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20 Attorneys for Defendants
21 BERKELEY BOWL MARKETPLACE and
22 BERKELEY BOWL PRODUCE, INC.

23 SUPERIOR COURT OF THE STATE OF CALIFORNIA
24 FOR THE COUNTY OF ALAMEDA
25 UNLIMITED CIVIL JURISDICTION

26 RUSSELL BRIMER

27 Plaintiff,

28 v.

BERKELEY BOWL MARKETPLACE;
BERKELEY BOWL PRODUCE, INC.; and
DOES 1 through 150, inclusive,

Defendants.

Case No. RG06290900

**STIPULATION AND [PROPOSED]
ORDER RE: CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer, Berkeley Bowl Marketplace and Berkeley Bowl Produce, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereinafter
4 "Brimer" or "plaintiff") and defendants BERKELEY BOWL MARKETPLACE and BERKELEY
5 BOWL PRODUCE, INC., (hereinafter "defendants"), with Brimer and defendants collectively
6 referred to as the "parties."

7 **1.2 Plaintiff**

8 Brimer is an individual residing in California who seeks to promote awareness of
9 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
10 substances contained in consumer products.

11 **1.3 Defendants**

12 Defendants each employ ten or more persons and are each a person in the course of doing
13 business for purposes of Proposition 65.

14 **1.4 General Allegations**

15 Brimer alleges that defendants have manufactured, distributed and/or sold in the State of
16 California certain glassware intended for the consumption of food or beverages with colored
17 artwork or designs containing lead on the exterior. Lead is listed pursuant to the Safe Drinking
18 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§25249.6 *et seq.*
19 ("Proposition 65"), as a chemical known to the State of California to cause birth defects and other
20 reproductive harm. Lead shall be referred to herein as the "Listed Chemical."

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as follows: glass jars
23 and other glassware intended for the consumption of food or beverages with colored artwork or
24 designs (containing lead) on the exterior including, but not limited to, *Bonny Doon Muscat Vin de*
25 *Glaciere* (#7 69434 10606 0). All such glassware shall be referred to herein as the "Products."

26 **1.6 Notice of Violation**

27 On November 23, 2005, Brimer served defendants and various public enforcement
28 agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that provided

1 defendants and such public enforcers with notice that alleged that defendants were in violation of
2 California Health & Safety Code §25249.6 for failing to warn consumers and customers that the
3 Products that defendants sold exposed users in California to the Listed Chemical.

4 **1.7 Complaint**

5 On September 26, 2006, Brimer, who is acting in the interest of the general public in
6 California, filed a complaint ("Complaint" or "Action") in the Superior Court in and for the City
7 and County of Alameda against Berkeley Bowl Marketplace, Berkeley Bowl Produce, Inc. and
8 Does 1 through 150, *Brimer v. Berkeley Bowl Marketplace, et al., Alameda Superior Court Case*
9 *No. RG06290900*, alleging violations of California Health & Safety Code §25249.6 based on the
10 alleged exposures to the Listed Chemical contained in the Products sold by defendants.

11 **1.8 No Admission**

12 Defendants deny the material factual and legal allegations contained in Brimer's Notice
13 and Complaint and maintains that all products that they have sold and distributed in California,
14 including the Products, have been and are in compliance with all laws. Nothing in this Consent
15 Judgment shall be construed as an admission by defendants of any fact, finding, issue of law, or
16 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
17 admission by defendants of any fact, finding, conclusion, issue of law or violation of law, such
18 being specifically denied by defendants. However, this Section shall not diminish or otherwise
19 affect the obligations, responsibilities and duties of defendants under this Consent Judgment.

20 **1.9 Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, the parties stipulate that this Court has
22 jurisdiction over defendants as to the allegations contained in the Complaint, that venue is proper
23 in the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions
24 of this Consent Judgment.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean May 1, 2007.
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1 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

2 **2.1 Product Warnings**

3 After the effective date, defendants shall not sell in California products containing the
4 listed chemical unless such products are sold with the clear and reasonable warning set out in this
5 Section 2.1, comply with the reformulation standards set forth in Section 2.3 or are otherwise
6 exempt pursuant to Section 2.2.

7 Any warning issued for products pursuant to this Section 2.1 shall be prominently placed
8 with such conspicuousness as compared with other words, statements, designs, or devices as to
9 render it likely to be read and understood by an ordinary individual under customary conditions
10 before purchase or used in the workplace, before use. Any warning issued pursuant to this Section
11 2.1 shall be provided in a manner such that the consumer or user understands to which *specific*
12 product the warning applies, so as to minimize if not eliminate the chance that an overwarning
13 situation will arise.

14 Section 2.1(a) describes defendants' options for satisfying their warning obligations. The
15 following warnings will be applicable when the product is sold to consumers:

16 **(a) Retail Store Sales**

17 **(i) Product Labeling.** From the Effective Date, a warning may be
18 affixed to the packaging, labeling or directly on the Product by defendants or their agent, that
19 states:

20 **WARNING: The materials used as colored decorations**
21 **on the exterior of this product contain lead,**
22 **a chemical known to the State of California**
 to cause birth defects and other
 reproductive harm.

23 **(ii) Point-of-Sale Warnings.** Defendants may perform their warning
24 obligations by insuring to the greatest extent possible that signs are posted at retail outlets in the
25 State of California where the Products are sold. Point-of-sale warnings shall be provided through
26 signs posted in close proximity to the point of display of the Products that state:

1 **WARNING: The materials used as colored decorations**
2 **on the exterior of this product contain lead,**
3 **a chemical known to the State of California**
4 **to cause birth defects and other**
5 **reproductive harm.**

6 *[list products for which warning is required]*

7 **2.2 Exceptions To Warning Requirements**

8 The warning requirements set forth in Section 2.1 shall not apply to:

- 9 (i) Any Products in inventory before the Effective Date; or
10 (ii) Reformulated Products (as defined in Section 2.3 below).

11 **2.3 Reformulation Standards**

12 Reformulated Products are defined as follows: any Product with exterior decorations
13 containing less than or equal to six one-hundredths of one percent (0.06%) of lead by weight or
14 less, as measured either before or after the material is fired onto (or otherwise affixed to) the
15 Product using EPA test methodology 3050B.¹ Products with decorations within the lip-and-rim
16 area² must *also* contain less than or equal to two one-hundredths of one percent (0.02%) of lead by
17 weight or less using a sample size of the material in question measuring approximately 50-100 mg
18 and a test method of sufficient sensitivity to establish a limit of quantitation of less than 200 ppm.

19 **2.4 Reformulation Goal**

20 Defendants hereby commit to undertake good faith efforts to ensure that as many Products
21 as reasonably possible that they offer for sale in California, shall either qualify as Reformulated
22 Products or will otherwise be exempt from the warning requirements of sections 2.1, with the
23 commitment that at least eighty percent (80%) of the Products sold in California on or after June
24 1, 2007, will not require warnings pursuant to section 2.1, with further commitment to undertake
25 all commercially reasonable efforts to sell one-hundred percent (100%) Reformulated Products in
26 California, after January 1, 2008.

27 ¹If the decoration is tested after it is affixed to the Product, the percentage of the Listed Chemical by weight
28 must relate only to the decorating material and must not include any quantity attributable to non-decorating material
 (e.g., the glass substrate).

²Lip-and-rim area is defined as the exterior top 20 millimeters of a hollowware food or beverage Product.

1 **3. MONETARY PAYMENTS**

2 **3.1 Penalties Pursuant to California Health & Safety Code §25249.7(b)**

3 In settlement of all of the claims referred to in this Consent Judgment against defendants,
4 they shall pay \$1,000 in civil penalties to be apportioned by Brimer in accordance with California
5 Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office
6 of Environmental Health Hazard Assessment and the remaining 25% of these penalty monies
7 retained by Brimer as provided by California Health & Safety Code §25249.12(d). Brimer shall
8 bear all responsibility for apportioning and paying to the State of California the appropriate civil
9 penalties paid in accordance with this section.

10 The payment set forth in this paragraph shall be made payable to "HIRST & CHANLER
11 LLP in Trust For Russell Brimer" within 10 days of execution of this Consent Judgment, and be
12 delivered to Brimer's counsel at the following address:

13 HIRST & CHANLER LLP
14 Attn: Proposition 65 Controller
15 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

16 **4. REIMBURSEMENT OF FEES AND COSTS**

17 The parties acknowledge that Brimer and his counsel offered to resolve this dispute
18 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
19 this fee issue to be resolved after the material terms of the agreement had been settled. Defendants
20 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
21 had been finalized. The parties then attempted to (and did) reach an accord on the compensation
22 due to Brimer and his counsel under the private attorney general doctrine codified at California
23 Code of Civil Procedure §1021.5 for all work performed through the Court's approval of this
24 agreement. Under the private attorney general doctrine, defendants shall reimburse Brimer and
25 his counsel for fees and costs incurred as a result of investigating, bringing this matter to
26 defendants' attention, litigating and negotiating a settlement in the public interest and seeking the
27 Court's approval of the settlement agreement. Defendants shall pay Brimer and his counsel
28 \$21,000 for all attorneys' fees, expert and investigation fees, litigation and related costs. The

1 payment shall be made payable to HIRST & CHANLER, LLP and shall be delivered within 10
2 days of execution of this Consent Judgment, at the following address:

3 HIRST & CHANLER LLP
4 Attn: Proposition 65 Controller
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710-2565

8 **5. RELEASE OF ALL CLAIMS**

9 **5.1 Release of Defendants and Downstream Customers**

10 In further consideration of the promises and agreements herein contained, and for the
11 payments to be made pursuant to sections 3 and 4, plaintiff, on behalf of himself his past and
12 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
13 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
14 form of legal action and releases all claims, including, without limitation, all actions, and causes
15 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
16 penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and
17 attorney's fees) of any nature whatsoever, whether known or unknown, fixed or contingent
18 (collectively "Claims"), against defendants and their downstream distributors, wholesalers,
19 licensors, licensees, auctioneers, retailers, dealers, customers, owners, purchasers, users, parent
20 companies, corporate affiliates, subsidiaries and their respective officers, directors, attorneys,
21 representatives, shareholders, agents, and employees and sister and parent entities (collectively
22 "Releasees") arising under or derived from Proposition 65, related to defendants or Releasees'
23 alleged failure to warn about consumer or occupational exposures to or identification of the Listed
24 Chemical contained in the Products.

25 The parties further agree and acknowledge that this Consent Judgment is a full, final, and
26 binding resolution of any direct or derivative violation of Proposition 65, that has been or could
27 have been asserted in the Complaint against defendants for the alleged failure to provide clear and
28 reasonable warnings of exposure to or identification of the Listed Chemical contained in the
Products.

1 It is specially understood and agreed that defendants' compliance with the terms of this
2 Consent Judgment resolves all issues and liability, now and in the future (so long as defendants
3 comply with the terms of the Consent Judgment) concerning defendants' and the Releasees'
4 compliance with the requirements of Proposition 65, as to the Listed Chemical in the exterior
5 decorations of the Products manufactured, distributed or offered for use or sale by defendants.

6 The releases provided by plaintiff in this subsection shall not extend upstream to any
7 entities that manufactured the Products or any component parts thereof, or any distributors or
8 suppliers who sold the Products or any component parts thereof to defendants.

9 **5.2 Defendants' Release of Brimer**

10 Defendants waive any and all claims against Brimer, his attorneys and other
11 representatives, for any and all actions taken or statements made (or those that could have been
12 taken or made) by Brimer and his attorneys and other representatives, whether in the course of
13 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
14 matter, and/or with respect to the Products.

15 **6. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and
17 shall be null and void if, for any reason, it is not approved and entered by the Court within one
18 year after it has been fully executed by all parties, in which event any monies that have been
19 provided to plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, shall be
20 refunded within fifteen (15) days after receiving written notice from defendants that the one-year
21 period has expired.

22 **7. SEVERABILITY**

23 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
24 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
25 provisions remaining shall not be adversely affected.

26 **8. ATTORNEYS' FEES**

27 In the event that, after the execution of this Consent Judgment: (1) a dispute arises with
28 respect to any provision of this Consent Judgment; or (2) Brimer takes reasonable and necessary

1 steps to enforce the terms of this Consent Judgment, the prevailing party shall be entitled to
2 reasonable attorneys' fees and costs. In the event that, after the execution of this Consent
3 Judgment defendants seek modification of this Consent Judgment pursuant to Section 14 below,
4 Brimer shall be entitled to his reasonable attorneys' fees and costs pursuant to CCP §1021.5."

5 **9. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of
7 California and apply within the State of California. In the event that Proposition 65 is repealed or
8 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
9 defendants shall provide written notice to Brimer of any asserted change in the law, and shall have
10 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
11 Products are so affected.

12 **10. NOTICES**

13 Unless specified herein, all correspondence and notices required to be provided pursuant to
14 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class.
15 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
16 other party at the following addresses:

17 To defendants:

18 Michael G. Pedhirney, Esq.
19 LITTLER MENDELSON
20 A Professional Corporation
21 650 California Street
22 20th Floor
23 San Francisco, CA 94108

24 To Brimer:

25 Proposition 65 Coordinator
26 HIRST & CHANLER LLP
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710-2565

1 Any party, from time to time, may specify in writing to the other party a change of address
2 to which all notices and other communications shall be sent.

3 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

4 This Consent Judgment may be executed in counterparts and by facsimile, each of which
5 shall be deemed an original, and all of which, when taken together, shall constitute one and the
6 same document.

7 **12. COMPLIANCE WITH CALIFORNIA HEALTH & SAFETY CODE §25249.7(f)**

8 Brimer agrees to comply with the reporting form requirements referenced in California
9 Health & Safety Code §25249.7(f).

10 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

11 Brimer and defendants agree to mutually employ their best efforts to support the entry of
12 this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court
13 in a timely manner. The parties acknowledge that, pursuant to California Health & Safety Code
14 §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
15 Accordingly, plaintiff agrees to file a Motion to Approve the Agreement ("Motion"). Defendants
16 shall have no additional responsibility to plaintiff's counsel pursuant to Code of Civil Procedure
17 §1021.5 or otherwise with regard to reimbursement of any fees and costs incurred with respect to
18 the preparation and filing of the Motion or with regard to plaintiff's counsel appearing for a
19 hearing thereon.

20 **14. MODIFICATION**

21 This Consent Judgment may be modified only: (1) by written agreement of the parties and
22 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
23 of any party and entry of a modified Consent Judgment by the Court. The Attorney General shall
24 be served with notice of any proposed modification to this Consent Judgment at least fifteen (15)
25 days in advance of its consideration by the Court.

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1 **15. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective parties and have read, understood and agree to all of the terms and conditions of this
4 Consent Judgment.

<p>5 AGREED TO:</p> <p>6 Date: _____</p> <p>7</p> <p>8 By: _____ Plaintiff, RUSSELL BRIMER</p> <p>9</p>	<p>5 AGREED TO:</p> <p>6 Date: <u>MAY 04, 2007</u></p> <p>7</p> <p>8 By: <u>[Signature]</u> Defendant, BERKELEY BOWL MARKET PLACE</p> <p>9</p>
	<p>10 AGREED TO:</p> <p>11 Date: <u>MAY 04, 2007</u></p> <p>12</p> <p>13 By: <u>[Signature]</u> Defendant, BERKELEY BOWL PRODUCE, INC.</p> <p>14</p>
<p>15 APPROVED AS TO FORM:</p> <p>16 Date: _____</p> <p>17 HIRST & CHANLER LLP</p> <p>18</p> <p>19 By: _____ Aparna L. Reddy Attorneys for Plaintiff RUSSELL BRIMER</p> <p>20</p> <p>21</p> <p>22</p>	<p>15 APPROVED AS TO FORM:</p> <p>16 Date: <u>May 9, 2007</u></p> <p>17 LITTLER MENDELSON</p> <p>18</p> <p>19 By: <u>[Signature]</u> Michael G. Pedhirney Attorney for the Defendants BERKELEY BOWL MARKETPLACE and BERKELEY BOWL PRODUCE, INC.</p> <p>20</p> <p>21</p> <p>22</p>

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24 **IT IS SO ORDERED**

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26 Date: _____

27 Hon. _____
JUDGE OF THE SUPERIOR COURT

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15. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Consent Judgment.

<p align="center">AGREED TO:</p> <p>Date: <u>5/2/07</u></p> <p>By: <u>[Signature]</u> Plaintiff, RUSSELL BRIMER</p>	<p align="center">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant, BERKELEY BOWL MARKET PLACE</p>
	<p align="center">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant, BERKELEY BOWL PRODUCE, INC.</p>
<p align="center">APPROVED AS TO FORM:</p> <p>Date: <u>5/4/07</u></p> <p align="center">HIRST & CHANLER LLP</p> <p>By: <u>[Signature]</u> Aparna L. Reddy Attorneys for Plaintiff RUSSELL BRIMER</p>	<p align="center">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p align="center">LITTLER MENDELSON</p> <p>By: _____ Michael G. Pedhirney Attorney for the Defendants BERKELEY BOWL MARKETPLACE and BERKELEY BOWL PRODUCE, INC.</p>

IT IS SO ORDERED

Date: _____

Hon.
JUDGE OF THE SUPERIOR COURT