safety Code §25249.11.

25 14. FIESTA MARKET manufactures, distributes and/or offers the PRODUCTS for sale
26 or use in the State of California or implies by its conduct that it manufactures, distributes and/or
27 offers the PRODUCTS for sale or use in the State of California.

28

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

3 16. MANUFACTURER DEFENDANTS engage in the process of research, testing,
4 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
5 engage in the process of research, testing, designing, assembling, fabricating and/or
6 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

7 17. Defendants DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each
8 persons doing business within the meaning of California Health & Safety Code §25249.11.

9 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
10 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
11 the State of California.

12 19. Defendants DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each
13 persons doing business within the meaning of California Health & Safety Code §25249.11.

14 20. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
15 of California.

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

21 22. FIESTA WAREHOUSE, FIESTA MARKET, MANUFACTURER
22 DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where
23 appropriate, collectively be referred to hereafter as "DEFENDANTS".

24 **VENUE AND JURISDICTION**

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

1 respect to the PRODUCTS.

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

6 25. The California Superior Court has jurisdiction over DEFENDANTS based on
7 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
8 association that either is a citizen of the State of California, has sufficient minimum contacts in the
9 State of California, or otherwise purposefully avails itself of the California market.

10 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
11 courts consistent with traditional notions of fair play and substantial justice.

12 **FIRST CAUSE OF ACTION**

13 **(Violation of Proposition 65)**

14 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
15 Paragraphs 1 through 25, inclusive.

16 27. The citizens of the State of California have expressly stated in the Safe Drinking
17 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.5, *et seq.*
18 (“Proposition 65”) that they must be informed “about exposures to chemicals that cause cancer,
19 birth defects and other reproductive harm.” (*Cal. Health & Safety Code §25249.6.*)

20 28. Proposition 65 states, “No person in the course of doing business shall knowingly
21 and intentionally expose any individual to a chemical known to the state to cause cancer or
22 reproductive toxicity without first giving clear and reasonable warning to such individual...” (*Id.*)

23 29. On January 12, 2007, a sixty-day notice of violation, together with the requisite
24 certificate of merit, was provided to FIESTA WAREHOUSE and FIESTA MARKET and various
25 public enforcement agencies stating that as a result of FIESTA WAREHOUSE and FIESTA
26 MARKET’s sale of the PRODUCTS, purchasers and users in the State of California were being
27 exposed to the LISTED CHEMICAL resulting from the reasonably foreseeable uses of the
28 PRODUCTS, without the individual purchasers and users first having been provided with a “clear

1 and reasonable warning” regarding such toxic exposures.

2 30. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
3 the PRODUCTS for sale or use in violation of California Health & Safety Code §25249.6 and
4 DEFENDANTS’ manufacture, distribution and/or offering of the PRODUCTS for sale or use in
5 violation of California Health & Safety Code §25249.6 has continued to occur beyond FIESTA
6 WAREHOUSE and FIESTA MARKET’s receipt of plaintiff’s sixty-day notice of violation.
7 Plaintiff further alleges and believes that such violations will continue to occur into the future.

8 31. After receipt of the claims asserted in the sixty-day notice of violation, the
9 appropriate public enforcement agencies have failed to commence and diligently prosecute a cause
10 of action against FIESTA WAREHOUSE and FIESTA MARKET under Proposition 65.

11 32. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
12 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
13 limits.

14 33. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
15 distributed, and/or offered for sale or use by DEFENDANTS in California contained the LISTED
16 CHEMICAL.

17 34. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
18 to expose individuals to the LISTED CHEMICAL through dermal contact and ingestion during the
19 reasonably foreseeable use of the PRODUCTS.

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

23 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
24 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
25 and ingestion.

26 37. DEFENDANTS, and each of them, intended that such exposures to the LISTED
27 CHEMICAL from the reasonably foreseeable use of the PRODUCTS would occur by their
28 deliberate, non-accidental participation in the manufacture, distribution and/or offer for sale or use

1 of PRODUCTS to individuals in the State of California.

2 38. DEFENDANTS failed to provide a “clear and reasonable warning” to those
3 consumers or other individuals in the State of California who were or who could become exposed
4 to the LISTED CHEMICAL through dermal contact or ingestion during the reasonably foreseeable
5 use of the PRODUCTS.

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

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

14 41. As a consequence of the above-described acts, California Health & Safety Code
15 §25249.7(a) also specifically authorizes the Court to grant injunctive relief against
16 DEFENDANTS.

17 42. Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
18 set forth hereafter.

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PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

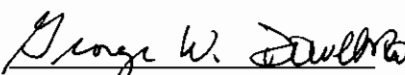
2. That the Court, pursuant to California Health & Safety Code §25249.7(a), preliminarily and permanently enjoin DEFENDANTS, and each of them, from manufacturing, distributing or offering the PRODUCTS for sale or use in California, without providing “clear and reasonable warnings” as defined by 22 CCR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

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: March 29, 2007

Respectfully Submitted,
HIRST & CHANLER, LLP


George W. Dowell
Attorneys for Plaintiff
RUSSELL BRIMER