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9 **Attorneys for Plaintiffs, Alexander Redfoot,  
A Minor, by and through his Guardian  
ad Litem Michell Redfoot; Michell Redfoot**

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA

13 ALEXANDER REDFOOT, a Minor, by and )  
14 Through is Guardian ad Litem, MICHELL )  
REDFOOT; MICHELL REDFOOT, )

15 Plaintiffs, )

16 vs. )

17 B.F. ASCHER & COMPANY, INC. and )  
18 KOLMAR LABORATORIES, INC.; and DOES )  
1 through 10, inclusive, )

19 Defendants. )

Case No. C05-02045 PJH

**FIRST AMENDED COMPLAINT  
FOR DAMAGES**

20 **FIRST AMENDED COMPLAINT FOR DAMAGES**

21 Plaintiffs, Alexander Redfoot, a Minor, by and through his Guardian ad Litem, Michell Redfoot, and  
22 Michell Redfoot individually, hereby allege as follows:  
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24 **GENERAL ALLEGATIONS**

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

5 2. Plaintiffs are informed and believe, and thereon allege that at all times herein mentioned,  
6 Defendants **B.F. ASCHER & COMPANY, INC., KOLMAR LABORATORIES, INC.,** and DOES 1 through  
7 10, inclusive, were individuals, corporations, partnerships and/or unincorporated associations organized and  
8 existing under and by virtue of the laws of the State of California, or the law of some other state or foreign  
9 jurisdiction, and that said Defendants, and each of them, were and are authorized to do and are doing business in  
10 the State of California, or the laws of some other state or foreign jurisdiction, and that said Defendants, and each  
11 of the, were and are authorized to do and are doing business in the State of California, and that said Defendants  
12 have regularly conducted business in the County of San Francisco, State of California.

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

14 4. On January 5, 1982, the Food and Drug Administration published its advance notice of  
15 proposed rule making regarding the toxicity of thimerosal. Their scientific panel's opinions and  
16 recommendations were the culmination of 5 years of research concerning the potential hazards and safety of  
17 thimerosal. The panel concluded that:

18 At the cellular level, thimerosal has been found to be more toxic  
19 for human epithelial cells in vitro than mercuric chloride, mercuric  
20 nitrate, and merbromim (mercurochrome).

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

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

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

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

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

3 **FIRST CAUSE OF ACTION**

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

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

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

11 10. Plaintiff Michell Redfoot administered Ayr Saline Nasal Mist to Alexander Redfoot, her minor  
12 child, for several years for the minor child's recurring nasal congestion. In so doing, Alexander Redfoot was  
13 exposed to and absorbed dangerous quantities of mercury and/or mercury compounds that resulted in adverse  
14 health effects. As a direct and proximate result of Alexander's exposure to the thimerosal preservative  
15 contained in Ayr Saline Nasal Mist, Alexander was chronically exposed to toxic levels of mercury. Said  
16 exposure directly and proximately caused the injuries described herein.

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

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

24 13. As a direct result of the absorption of mercury from the Ayr Saline Nasal Mist, Alexander  
25 Redfoot was severely injured and afflicted. Plaintiffs are informed and believe, and thereon allege, that  
26 Alexander, has been permanently disabled by these injuries to the extent that he has sustained a serious  
27 impairment of his future earning capacity.  
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1           14.     As a further direct and proximate result of the events alleged herein, Plaintiffs were required to  
2 employ at their expense physicians and other medical personnel and incur other incidental medical expenses, all  
3 to their further damage, in an amount not yet fully ascertained. Plaintiffs are informed and believe, and thereon  
4 allege, that they will be required to incur additional and future medical and incidental expenses as a result of  
5 Alexander's injuries, all to their further damage in an amount not yet fully ascertained. Accordingly, Plaintiffs  
6 will seek leave to amend this complaint to insert the amounts of such damages when they are fully ascertained,  
7 or according to proof at the time of trial.

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

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

12                                     **SECOND CAUSE OF ACTION**

13                                     **(Negligence: Failure to Warn)**

14           16.     Plaintiffs reallege and incorporate herein by reference as fully set forth herein each and every  
15 allegation contained in paragraphs 1 through 15. This Cause of Action is alleged against Defendants B.F.  
16 Ascher & Company, Inc., Kolmar Laboratories, Inc. and DOES 1 through 10, inclusive.

17           17.     Defendants named herein knew or should have known that their thimerosal-containing products  
18 and/or thimerosal were defective at the time they left the Defendants' possession in that they contained  
19 toxicologically significant quantities of mercury and/or mercury compounds.

20           18.     Defendants failed to adequately warn Plaintiffs of the mercury content and of the substantial  
21 dangers of which the Defendants were, or should have been, aware that were associated with Plaintiffs' use of  
22 Ayr Saline Nasal Mist.

23           19.     As a direct and proximate result of the Defendants' failure to warn Plaintiffs of the dangers  
24 associated with the use of Ayr Saline Nasal Mist, Plaintiff Alexander Redfoot was severely injured.

25           20.     Alexander Redfoot began to suffer the ill effects associated with chronic exposure to mercury-  
26 containing products. Michell Redfoot did not realize that her administration of Ayr Saline Nasal Mist to her  
27 minor son for several years was causing his adverse health effects. Plaintiffs discovered that Ayr Saline Nasal  
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1 Mist contained thimerosal no sooner than April 2003 and that the thimerosal-containing Ayr Saline Nasal Mist  
2 was the cause of Alexander's persistent health problems.

3 21. As a direct result of the absorption of Ayr Saline Nasal Mist, Alexander Redfoot was severely  
4 injured and afflicted. Plaintiffs are informed and believe, and thereon allege, that Alexander Redfoot had been  
5 permanently disabled by these injuries.

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

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

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

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18 **THIRD CAUSE OF ACTION**

19 **(Intentional and/or Reckless Concealment and/or Non-Disclosure**  
20 **of Known Defective and/or Dangerous Conditions**  
21 **Associated With Use of Ayr Saline Nasal Mist)**

22 24. Plaintiffs reallege and incorporate herein by reference as fully set forth herein each and every  
23 allegation contained in paragraphs 1 through 23. This Cause of Action is alleged against Defendants B.F.  
24 Ascher & Company, Inc., Kolmar Laboratories, Inc., and DOES 1 through 10, inclusive.

25 25. On information and belief, Plaintiffs state that Defendants were actually aware of the mercury  
26 content and of the dangers to human life from the mercury containing thimerosal and thimerosal-containing Ayr  
27 Saline Nasal Mist and the use thereof.

28 26. As a result of Defendants' failure to warn, recall and/or assure that their defective and  
unreasonably dangerous product was removed from the marketplace, Plaintiffs suffered the harms and damages

1 herein alleged.

2 27. Defendants, through their employees and/or agents, acted recklessly and/or intentionally so as  
3 to warrant an award of punitive damages because they consciously disregarded substantial and unjustifiable  
4 risks of such nature that its disregard constitutes gross deviation from the standard of care that ordinary persons  
5 would exercise under these circumstances.

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

7 **FOURTH CAUSE OF ACTION**

8 **(Negligence Per Se)**

9 28. Plaintiffs reallege and incorporate herein by reference as fully set forth herein each and every  
10 allegation contained in paragraphs 1 through 27. This Cause of Action is alleged against Defendants B.F.  
11 Ascher & Company, Inc., Kolmar Laboratories, Inc., and DOES 1 through 10, inclusive.

12 29. Defendants' failure to warn Plaintiffs of the dangers associated with the use of thimerosal  
13 and/or thimerosal-containing Ayr Saline Nasal Mist violates the federal ban on thimerosal products. *See* 63  
14 FED. REG. 19799 (April 22, 1998). Defendants' violation of these regulations proximately caused Plaintiff and  
15 her minor son's injuries alleged herein.

16 30. Plaintiff Alexander Redfoot's injuries resulted from an occurrence of the nature of which the  
17 regulations were designed to prevent. Moreover, Alexander Redfoot was one of the classes of persons for  
18 whose protection the regulations were adopted.

19 31. As a direct and proximate result of Defendants' violation of these regulations, Alexander  
20 Redfoot was severely injured and afflicted. Plaintiffs are informed and believe, and thereon allege, that  
21 Alexander has been permanently disabled by these injuries.

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

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

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

6 **FIFTH CAUSE OF ACTION**

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

8 34. Plaintiffs reallege and incorporate herein by reference as fully set forth herein each and every  
9 allegation contained in paragraphs 1 through 33. This Cause of Action is alleged against Defendant **KOLMAR**  
10 **LABORATORIES, INC.** and DOES 1 through 10, inclusive.

11 35. For all pertinent times, Defendant **KOLMAR LABORATORIES, INC.** and DOES 1 through  
12 10, inclusive, sold, manufactured, distributed and/or supplied mercury-containing thimerosal contained in the  
13 Ayr Saline Nasal Mist which Plaintiff Alexander Redfoot inhaled, causing his injuries.

14 36. Defendant **KOLMAR LABORATORIES, INC.** and DOES 1 through 10, inclusive, as  
15 manufacturers, shippers, and suppliers of thimerosal to various thimerosal-containing product manufacturers,  
16 are liable to Plaintiffs for the defective design of the Ayr Saline Nasal Mist and for the failure to warn of the  
17 mercury content and of the health hazards associated with thimerosal and failure to design and package its  
18 thimerosal so as to adequately protect and warn users of the dangers of thimerosal.

19 37. Further, Defendant **KOLMAR LABORATORIES, INC.** and DOES 1 through 10, inclusive,  
20 are liable to Plaintiffs as professional vendors of thimerosal and, as such, because of the Defendants' size,  
21 volume of business and merchandising practices, knew or should have known of the defects of the thimerosal  
22 they sold, and they are strictly liable and negligent for failing to warn the users of potential health hazards from  
23 the use of said product.

24 38. Further, Defendant **KOLMAR LABORATORIES, INC.** and DOES 1 through 10, inclusive,  
25 made misrepresentations regarding the safety of thimerosal to thimerosal-containing product manufacturers,  
26 thereby fraudulently inducing other sophisticated users to use their thimerosal instead of other types. As such,  
27 Defendant **KOLMAR LABORATORIES, INC.** and DOES 1 through 10, inclusive, are liable to Plaintiffs for  
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1 injuries suffered by Alexander Redfoot caused by the inhalation of thimerosal-containing Ayr Saline Nasal Mist  
2 because their fraudulent misrepresentations were detrimentally relied upon (1) by thimerosal-containing product  
3 manufacturers incorporating their thimerosal into their finished product and (2) by Plaintiff Michell Redfoot and  
4 her minor son, Alexander Redfoot, who inhaled the thimerosal-containing product.

5 39. Finally, Defendant **KOLMAR LABORATORIES, INC.** and DOES 1 through 10, inclusive,  
6 are liable to Plaintiffs because they knew or should have known that the thimerosal, which they sold and  
7 supplied, was unreasonably dangerous in normal use, and their failure to communicate this information  
8 constitutes negligence. This negligence was the cause of Alexander Redfoot's injuries, including, but not  
9 limited to Pervasive Developmental Disorder, Autism and associated symptoms.

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

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

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

21 **PUNITIVE DAMAGES ALLEGATIONS**

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

24 43. Defendants **B.F. ASCHER & COMPANY, INC., KOLMAR LABORATORIES, INC.,** and  
25 DOES 1 through 10, inclusive, named herein acted with conscious disregard for the safety of those who used  
26 Ayr Saline Nasal Mist. They had specific prior knowledge that there was an unacceptable risk of injury  
27 resulting from the use of Ayr Saline Nasal Mist, including but not limited to the severe and permanent injuries  
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1 suffered by Plaintiff Alexander Redfoot. Their knowledge was obtained, in part, from scientific studies and  
2 data to which they had access, as well as studies and investigation performed by and for these Defendants.

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

7 45. With specific knowledge of the dangers of Ayr Saline Nasal Mist, Defendants opted to  
8 manufacture and introduce their products into the stream of commerce without attempting to protect users from  
9 or warn users of, the high risk of injury resulting from the use of this product caused by its foreseeable use.  
10 Rather than attempting to protect users from, or warn users of, the high risk of injury from the use of Ayr Saline  
11 Nasal Mist, Defendants intentionally failed to reveal their knowledge of the hazards of the product and  
12 fraudulently, consciously and actively concealed and suppressed that knowledge from those who used the  
13 product.

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

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

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

- 23 1. General damages in accordance with proof;
- 24 2. Special damages in accordance with proof;
- 25 3. Punitive damages in an amount sufficient to punish the Defendants and deter other  
26 persons from engaging in similar conduct;
- 27 4. Prejudgment interest and post-judgment interest in accordance with law;
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- 5. Costs of this suit; and
- 6. Such other relief as the Court deems proper.

WATERS & KRAUS, L.L.P.

LEVIN SIMES & KAISER, LLP

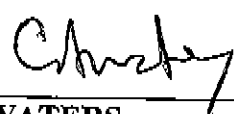


C. ANDREW WATERS

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the First Amended Complaint was sent by Certified Mail Return Receipt Requested on this 26<sup>th</sup> day of May, 2006 to all counsel of record.



C. ANDREW WATERS