

1 Robert B. Leck III (State Bar No. 46903)  
LECK & ASSOCIATES  
2 Attorneys at Law  
100 Wilshire, Suite 200  
3 Santa Monica, CA 90401  
Telephone: (310) 899-2041  
4 Telecopier: (310) 451-7737

5 Attorneys for Defendant  
6 B.F Ascher & Company, Inc.

7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA  
9

10 ALEXANDER REDFOOT, a minor by and  
through his Guardian Ad Litem, MICHELL,  
11 REDFOOT; MICHELL REDFOOT,

12 Plaintiff,

13 v.

14 B.F. ASCHER & COMPANY; and DOES 1  
through 10, inclusive,

15 Defendants.  
16  
17

) CASE NO.  
)  
) NOTICE OF REMOVAL OF ACTION UNDER  
) 28 U.S.C. §1441(b) [DIVERSITY]

18 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

19 PLEASE TAKE NOTICE that defendant B.F. Ascher & Company, Inc. ("B.F. Ascher")  
20 hereby removes to this Court the state court action described herein.

21 1. On April 1, 2005, an action was commenced in the Superior Court of the State of  
22 California in and for the County of Contra Costa, entitled Alexander Redfoot, etc., et al., v. B.F.  
23 Ascher & Company, and Does 1 through 10, inclusive, Case Number C05-00674. A copy of the  
24 complaint is attached hereto as Exhibit "A."

25 2. The first date upon which defendant B.F. Ascher received a copy of said complaint  
26 was April 20, 2005, when a non-managerial employee of defendant was handed by an unknown  
27 person in a parking lot after hours, in an apparent service attempt, a copy of the summons and  
28 complaint of the state court; a Notice of Case Management Conference together with a Notice to

1 Plaintiff's of the ADR Information Sheet, a blank Case Management Conference Questionnaire, a  
2 blank Stipulation form; and an Application and Order for Appointment of Guardian Ad Litem. A  
3 copy of the summons is attached hereto as Exhibit "B" and the Application of Guardian Ad Litem is  
4 attached hereto as Exhibit "C."

5 3. A copy of the Answer to Complaint filed on behalf of B.F. Ascher in Contra Costa  
6 County Superior Court is attached hereto as Exhibit "D."

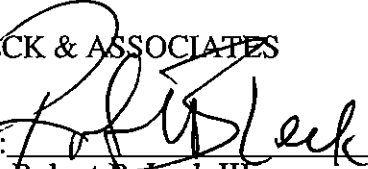
7 4. This action is a civil action of which this Court has original jurisdiction under 28  
8 U.S.C. §1332, and is one which may be removed to this Court by defendant pursuant to the  
9 provisions of 28 U.S.C. §1441(b), in that it is a civil action between citizens of different states and  
10 the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs. This is a  
11 products liability action brought by Michell Redfoot, individually and as Guardian Ad Litem of her  
12 5 year old minor son, Alexander Redfoot, to recover expenses to employ health care providers and  
13 for other medical expenses to care for Alexander, and for pain and suffering, and future medical  
14 expenses and lost wages for Alexander, who allegedly is permanently disabled and suffers from  
15 Pervasive Developmental Disorder, Autism, and associated symptoms as a result of exposure to Ayr  
16 Saline Nasal Mist, an over-the-counter product manufactured by defendant with the preservative  
17 thimerosal, which contains mercury. It is alleged that Michell administered the Nasal Mist to  
18 Alexander for several years for recurring nasal congestion. Plaintiffs' seeks general damages,  
19 economic damages for medical expenses, lost wages, loss of earning capacity, and punitive  
20 damages. While plaintiffs' prayer for damages does not include a specific amount in controversy,  
21 plaintiffs' request for general damages, special damages, and punitive damages reasonably will  
22 exceed the requisite jurisdictional limits.

23 5. Defendants are informed and believe that Michell Redfoot and Alexander Redfoot  
24 were, at the time of the filing of this action, and still are, citizens of the State of California residing  
25 in Lafayette, Contra Costa County. Defendant B.F. Ascher was, at the time of the filing of this  
26 action, and still is, a corporation incorporated under the laws of the State of Kansas, having its  
27 principal place of business in Lenexa, Kansas, and the state court complaint alleges that B.F. Ascher  
28 does business in San Francisco County, California.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

For all of the foregoing reasons, defendant B.F. Ascher respectfully submits that removal of this matter to this federal district court is appropriate.

Dated: May 18, 2005

LECK & ASSOCIATES  
By:   
Robert B. Leck III  
Attorneys for Defendant  
B. F. Ascher & Company, Inc.

# EXHIBIT A

**FILED**

2005 MAY 01 P 3:00

K. RYAN... COURT  
...  
... COURT

1 C. ANDREW WATERS, CA Bar No. 147259  
2 DANA C. FOX, TX Bar No. 24032191  
3 PAUL COOK, CA Bar No. 1790901  
4 WATERS & KRAUS, L.L.P.  
5 Continental Grand Plaza I  
6 300 North Continental Blvd., Suite 500  
7 El Segundo, California 90245  
8 Tel: (310) 414-8146  
9 Fax: (310) 414-8156

6 LAUREL L. SIMES, CA Bar No. 134637  
7 LEVIN SIMES & KAISER LLP  
8 One Bush Street, 14<sup>th</sup> Floor  
9 San Francisco, California 90802  
10 Tel: (415) 646-7160  
11 Fax: (415) 981-1270

10 Attorneys for Plaintiffs,  
11 Alexander Redfoot, a Minor, by and through his Guardian  
ad Litem and Michell Redfoot, and Michell Redfoot

PER LOCAL RULE 5 THIS  
CASE IS ASSIGNED TO  
DEPT 26

13 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
14 COUNTY OF CONTRA COSTA

C05-00674

16 ALEXANDER REDFOOT, a Minor, by and  
17 through his Guardian ad Litem, MICHELL  
18 REDFOOT; MICHELL REDFOOT,

) Case No.  
)  
) COMPLAINT FOR DAMAGES  
)

18 Plaintiffs,

19 vs.

20  
21 B.F. ASCHER & COMPANY, INC.; and  
DOES 1 through 10, inclusive,

22 Defendants.  
23

1 Plaintiffs, Alexander Redfoot, a Minor, by and through his Guardian ad Litem, Michell  
2 Redfoot, and Michell Redfoot individually, hereby allege as follows:

3 **GENERAL ALLEGATIONS**

4 1. The true names and capacities, whether individual, corporate, associate, governmental  
5 or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs at this time,  
6 who therefore sue said Defendants by such fictitious names. When the true names and capacities of  
7 said Defendants have been ascertained, Plaintiffs will amend this complaint accordingly. Plaintiffs  
8 are informed and believe, and thereon allege, that each Defendant designated herein as a DOE is  
9 responsible, negligently or in some other actionable manner, for the events and happenings  
10 hereinafter referred to, and caused injuries and damages proximately thereby to Plaintiffs as  
11 hereinafter alleged.

12 2. Plaintiffs are informed and believe, and thereon allege that at all times herein  
13 mentioned, Defendant B.F. ASCHER & COMPANY, INC. and DOES 1 through 10, inclusive,  
14 were individuals, corporations, partnerships and/or unincorporated associations organized and  
15 existing under and by virtue of the laws of the State of California, or the laws of some other state or  
16 foreign jurisdiction, and that said Defendants, and each of them, were and are authorized to do and  
17 are doing business in the State of California, or the laws of some other state or foreign jurisdiction,  
18 and that said Defendants, and each of them, were and are authorized to do and are doing business in  
19 the State of California, and that said Defendants have regularly conducted business in the County of  
20 San Francisco, State of California.

21 3. Plaintiffs are currently residents of Lafayette, County of Contra Costa, State of  
22 California.

23 4. On January 5, 1982, the Food and Drug Administration published its advance notice  
24 of proposed rule making regarding the toxicity of thimerosal. Their scientific panel's opinions and  
25 recommendations were the culmination of 5 years of research concerning the potential hazards and

1 safety of thimerosal. The panel concluded that:

2 At the cellular level, thimerosal has been found to be more toxic for  
3 human epithelial cells in vitro than mercuric chloride, mercuric nitrate,  
4 and merbromim (mercuochrome).

5 5. The FDA specifically found that thimerosal was significantly more toxic for living  
6 tissue than it was for the bacteria it was supposed to kill:

7 It was found to be 35.3 times more toxic for embryonic chick heart tissue  
8 than for staphylococcus aureus.

9 6. The FDA scientific panel's conclusions were clear and unequivocal, focusing on  
10 thimerosal's potential for cell damage and its significant toxicity:

11 The Panel concludes that thimerosal is not safe for [over-the-counter]  
12 topical use because of its potential for cell damage if applied to broken  
13 skin and its allergy potential.

14 7. The FDA's conclusions were published in the Federal Register.

15 **FIRST CAUSE OF ACTION**

16 **(Strict Products Liability: Failure to Warn)**

17 8. Plaintiffs reallege and incorporate herein by reference as fully set forth herein each  
18 and every allegation contained in paragraphs 1 through 7. This Cause of Action is alleged against all  
19 Defendants.

20 9. During all times relevant herein, Defendant B.F. Ascher & Company, Inc. and DOES  
21 1 through 10, inclusive, were engaged in the business of manufacturing, testing, inspecting,  
22 distributing, transporting, shipping, marketing, advertising, and/or selling thimerosal, which consists  
23 of 49.6% ethyl mercury, and/or thimerosal-containing Ayr Saline Nasal Mist.

24 10. Plaintiff Michell Redfoot administered Ayr Saline Nasal Mist to Alexander Redfoot,  
25 her minor child, for several years for the minor child's recurring nasal congestion. In so doing,

1 Alexander Redfoot was exposed to and absorbed dangerous quantities of mercury and/or mercury  
2 compounds that resulted in adverse health effects. As a direct and proximate result of Alexander's  
3 exposure to the thimerosal preservative contained in Ayr Saline Nasal Mist, Alexander was  
4 chronically exposed to toxic levels of mercury. Said exposure directly and proximately caused the  
5 injuries described herein.

6 11. Defendant B.F. Ascher & Company, Inc. and DOES 1 through 10, inclusive,  
7 manufactured, distributed and supplied Ayr Saline Nasal Mist which was defective in design and  
8 which failed to contain adequate warnings to Plaintiffs concerning mercury content the neurological  
9 dangers associated with mercury and thimerosal.

10 12. Plaintiff Michell Redfoot became aware no sooner than April 2, 2003 that Ayr Saline  
11 Nasal Mist contained mercury, which Plaintiff alleges caused Alexander's Pervasive Developmental  
12 Disorder, Autism and associated symptoms.

13 13. As a direct result of the absorption of mercury from the Ayr Saline Nasal Mist,  
14 Alexander Redfoot was severely injured and afflicted. Plaintiffs are informed and believe, and  
15 thereon allege, that Alexander, has been permanently disabled by these injuries to the extent that he  
16 has sustained a serious impairment of his future earning capacity.

17 14. As a further direct and proximate result of the events alleged herein, Plaintiffs were  
18 required to employ at their expense physicians and other medical personnel and incur other  
19 incidental medical expenses, all to their further damage, in an amount not yet fully ascertained.  
20 Plaintiffs are informed and believe, and thereon allege, that they will be required to incur additional  
21 and future medical and incidental expenses as a result of Alexander's injuries, all to their further  
22 damage in an amount not yet fully ascertained. Accordingly, Plaintiffs will seek leave to amend this  
23 complaint to insert the amounts of such damages when they are fully ascertained, or according to  
24 proof at the time of trial.

25







1 incidental medical expenses, all to their further damage, in an amount not yet fully ascertained.  
2 Plaintiffs are informed and believe, and thereon allege, that they will be required to incur additional  
3 and future medical and incidental expenses as a result of Alexander's injuries, all to their further  
4 damage in an amount not yet fully ascertained. Accordingly, Plaintiffs will seek leave to amend this  
5 complaint to insert the amounts of such damages when they are fully ascertained, or according to  
6 proof at the time of trial.

7 33. As a direct and proximate result of the events alleged herein and the ensuing injuries,  
8 Plaintiff Michell Redfoot's earning capacity has been greatly impaired due to the need to care for her  
9 minor child, both in the past and in the future, and will be ascertained in an amount according to  
10 proof.

11 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

12 **FIFTH CAUSE OF ACTION**

13 **(Allegations Against Doe Manufacturer/Distributor/Supplier Defendants)**

14 34. Plaintiffs reallege and incorporate herein by reference as fully set forth herein each  
15 and every allegation contained in paragraphs 1 through 33. This Cause of Action is alleged against  
16 Defendant DOES 1 through 10, inclusive.

17 35. For all pertinent times, DOES 1 through 10, inclusive, sold, manufactured, distributed  
18 and/or supplied mercury containing thimerosal contained in the Ayr Saline Nasal Mist which  
19 Plaintiff Alexander Redfoot inhaled, causing his injuries.

20 36. DOES 1 through 10, inclusive, as manufacturers, shippers and suppliers of thimerosal  
21 to various thimerosal-containing product manufacturers, are liable to Plaintiffs for the defective  
22 design of the Ayr Saline Nasal Mist and for the failure to warn of the mercury content and of the  
23 health hazards associated with thimerosal and failure to design and package its thimerosal so as to  
24 adequately protect and warn users of the dangers of thimerosal.

25

1           37. Further, DOES 1 through 10, inclusive, are liable to Plaintiffs as professional vendors  
2 of thimerosal and, as such, because of the Defendants' size, volume of business and merchandising  
3 practices, knew or should have known of the defects of the thimerosal they sold, and they are strictly  
4 liable and negligent for failing to warn the users of potential health hazards from the use of said  
5 product.

6           38. Further, DOES 1 through 10, inclusive, made misrepresentations regarding the safety  
7 of thimerosal to thimerosal-containing product manufacturers, thereby fraudulently inducing other  
8 sophisticated users to use their thimerosal instead of other types. As such, DOES 1 through 10,  
9 inclusive, are liable to Plaintiffs for injuries suffered by Alexander Redfoot caused by the inhalation  
10 of thimerosal-containing Ayr Saline Nasal Mist because their fraudulent misrepresentations were  
11 detrimentally relied upon (1) by thimerosal-containing product manufacturers incorporating their  
12 thimerosal into their finished product and (2) by Plaintiff Michell Redfoot and her minor son,  
13 Alexander Redfoot, who inhaled the thimerosal-containing product.

14           39. Finally, DOES 1 through 10, inclusive, are liable to Plaintiffs because they knew or  
15 should have known that the thimerosal, which they sold and supplied, was unreasonably dangerous  
16 in normal use, and their failure to communicate this information constitutes negligence. This  
17 negligence was the cause of Alexander Redfoot's injuries, including, but not limited to Pervasive  
18 Developmental Disorder, Autism and associated symptoms.

19           40. As a further direct and proximate result of the events alleged herein, Plaintiffs were  
20 required to employ at their expense physicians and other medical personnel and incur other  
21 incidental medical expenses, all to their further damage, in an amount not yet fully ascertained.  
22 Plaintiffs are informed and believe, and thereon allege, that they will be required to incur additional  
23 and future medical and incidental expenses as a result of Alexander's injuries, all to their further  
24 damage in an amount not yet fully ascertained. Accordingly, Plaintiffs will seek leave to amend this  
25 complaint to insert the amounts of such damages when they are fully ascertained, or according to

1 proof at the time of trial.

2 41. As a direct and proximate result of the events alleged herein and the ensuing injuries,  
3 Plaintiff Michell Redfoot's earning capacity has been greatly impaired due to the need to care for her  
4 minor child, both in the past and in the future, and will be ascertained in an amount according to  
5 proof.

6 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

7 **PUNITIVE DAMAGES ALLEGATIONS**

8 42. Plaintiffs reallege and incorporate herein by reference as fully set forth herein each  
9 and every allegation contained in paragraphs 1 through 41.

10 43. Defendant B.F. Ascher & Company, Inc. and DOES 1 through 10, inclusive, named  
11 herein acted with conscious disregard for the safety of those who used Ayr Saline Nasal Mist. They  
12 had specific prior knowledge that there was an unacceptable risk of injury resulting from the use of  
13 Ayr Saline Nasal Mist, including but not limited to the severe and permanent injuries suffered by  
14 Plaintiff Alexander Redfoot. Their knowledge was obtained, in part, from scientific studies and data  
15 to which they had access, as well as studies and investigation performed by and for these Defendants.

16 44. Defendants named herein were also aware that potential users of Ayr Saline Nasal  
17 Mist had no knowledge or information indicating that the product contained mercury and could cause  
18 serious injury, and knew that users of the product would assume, and in fact did assume, that using  
19 Ayr Saline Nasal Mist was safe, when in fact the product was extremely hazardous to human life.

20 45. With specific knowledge of the dangers of Ayr Saline Nasal Mist, Defendants opted  
21 to manufacture and introduce their products into the stream of commerce without attempting to  
22 protect users from, or warn users of, the high risk of injury resulting from the use of this product  
23 caused by its foreseeable use. Rather than attempting to protect users from, or warn users of, the  
24 high risk of injury from the use of Ayr Saline Nasal Mist, Defendants intentionally failed to reveal

25

1 their knowledge of the hazards of the product and fraudulently, consciously and actively concealed  
2 and suppressed that knowledge from those who used the product.

3 46. The conduct of Defendants was motivated by a financial interest in the continuing,  
4 uninterrupted distribution and marketing of their products. Defendants consciously disregarded the  
5 safety of the users of their products, including Plaintiff Alexander Redfoot.

6 47. The conduct of Defendants was and is vile, base, willful, malicious, fraudulent,  
7 oppressive, outrageous, and Defendants' acts were committed in conscious disregard and  
8 indifference to the safety and health of users of its products, including Plaintiff Alexander Redfoot.  
9 Plaintiffs, for the sake of example, and by way of punishing said Defendants, seek punitive damages  
10 according to proof.

11 WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, jointly  
12 and severally, as hereinafter set forth.

- 13 1. General damages in accordance with proof;  
14 2. Special damages in accordance with proof;  
15 3. Punitive damages in an amount sufficient to punish the Defendants and deter other  
16 persons from engaging in similar conduct;  
17 4. Prejudgment interest and post-judgment interest in accordance with law;  
18 5. Costs of this suit; and  
19 6. Such other relief as the Court deems proper.  
20

21 DATED: April 1, 2005

WATERS & KRAUS, L.L.P.

LEVIN SIMES & KAISER LLP

22  
23  
24 By: 

25 \_\_\_\_\_  
Laurel L. Simes  
Attorneys for Plaintiffs

# EXHIBIT B

**SUMMONS  
(CITACION JUDICIAL)**

**SUM-100**

**NOTICE TO DEFENDANT:  
(AVISO AL DEMANDADO):**  
B.F. ASCHER & COMPANY, INC.; and

**RECEIVED ON**

**APR 20 2005**

**FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)**

**AT B.F. ASCHER CO., INC.**

**DOES 1 through 10, inclusive  
YOU ARE BEING SUED BY PLAINTIFF:**

**(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

**ALEXANDER REDFOOT, a Minor, by and through his  
Guardian ad Litem, MICHELL REDFOOT; MICHELL REDFOOT**

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted puede usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:  
(El nombre y dirección de la corte es):  
Contra Costa County Superior Court

CASE NUMBER:  
(Número del Caso): CO5-00674

PO Box 911  
725 Court Street, Room 103  
Martinez, CA 94553

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:  
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogada, es):

Laurel L. Simes, Esq. (SBN 134637)  
Levin, Simes & Kaiser, LLP  
One Bush Street, 14th Floor  
San Francisco, CA 94105

DATE: April 2005  
(Fecha) APR 4 - 2005

Clerk, by [Signature] Deputy  
(Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)  
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



**NOTICE TO THE PERSON SERVED: You are served**

- 1.  as an individual defendant.
- 2.  as the person sued under the fictitious name of (specify):

3.  on behalf of (specify):

**B.F. ASCHER & COMPANY, INC.**

- under:  CCP 416.10 (corporation)  CCP 416.60 (minor)
- CCP 416.20 (defunct corporation)  CCP 416.70 (conservatee)
- CCP 416.40 (association or partnership)  CCP 416.90 (authorized person)

other (specify):

4.  by personal delivery on (date):

Page 1 of 1

# EXHIBIT C

982(a)(27)

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):  
**Laurel L. Simes, Esq. (SBN 134637)**  
**Levin, Simes & Kaiser LLP**  
**One Bush Street, 14th Floor**  
**San Francisco, CA 94104**

TELEPHONE NO.: (415) 646-7160 FAX NO. (Optional): (415) 981-1270  
 E-MAIL ADDRESS (Optional):  
 ATTORNEY FOR (Name): **Plaintiffs**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA**  
 STREET ADDRESS: 725 Court Street  
 MAILING ADDRESS: PO Box 911  
 CITY AND ZIP CODE: Martinez, CA 94553  
 BRANCH NAME:

PLAINTIFF/PETITIONER: **MICHELL REDFOOT, Individually and as Guardian ad Litem of Alexander Redfoot**  
 DEFENDANT/RESPONDENT: **B.F. Ascher & Company, Inc., et al.**

**APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM — CIVIL**  
 EX PARTE

FOR COURT USE ONLY

**FILED**

2005 APR 14 P 12:56

CLERK OF THE SUPERIOR COURT  
 COUNTY OF CONTRA COSTA, CALIF.

BY: *C. Agiles-Jones, County Clerk*

CASE NUMBER:  
**C05-00674**

Note: This form is for use in civil proceedings in which a party is a minor, an incapacitated person, or a person for whom a conservator has been appointed. A party who seeks the appointment of a guardian ad litem in a family law proceeding should use form FL-935. A party who seeks the appointment of a guardian ad litem in a probate proceeding should use form DE-350/GC-100. An individual may not act as a guardian ad litem unless he or she is represented by an attorney or is an attorney.

1. Applicant (name): \_\_\_\_\_ is
    - a.  the parent of (name): **Alexander Redfoot**
    - b.  the guardian of (name):
    - c.  the conservator of (name):
    - d.  a party to the suit.
    - e.  the minor to be represented (if the minor is 14 years of age or older).
    - f.  another interested person (specify capacity):
  
  2. This application seeks the appointment of the following person as guardian ad litem (state name, address, and telephone number):  
**Michell Redfoot, 1014 Creekwood Place, Lafayette, CA 94549**  
**925-299-1387**
  
  3. The guardian ad litem is to represent the interests of the following person (state name, address, and telephone number):  
**Alexander Redfoot, 1014 Creekwood Place, Lafayette, CA 94549**  
**925-299-1387**
  
  4. The person to be represented is:
    - a.  a minor (date of birth):
    - b.  an incompetent person.
    - c.  a person for whom a conservator has been appointed.
  
  5. The court should appoint a guardian ad litem because:
    - a.  the person named in item 3 has a cause or causes of action on which suit should be brought (describe):  
**Alexander Redfoot suffered severe personal injuries as a result of Defendants' conduct. He is (5) five years of age and, as a minor, is required to have a Guardian ad Litem to file and pursue a civil action against Defendants.**
- Continued on Attachment 6a.

PLAINTIFF/PETITIONER: MICHELL REDFOOT, Individually and as Guardian ad Litem of Alexander Redfoot DEFENDANT/RESPONDENT: B.F. Ascher & Company, Inc., et al.	CASE NUMBER:
---	--------------

5. b.  more than 10 days have elapsed since the summons in the above-entitled matter was served on the person named in item 3, and no application for the appointment of a guardian ad litem has been made by the person identified in item 3 or any other person.
- c.  the person named in item 3 has no guardian or conservator of his or her estate.
- d.  the appointment of a guardian ad litem is necessary for the following reasons (specify): Alexander Redfoot suffered severe personal injuries as a result of Defendants' conduct. He is (5) five years of age and, as a minor, is required to have a Guardian ad Litem to file and pursue a civil action against Defendants.

Continued on Attachment 5d.

6. The proposed guardian ad litem's relationship to the person he or she will be representing is:

- a.  related (state relationship): Natural mother.
- b.  not related (specify capacity):

7. The proposed guardian ad litem is fully competent and qualified to understand and protect the rights of the person he or she will represent and has no interests adverse to the interests of that person. (If there are any issues of competency or qualification or any possible adverse interests, describe and explain why the proposed guardian should nevertheless be appointed):

Continued on Attachment 7.

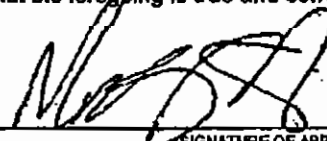
Laurel L. Simes, Esq. (SBN 134637)  
(TYPE OR PRINT NAME)

  
(SIGNATURE OF ATTORNEY)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April 1, 2005

Michell Redfoot  
(TYPE OR PRINT NAME)


  
(SIGNATURE OF APPLICANT)

**CONSENT TO ACT AS GUARDIAN AD LITEM**

I consent to the appointment as guardian ad litem under the above petition.

Date: April 1, 2005

Michell Redfoot  
(TYPE OR PRINT NAME)

  
(SIGNATURE OF PROPOSED GUARDIAN AD LITEM)

ORDER  EX PARTE

THE COURT FINDS that it is reasonable and necessary to appoint a guardian ad litem for the person named in item 3 of the application, as requested.

THE COURT ORDERS that (name): Michell Redfoot is hereby appointed as the guardian ad litem for (name): Alexander Redfoot for the reasons set forth in item 5 of the application.

Date: APR 4 - 2005

DIANA DECTON SMITH

JUDICIAL OFFICER

SIGNATURE FOLLOWS LAST ATTACHMENT

# EXHIBIT D

1 Robert B. Leck III (State Bar No. 46903)  
LECK & ASSOCIATES  
2 Attorneys at Law  
100 Wilshire, Suite 200  
3 Santa Monica, CA 90401  
Telephone: (310) 899-2041  
4 Telecopier: (310) 451-7737  
5 Attorneys for Defendant  
B.F. Ascher & Company, Inc.  
6

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 FOR THE COUNTY OF CONTRA COSTA  
9

10 ALEXANDER REDFOOT, A minor by and ) CASE NO. CO5-00674  
through his Guardian Ad Litem, MICHELL, )  
11 REDFOOT; MICHELL REDFOOT, ) (Assigned for all purposes to the Honorable Diana  
B. Smith, Department 30)  
12 Plaintiff, )  
13 v. ) DEFENDANT B.F. ASCHER & COMPANY,  
INC.'S ANSWER TO PLAINTIFFS'  
14 B.F. ASCHER & COMPANY; and DOES 1 ) UNVERIFIED COMPLAINT; AND DEMAND  
through 10, inclusive, ) FOR JURY TRIAL  
15 Defendants. ) Complaint Filed: April 1, 2005  
16 ) Trial Date: None set  
17 )

18 Defendant B.F. Ascher & Company, Inc. ("B.F. Ascher" or "defendant"), for itself alone,  
19 answering plaintiffs' unverified complaint, herein admits, denies and alleges as follows:  
20

21 GENERAL DENIAL

22 1. Pursuant to *California Code of Civil Procedure* section 431.30(d), this answering  
23 defendant generally denies each and every material allegation of plaintiffs' complaint and further  
24 denies that plaintiffs were injured or damaged in the sum or sums alleged, or any sum at all, by  
25 reason of any act or omission of this answering defendant

26 ///  
27 ///  
28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

2. The complaint, and each and every cause of action stated therein, fails to state facts sufficient to constitute a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Failure to State a Claim for Punitive Damages)

3. The complaint, and each and every cause of action stated therein, fails to state facts sufficient to support a claim for punitive damages against this answering defendant.

THIRD AFFIRMATIVE DEFENSE

(Statute of Limitations)

4. The complaint, and each and every cause of action stated therein, is barred by the applicable statute or statutes of limitations, including, without limitation, California Code of Civil Procedure, section 340(3), in that more than two years elapsed between the accrual of plaintiffs' alleged causes of action and the filing of plaintiffs' complaint.

FOURTH AFFIRMATIVE DEFENSE

(Comparative Fault of Plaintiff)

5. If plaintiffs suffered or sustained any injury, loss, or damage as alleged in the complaint, the same was directly and legally caused, in whole or in part, or contributed to or exacerbated, by the careless, reckless, negligent and unlawful conduct of plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

(Negligence of Others)

6. If plaintiffs suffered or sustained any injury, loss, or damage as alleged in the complaint, the same was caused by the acts or omissions of some person or third party over whom

1 this answering defendant has no control, and for whom this answering defendant is not legally  
2 responsible.

3  
4 SIXTH AFFIRMATIVE DEFENSE

5 (Intervening Cause)

6 7. If plaintiffs suffered or sustained any injury, loss or damages as alleged in the  
7 complaint, the same were caused, in whole or in part, by the negligent, intentional or wrongful acts  
8 or omissions of persons or third parties other than this answering defendant, for whose conduct this  
9 answering defendant is not legally responsible and had no reason to anticipate, and such acts  
10 constitute independent, intervening and superseding causes.

11  
12 SEVENTH AFFIRMATIVE DEFENSE

13 (Breach of Warranty: No Reliance)

14 8. To the extent that plaintiffs rely on any theory of breach of warranty, any recovery  
15 by plaintiffs against this answering defendant is barred in that plaintiffs did not rely upon any  
16 alleged warranty.

17  
18 EIGHTH AFFIRMATIVE DEFENSE

19 (Breach of Warranty: Lack of Privity/Notice)

20 9. To the extent that plaintiffs rely on any theory of breach of warranty, such claims are  
21 barred for lack of privity with this answering defendant, and for failure of plaintiffs or any  
22 representative of plaintiffs to give timely notice to this answering defendant of any alleged breach  
23 of warranty.

24  
25 NINTH AFFIRMATIVE DEFENSE

26 (Punitive Damages Unconstitutional)

27 10. Plaintiffs' claim for punitive damages is in violation of and barred by the  
28 Constitutions of the United States and the State of California, including, but not limited to, the Due

1 Process and Equal Protection provisions contained in the Fifth and Fourteenth Amendments of the  
2 United States Constitution.

3  
4 TENTH AFFIRMATIVE DEFENSE

5 (Compliance with Governmental Regulations)

6 11. The product which is the subject of this action is an over-the-counter product. The  
7 product is registered with the FDA, and the federal government has preempted the field of law  
8 applicable to the manufacture of such product. This answering defendant's manufacturing, labeling,  
9 and warning of the subject product was at all times in compliance with applicable federal law.  
10 Plaintiffs' causes of action against this answering defendant therefore fail to state a claim upon  
11 which relief can be granted; such claims, if allowed, would conflict with applicable federal law and  
12 violate the Supremacy Clause of the United States Constitution.

13  
14 ELEVENTH AFFIRMATIVE DEFENSE

15 (Product Not Defectively Designed, Manufactured)

16 12. If the subject product manufactured by this answering defendant was involved in the  
17 alleged incident referred to in plaintiffs' complaint, then, and in that event, said product was not  
18 defectively designed and/or manufactured at the time of manufacture, and it is therefore not the  
19 ultimate liability of this answering defendant.

20  
21 TWELFTH AFFIRMATIVE DEFENSE

22 (Benefits Outweigh Risks)

23 13. This answering defendant asserts that the benefits of the subject product outweigh  
24 the risks, if any, which may be attendant to its use.

25 ///

26 ///

27 ///

28 THIRTEENTH AFFIRMATIVE DEFENSE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

(Adequate Warnings Given)

14. At all relevant times that this answering defendant manufactured the subject product, it was reasonably safe and reasonably fit for its intended use and this answering defendant provided proper warnings, information, and instructions, pursuant to generally recognized and prevailing standards in existence at the time, as contained in the packaging inserts, and literature for the subject product, and therefore was not defective or unreasonably dangerous.

FOURTEENTH AFFIRMATIVE DEFENSE

(Misuse of Product)

15. Plaintiffs' alleged injuries and damages, if any, were proximately caused by the misuse, abuse, unintended or unforeseeable use of the subject product, and consequently, no act or omission on the part of this answering defendant proximately caused any of plaintiffs' claimed injuries or damages.

FIFTEENTH AFFIRMATIVE DEFENSE

(Material Alteration of Product)

16. The product at issue in this case may have been altered, modified, or otherwise rendered to a form not substantially similar to its form when it left the custody and control of this answering defendant, by others over whom this answering defendant had no control and whose conduct this answering defendant had no reason to anticipate.

SIXTEENTH AFFIRMATIVE DEFENSE

(Idiosyncratic Reaction)

17. Plaintiffs' alleged injuries and damages, if any, may have been caused, in whole or in part, by an idiosyncratic reaction, operation of nature, or act of God, or by pre-existing and/or unrelated medical, genetic, and/or environmental conditions, diseases, or illnesses.

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

SEVENTEENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

18. If plaintiffs suffered or sustained any damage, loss or injury as alleged in the complaint, the same was caused, in whole or in part, or contributed to or exacerbated, by plaintiffs' failure to exercise reasonable care and diligence to mitigate their alleged damages.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Assumption of the Risk)

19. The complaint, and each and every cause of action therein, is barred, in whole or in part, by the doctrine of assumption of the risk.

NINETEENTH AFFIRMATIVE DEFENSE

(Election of Credit)

20. This answering defendant reserves its right to make a written election of credit for settlements with other parties or third persons under the applicable law. This answering defendant further demands that its fault or responsibility be compared to other parties and third persons to this action as provided by any governing statutory or common law scheme of comparative fault, comparative responsibility, or contribution.

TWENTIETH AFFIRMATIVE DEFENSE

(Several Liability: Economic Damages)

21. The provisions of California Civil Code section 1431.2, are applicable to plaintiffs' complaint, and each and every cause of action stated therein, such that the liability of each defendant shall be several only and shall not be joint.

///  
///  
///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Laches)

22. The complaint, and each and every cause of action therein, is barred, in whole or in part, by the doctrine of laches.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Unclean Hands)

23. The complaint, and each and every cause of action therein, is barred, in whole or in part, by the doctrine of unclean hands.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Estoppel)

24. The complaint, and each and every cause of action therein, is barred, in whole or in part, by the doctrine(s) of estoppel and/or judicial estoppel.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Waiver)

25. The complaint, and each and every cause of action therein, is barred, in whole or in part, by the doctrine of waiver.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(No Personal Jurisdiction)

26. This court may not be able to properly exercise personal jurisdiction over this answering defendant.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Venue Improper)

27. Venue may not be proper in this action.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Indispensable Parties, Real Party in Interest)

28. Plaintiffs have failed to join identifiable and indispensable parties necessary for proper adjudication of the action and/or may not be the real party in interest who has a right to prosecute the claims asserted or who has standing to do so.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Preemption of State Decisional Law)

29. This answering defendant asserts that the State of California's judicially-created definitions of manufacturing defect and design defect and standards for determining whether there has been an actionable failure to warn are unconstitutional in that, among other things, they are void for vagueness and an undue burden upon interstate commerce, as well as an impermissible effort to regulate in an area that has previously been preempted by the federal government.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Apportionment of Fault)

30. Individuals or entities, other than this answering defendant, that are co-defendants or third persons not party to this action, were negligent and/or legally responsible or otherwise at fault for the damages alleged in plaintiffs' complaint. This answering defendant therefore requests that in the event of a finding of any liability in favor of plaintiffs, or settlement or judgment against such individuals or any defendant(s) other than this answering defendant, an apportionment of fault be made among all parties and third persons, as permitted by Li v. Yellow Cab Co. and American Motorcycle Ass'n v. Superior Court by the court or jury. This answering defendant further requests a judgment and declaration of complete or partial indemnification and contribution against all other parties or persons in accordance with the apportionment of fault.

///  
///  
///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

THIRTIETH AFFIRMATIVE DEFENSE

(Restatement of Torts)

31. The product which is the subject of this action is an over-the-counter product which falls within the "comment k" and "comment j" exceptions to strict liability, as defined in the Rest2d Torts, section 402A, as well as the Restatement (Third) of Torts: Prod. Liab., section 4 (1998). The subject product is therefore neither defective nor unreasonably dangerous when properly prepared and accompanied by proper warnings and instructions for use. At all times material to plaintiffs' complaint, the subject product was properly prepared and accompanied by proper warnings and instructions for use.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(State of the Art)

32. Based on the state of scientific, medical, and technological knowledge at the time the product which is the subject of this action was distributed, it was reasonably safe for its normal and foreseeable use at all relevant times, or in light of existing reasonably available medical, scientific, and technological knowledge, this answering defendant could not have known of: (a) the design characteristics, if any, that allegedly caused the injuries and damages complained of herein or the alleged danger of such characteristics; or (b) any alternative design referred to by plaintiffs.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Conflict of Laws)

33. This answering defendant intends to rely upon, reserves its right to assert, and hereby pleads such other and related defenses as may become available in the event of a determination that the action, or some part thereof, is governed by the substantive law of a state other than California or a foreign country.

///  
///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Incorporation of Affirmative Defenses By Others)

34. Any affirmative defense pled or raised by other defendants in this action and not specifically pled by this answering defendant are hereby incorporated herein to the extent that they do not conflict with this answering defendant's own affirmative defenses.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Additional Defenses)

35. This answering defendant hereby reserves the right to rely upon any additional defenses to claims asserted by plaintiffs to the extent that such defenses are supported by information developed through discovery or by evidence at trial, and hereby reserves the right to amend its answer to assert any such defenses.

WHEREFORE, defendant prays as follows:

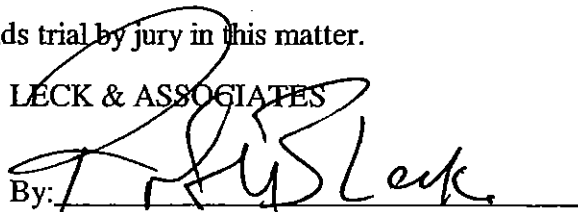
- 1. That plaintiffs take nothing by way of the complaint on file herein;
- 2. That the court enter judgment in favor of this answering defendant, and against plaintiffs, dismissing plaintiffs' claims in their entirety, with prejudice;
- 3. That this answering defendant recover all attorneys' fees and costs incurred herein; and,
- 4. For such other and further relief as the court deems just and proper.

DEMAND FOR JURY

Defendant hereby respectfully demands trial by jury in this matter.

Dated: May 10, 2005

LECK & ASSOCIATES

By:   
 Robert B. Leck III  
 Attorneys for Defendant  
 B. F. Ascher & Company, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 100 Wilshire, Suite 200, Santa Monica, California 90401.

On May 11, 2005, I served the foregoing document described as: DEFENDANT B.F. ASCHER & COMPANY, INC.'S ANSWER TO PLAINTIFFS' UNVERIFIED COMPLAINT; AND DEMAND FOR JURY TRIAL on the interested parties in this action  by placing  the original  true copies thereof enclosed in a sealed envelope addressed as follows:

C. Andrew Waters, Esq.	Laurel L. Simes, Esq.
Waters & Krauss, LLP	Levin Simes & Kaiser, LLP
Continental Grand Plaza I	One Bush Street, 14 <sup>th</sup> Floor
300 North Continental Boulevard, Suite 500	San Francisco, California 90802
El Segundo, California 90245	

- (BY MAIL)
  - I deposited such envelope(s) with postage fully prepaid in the mail at Santa Monica, California.
  - As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Monica, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit.
- (BY OTHER) The counsel by whose name an asterisk appears will be forwarded a copy of said document(s) by  MESSENGER  FEDERAL EXPRESS  EXPRESS MAIL

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this Court, at whose direction the service was made.

Executed on May 11, 2005, at Santa Monica, California.

\_\_\_\_\_  
Tania Ferrer