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ENDORSED
FILED
San Francisco County Superior Court

AUG 23 2007

GORDON PARK-LI, Clerk
BY: CRISTINA E. BAUTISTA
Deputy Clerk
CASE MANAGEMENT CONFERENCE SET

JAN 25 2008 9:00 AM

DEPARTMENT OF
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

REC-07-166507

13 RUSSELL BRIMER,
14 Plaintiff,
15 v.
16 WHOLE FOODS MARKET, CALIFORNIA,
17 INC.; and DOES 1 through 150, inclusive,
18 Defendants.

No. _____
**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

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

3 **NATURE OF THE ACTION**

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

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

10 3. Lead is a chemical that is identified in Title 22, California Code of Regulations
11 ("CCR"), §12000 that is known to the State of California to cause birth defects and other
12 reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL." The
13 consumer products containing the LISTED CHEMICAL, and for which defendants are
14 responsible, are glass salad dressing shakers and glass wine bottles with colored artwork or
15 designs on the exterior, including, but not limited to, *Salad Dressing Shaker*, #20712 (#8 81448
16 20712 7), *Indaba Pinotage 2005* (#7 55738 00033 3), *Indaba Steen 2005* (#7 55738 00100 2) and
17 *Vintage 2004 Porto* (#5 601387 000702, alternate # 6 31992 90104 6). August 22, 2007. All such
18 consumer products containing the LISTED CHEMICAL on the exterior shall hereafter be referred
19 to as the "PRODUCTS."

20 4. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
21 Health & Safety Code §25249.6 *et seq.* (hereafter "Proposition 65"), "No person in the course of
22 doing business shall knowingly and intentionally expose any individual to a chemical known to
23 the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
24 to such individual...."

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

1 6. Defendants' failure to provide proper mandatory warnings about exposure to the
2 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of
3 Proposition 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for
4 each such violation.

5 7. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
6 and permanent injunctive relief to compel defendants to provide purchasers of the PRODUCTS
7 with the appropriate Proposition 65 warning regarding the health hazards of the LISTED
8 CHEMICAL.

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

11 9. This Complaint does not allege violations of Proposition 65 with respect to those
12 products already at issue in *Russell Brimer v. Whole Foods Market, California, Inc. et al.* (San
13 Francisco Case No. CGC-06-457886), currently pending in the San Francisco Superior Court.

14 **PARTIES**

15 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated
16 to protecting the health of California citizens, including by pursuing the elimination or reduction
17 of toxic exposures from consumer products, and who brings this action on behalf of the general
18 public pursuant to Health & Safety Code §25249.7.

19 11. Defendant WHOLE FOODS MARKET, CALIFORNIA, INC. ("WHOLE FOODS
20 CALIFORNIA") is a person doing business within the meaning of Health & Safety Code
21 §25249.11.

22 12. WHOLE FOODS CALIFORNIA manufactures, distributes and/or offers the
23 PRODUCTS for sale or use in the State of California or implies by its conduct that it
24 manufactures, distributes and/or offers the PRODUCTS for sale or use in the State of California.

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

27 14. 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
2 manufacturing, one or more of the PRODUCTS for sale, consumption or use in the State of
3 California.

4 15. Defendants DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each
5 persons doing business within the meaning of Health & Safety Code §25249.11.

6 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
7 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of
8 California.

9 17. Defendants DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each
10 persons doing business within the meaning of Health & Safety Code §25249.11.

11 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
12 of California.

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

18 20. WHOLE FOODS CALIFORNIA, MANUFACTURER DEFENDANTS,
19 DISTRIBUTOR DEFENDANTS, RETAIL DEFENDANTS, and Defendants DOES 1 through
20 150 shall, where appropriate, collectively be referred to hereafter as "DEFENDANTS."

21 VENUE AND JURISDICTION

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

27 22. The California Superior Court has jurisdiction over this action pursuant to
28 California Constitution Article VI, §10, which grants the Superior Court "original jurisdiction in

1 all causes except those given by statute to other trial courts.” The statute under which this action
2 is brought does not specify any other basis of subject matter jurisdiction.

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

9 **FIRST CAUSE OF ACTION**

10 **(Violation of Proposition 65)**

11 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 23, inclusive.

13 25. The citizens of the State of California have expressly stated in the Safe Drinking
14 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.6, *et seq.* that they must
15 be informed “about exposures to chemicals that cause cancer, birth defects and other reproductive
16 harm.” (*Proposition 65, §1(b).*)

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

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

27 28. On March 30, 2007, a “60-Day Notice” of Proposition 65 violations containing a
28 Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1) was provided to

1 public enforcement agencies and to WHOLE FOODS CALIFORNIA, stating that exposures to the
2 LISTED CHEMICAL were occurring in the State of California from the reasonably foreseeable
3 uses of the PRODUCTS, without the individual purchasers and users first having been provided
4 with a “clear and reasonable warning” regarding such exposure.

5 29. The “60-Day Notice” complied with 8 CCR §338 and was served to public
6 enforcement agencies with the statement set forth in 8 CCR §338(b). In addition, the mailing
7 envelopes of the notices that were served upon the Public Prosecutors prominently stated “Hazard
8 Communication Standard/ Proposition 65 Supplemental Enforcement Matter” in compliance with
9 8 CCR §338(f).

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

13 31. At all times relevant to this action, the PRODUCTS contained the LISTED
14 CHEMICAL.

15 32. At all times relevant to this action, the DEFENDANTS knew or should have known
16 that the PRODUCTS contained the LISTED CHEMICAL, as evidenced by prior notices having
17 been served on WHOLE FOODS CALIFORNIA for its sale of lead-painted glassware and
18 ceramicware dated September 9, 2005, August 11, 2006, and March 30, 2007.

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

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

25 35. Based on information and good-faith belief, plaintiff alleges that at all times
26 relevant to this action, DEFENDANTS had knowledge that individuals’ normal and reasonably
27 foreseeable use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL.
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1 36. At all times relevant to this action, DEFENDANTS, and each of them, intended that
2 such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the
3 PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture,
4 distribution and/or sale of PRODUCTS to individuals in the State of California.

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

9 38. DEFENDANTS' actions, in addition to exposing consumers, have also exposed their
10 employees, as well as the employees at other workplaces, to the LISTED CHEMICAL, without
11 appropriate warnings, including those provided in the general hazard communication requirements
12 of the California Occupational Safety and Health Administration set forth in 8 CCR §5194.

13 39. Plaintiff is informed and believes that, at all times relevant to this matter WHOLE
14 FOODS CALIFORNIA has been an employer as defined in 8 CCR §5194(c).

15 40. Plaintiff is informed and believes that, at all times relevant to this matter, WHOLE
16 FOODS CALIFORNIA failed to comply with 8 CCR §5194(f), and is liable for the exposures of
17 its employees, in addition to its customers , who received the PRODUCTS without appropriate
18 warning information.

19 41. Employees are exposed at the California business locations of WHOLE FOODS
20 CALIFORNIA, where the PRODUCTS are, by way of example but not limitation, packed,
21 unpacked, labeled, arranged, displayed, cleaned, transferred, stocked, stored or otherwise handled.

22 42. These tasks cause employee exposure directly or indirectly though the routine
23 touching of the parts or portions of the PRODUCTS containing readily available surface amounts
24 of the LISTED CHEMICAL.

25 43. Additionally, exposure can occur through the routine touching and ingesting of
26 other materials that are contaminated with the LISTED CHEMICAL from the PRODUCTS as a
27 result of these tasks.

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1 44. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
2 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the
3 PRODUCTS, without “clear and reasonable warning,” have suffered and continue to suffer
4 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

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

12 **PRAYER FOR RELIEF**

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

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

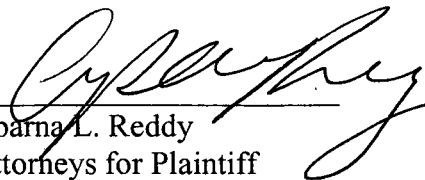
17 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
18 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for sale or
19 use in California, without providing an identification of the LISTED CHEMICAL in the
20 PRODUCTS as well as “clear and reasonable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

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

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

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24 Dated: August 23, 2007

Respectfully Submitted,
HIRST & CHANLER, LLP

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28 Aparna L. Reddy
Attorneys for Plaintiff
RUSSELL BRIMER