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9 Attorneys for Plaintiff
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Beverages & More, Inc.

15
16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
18 UNLIMITED CIVIL JURISDICTION
19

20 RUSSELL BRIMER,

21 Plaintiff,

22 v.

23 BEVERAGES & MORE, INC.; and DOES 1
24 through 150,

25 Defendants.

Case No. CGC-04-435215

(JCK)
[PROPOSED] SECOND AMENDED
ORDER PURSUANT TO TERMS OF
CONSENT JUDGMENT

Date: October 6, 2005
Time: 9:30 A.M.
Dept.: 301
Judge: Hon. James L. Warren

ENDORSED
FILED
San Francisco County Superior Court

OCT 6 2005

GORDON PARK-LI, Clerk
BY: JOCELYN C. ROQUE
Deputy Clerk

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant BEVERAGES
2 & MORE, INC., having agreed through their respective counsel that judgment be entered
3 pursuant to the terms of the Stipulation and [Proposed] Order Re: Consent Judgment (“Consent
4 Judgment”) entered into by the above-referenced parties and attached hereto as **Exhibit A**; and
5 after consideration of the papers submitted and the arguments presented, the Court finds that the
6 settlement agreement set out in the attached Consent Judgment meets the criteria established by
7 Senate Bill 471, in that:

- 8 1. The health hazard warning that is required by the Consent Judgment complies with
9 Health & Safety Code §25249.7 (as amended by Senate Bill 471);
- 10 2. The reimbursement of fees and costs to be paid pursuant to the parties’ Consent
11 Judgment is reasonable under California law; and
- 12 3. The civil penalty amount to be paid pursuant to the parties’ Consent Judgment is
13 reasonable,

14 IT IS HEREBY ORDERED that judgment be entered in this case, in accordance with the
15 terms of the Consent Judgment, attached hereto as **Exhibit A**.

16 **IT IS SO ORDERED.**

17 Dated: October 6, 2005

JAMES L. WARREN

Hon. James L. Warren
JUDGE OF THE SUPERIOR COURT

Exhibit A

1 Clifford A. Chanler (State Bar No. 135534)
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3 71 Elm Street, Suite 8
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8 Russell Brimer

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15 Attorneys for Defendant
16 Beverages & More, Inc.

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

18 RUSSELL BRIMER,
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20 Plaintiff,
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22 v.
23 BEVERAGES & MORE, INC.; and DOES 1
24 through 150,
25
26 Defendants.

Case No. CGC-04-435215

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

1 **1. INTRODUCTION**

2 **1.1 Plaintiff and Settling Defendant.** This Consent Judgment is entered into by and
3 between plaintiff Russell Brimer (hereafter “Brimer” or “Plaintiff”) and Beverages & More, Inc.
4 (hereafter “Beverages”), with Plaintiff and Beverages collectively referred to as the “Parties” and
5 Brimer and Beverages each being a “Party.”

6 **1.2 Plaintiff.** Brimer is an individual residing in Alameda County, California, whose
7 complaint alleges that he seeks to promote awareness of exposures to toxic chemicals and
8 improve human health by reducing or eliminating hazardous substances contained in consumer
9 and industrial products.

10 **1.3 General Allegations.** Plaintiff alleges that Beverages has manufactured,
11 distributed and/or sold in the State of California glass sets, drinking glasses, glass soda bottles,
12 and other glassware with colored artwork, designs or markings on the exterior surface with
13 materials that contain lead and/or lead compounds and cadmium that are listed pursuant to the
14 Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
15 Sections 25249.5 et seq., also known as Proposition 65, to cause cancer and birth defects and/or
16 other reproductive harm. Lead and/or lead compounds and cadmium are referred to herein as
17 “Listed Chemicals.”

18 **1.4 Product Descriptions.** The products that are covered by this Consent Judgment
19 are defined as follows: glassware products manufactured, sold and/or distributed by Beverages
20 with colored artwork, designs or markings on the exterior surface, including, by way of example
21 and without limitation, the glassware listed at Exhibit A. Such products collectively are referred
22 to herein as the “Products.”

23 **1.5 Notices of Violation.** Beginning on July 30, 2004, Brimer served Beverages and
24 various public enforcement agencies with documents, entitled “60-Day Notice of Violation”
25 (“Notice”) that provided Beverages and such public enforcers with notice that alleged that
26 Beverages was in violation of Health & Safety Code Section 25249.6 for failing to warn
27 purchasers that certain products that it sold expose users in California to lead and/or lead
28 compounds and cadmium.

1 1.6 **Complaint.** On October 5, 2004, Brimer, alleging that he was acting in the
2 interest of the general public in California, filed a complaint (hereafter referred to as the
3 “Complaint” or the “Action”) in the Superior Court for the City and County of San Francisco
4 against Beverages and Does 1 through 150, alleging violations of Health & Safety Code
5 Section 25249.6 based on the alleged exposures to one or more of the Listed Chemicals contained
6 in certain products sold by Beverages.

7 1.7 **No Admission.** Beverages denies the material factual and legal allegations
8 contained in Plaintiff’s Notices and Complaint and maintains that all products that it has sold in
9 California, including the Products, have been and are in compliance with all laws. Nothing in this
10 Consent Judgment shall be construed as an admission by Beverages of any fact, finding, issue of
11 law, or violation of law, nor shall compliance with this Agreement constitute or be construed as
12 an admission by Beverages of any fact, finding, conclusion, issue of law or violation of law.
13 However, this section shall not diminish or otherwise affect the obligations, responsibilities and
14 duties of Beverages under this Consent Judgment.

15 1.8 **Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
16 stipulate that this Court has jurisdiction over the allegations of violations contained in the
17 Complaint and personal jurisdiction over Beverages as to the acts alleged in the Complaint, that
18 venue is proper in the County of San Francisco, that this Court has jurisdiction to enter this
19 Consent Judgment as a full and final settlement and resolution of the allegations contained in the
20 Complaint and of all claims which were or could have been raised based on the facts alleged
21 therein or arising therefrom, and to enforce the provisions thereof.

22 1.9 **Effective Date.** For purposes of this Consent Judgment, the “Effective Date” shall
23 be May 17, 2005.

24 **2. INJUNCTIVE RELIEF: PROPOSITION 65**

25 2.1 **WARNINGS AND REFORMULATION OBLIGATIONS**

26 (a) **Required Warnings.** No later than July 1, 2005, Beverages shall not sell
27 or offer for sale in California any Products containing the Listed Chemicals, unless warnings are
28 given in accordance with one or more provisions in subsection 2.2 below.

1 (b) **Exceptions.** The warning requirements set forth in subsections 2.1(a) and
2 2.2 below shall not apply to reformulated Products as defined in subsection 2.3 below.

3 2.2 **CLEAR AND REASONABLE WARNINGS**

4 (a) **Product Labeling.** A warning is affixed to the packaging, labeling or
5 directly to or on a Product by Beverages, its agent, or the manufacturer, importer, wholesaler or
6 distributor of the Product that states:

7 **WARNING: The materials used as colored decorations on the**
8 **exterior of this product contain lead and/ or**
9 **cadmium, chemicals known to the State of**
10 **California to cause birth defects or other**
11 **reproductive harm.**

12 or

13 **WARNING: The materials used as colored decorations on the**
14 **exterior of these products contain chemicals**
15 **known to the State of California to cause birth**
16 **defects or other reproductive harm.**

17 Warnings issued for Products pursuant to this subsection shall be prominently placed with
18 such conspicuousness as compared with other words, statements, designs, or devices as to render
19 it likely to be read and understood by an ordinary individual under customary conditions of use or
20 purchase. Any changes to the language or format of the warning required by this subsection shall
21 only be made following: (1) approval of Plaintiff; (2) approval from the California Attorney
22 General's Office, provided that written notice of at least fifteen (15) days is given to Plaintiff for
23 the opportunity to comment; or (3) Court approval.

24 (b) **Point-of-Sale Warnings.** Beverages may execute its warning
25 obligations, where applicable, through the posting of signs at its retail outlets in the State of
26 California at which Products are sold, in accordance with the terms specified in
27 subsections 2.2(b)(i) and 2.2(b)(ii).

28 (i) Point of Sale warnings may be provided through one or more signs
posted at or near the point of sale or display of the Products that state:

1 **Proposition 65 WARNING: Use of the following glassware products will**
2 **expose you to lead or cadmium, chemicals known**
3 **to the State of California to cause birth defects**
4 **or other reproductive harm: [List the specific**
5 **products for which a warning is given.]**

6 (ii) A point of sale warning provided pursuant to subsection 2.2(b)(i)
7 shall be prominently placed with such conspicuousness as compared with other words,
8 statements, designs, or devices as to render it likely to be read and understood by an ordinary
9 individual under customary conditions of use or purchase and shall be placed or written in a
10 manner such that the consumer understands to which *specific* Products the warnings apply so as
11 to minimize if not eliminate the chances that an overwarning situation will arise. Any changes to
12 the language or format of the warning required for Products by this subsection shall only be made
13 following: (1) approval of Plaintiff; (2) approval from the California Attorney General's Office,
14 provided that written notice of at least fifteen (15) days is given to Plaintiff for the opportunity to
15 comment; or (3) Court approval.

16 2.3 **REFORMULATION STANDARDS:** Products satisfying the conditions of
17 section 2.3(a) and 2.3(b) are referred to as "Reformulated Products" and are defined as follows:

18 **Reformulation Standards Regarding Lead**

19 (a) If the colored artwork, designs or markings on the exterior surface of the
20 Product that do not extend into the top 20 millimeters of the glassware (*i.e.*, below the exterior
21 portion of the lip and rim area as defined by American Society of Testing and Materials Standard
22 Test Method C 927-99, hereinafter the "Lip and Rim Area"), produce a test result no higher than
23 1.0 micrograms (ug) of lead using a Ghost Wipe™ test applied on the decorated portions of the
24 surface of the Product performed as outlined in NIOSH method no. 9100, such Product is a
25 Reformulated Product; and (b) If the colored artwork, designs or markings on the exterior surface
26 of the Product do extend into the Lip and Rim Area, then the colored artwork, designs, or
27 markings appearing within the Lip and Rim Area must contain six one-hundredths of one percent
28 (0.06%) lead by weight or less as measured at Beverages's option, either before or after the

1 material is fired onto (or otherwise affixed to) the Product, using a sample size of the materials in
2 question measuring approximately 50-100 mg and a test method of sufficient sensitivity to
3 establish a limit of quantitation (as distinguished from detection) of less than 600 parts per million
4 (“ppm”) such Product is a Reformulated Product; or

5 (c) If the Product utilizes paints, decals, or other materials for colored artwork,
6 designs or markings containing six one-hundredths of one percent (0.06%) lead by weight or less
7 as measured at Beverages’s option, either before or after the material is fired onto (or otherwise
8 affixed to) the Product, using a sample size of the materials in question measuring approximately
9 50-100 mg and a test method of sufficient sensitivity to establish a limit of quantitation (as
10 distinguished from detection) of less than 600 parts per million (“ppm”), such Product is a
11 Reformulated Product.

12 **Reformulation Standards Regarding Cadmium**

13 (a) If the colored artwork, designs or markings on the exterior surface of the
14 Product that do not extend into the Lip and Rim Area produce a test result no higher than 4.0
15 micrograms (ug) of cadmium using a Ghost Wipe™ test applied on the decorated portions of the
16 surface of the Product performed as outlined in NIOSH method no. 9100, then such Product is a
17 reformulated Product; and

18 (b) If the Product utilizes paints, decals, or other materials for colored artwork,
19 designs or markings containing twenty-four one-hundredths of one percent (0.24%) cadmium by
20 weight or less as measured at Beverages’s option, either before or after the material is fired onto
21 (or otherwise affixed to) the Product, using a sample size of the materials in question measuring
22 approximately 50-100 mg and a test method of sufficient sensitivity to establish a limit of
23 quantitation (as distinguished from detection) of less than 600 ppm, then such Product is a
24 Reformulated Product; or

25 (c) If the colored artwork, designs or markings on the exterior surface of the
26 Product do extent into the Lip and Rim Area, then the colored artwork, designs, or markings
27 appearing within the Lip and Rim Area must contain eight one-hundredths of one percent (0.08%)
28 cadmium by weight or less as measured at Beverage’s option, either before or after the material is

1 fired onto (or otherwise affixed to) the Product, using a sample size of the materials in question
2 measuring approximately 50-100 mg and a test method of sufficient sensitivity to establish a limit
3 of quantitation (as distinguished from detection) of less than 600 ppm, then such Product is a
4 Reformulated Product.

5 **2.4 REFORMULATION COMMITMENT.** By entering into this Stipulation and
6 Consent Judgment, Beverages hereby commits that: (a) as a continuing matter of corporate
7 policy, Beverages intends to undertake good faith efforts, taking into consideration Beverages'
8 operational and product licensing restrictions, to ensure that as many Products as reasonably
9 possible shall qualify as Reformulated Products; (b) to reach 80% (eighty percent) or more
10 Reformulated Products for Products offered for sale by Beverages by January 1, 2007; and (c) to
11 make commercially reasonable efforts thereafter to reach 100% (one-hundred percent)
12 Reformulated Products.

13 **3. MONETARY RELIEF**

14 **3.1 Penalties Pursuant to Health & Safety Code Section 25249.7(b).** Pursuant to
15 Health & Safety Code Section 25249.7(b), Beverages shall pay \$15,000 in civil penalties. The
16 penalty payment shall be made payable to "Chanler Law Group in Trust For Russell Brimer," and
17 shall be delivered to Plaintiff's counsel on or before June 1, 2005, at the following address:

18
19 CHANLER LAW GROUP
20 Attn: Clifford A. Chanler
21 71 Elm Street, Suite 8
22 New Canaan, CT 06840

23 (a) In the event that Beverages pays any penalty and the Consent Judgment is
24 not thereafter approved and entered by the Court, Brimer shall return any penalty funds paid
25 under this agreement within fifteen (15) days of receipt of a written request from Beverages
26 following notice of the issuance of the Court's decision.

27 (b) The Parties agree that Beverages's interest in and ability to acquire and
28 market Reformulated Products is to be accounted for in this section and, since it is not a remedy

1 provided for by law, the absence of Beverages previously marketing or selling Reformulated
2 Products is not relevant to the establishment of a penalty amount pursuant to section 3.1 above.

3 (c) **Apportionment of Penalties Received.** After Court approval of this
4 Consent Judgment pursuant to section 6, all penalty monies received shall be apportioned by
5 Plaintiff in accordance with Health & Safety Code Section 25192, with 75% of these funds
6 remitted to the State of California's Office of Environmental Health Hazard Assessment and the
7 remaining 25% of these penalty monies retained by Plaintiff as provided by Health & Safety
8 Code Section 25249.12(d). Plaintiff shall bear all responsibility for apportioning and paying to
9 the State of California the appropriate civil penalties paid in accordance with this section.

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

11 4.1 The Parties acknowledge that Plaintiff and his counsel offered to resolve this
12 dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
13 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
14 Beverages then expressed a desire to resolve the fee and cost issue shortly after the other
15 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
16 the compensation due to Plaintiff and his counsel under the private attorney general doctrine
17 codified at Code of Civil Procedure Section 1021.5 for all work performed through the Effective
18 Date of the Agreement. Under the private attorney general doctrine codified at Code of Civil
19 Procedure Section 1021.5, Beverages shall reimburse Plaintiff and his counsel for fees and costs,
20 incurred as a result of investigating, bringing this matter to Beverages's attention, litigating and
21 negotiating a settlement in the public interest. Beverages shall pay Plaintiff and his counsel
22 \$50,000 for all attorneys' fees, expert and investigation fees, and litigation costs. The payment
23 shall be made payable to the "Chanler Law Group" and shall be delivered to Plaintiff's counsel
24 on or before June 1, 2005 at the following address:

25 CHANLER LAW GROUP
26 Attn: Clifford A. Chanler
27 71 Elm Street, Suite 8
28 New Canaan, CT 06840

1 4.2 Except as specifically provided in this Consent Judgment, Beverages shall have no
2 further obligation with regard to reimbursement of Plaintiff's attorney's fees and costs with
3 regard to the Products covered in this Action.

4 **5. RELEASE OF ALL CLAIMS**

5 5.1 **Plaintiff's Release of Beverages.** As to Products, this Consent Judgment is a full,
6 final and binding resolution between the Plaintiff, acting on behalf of the public interest pursuant
7 to Health and Safety Code Section 25249.7(d), on the one hand, and Beverages, on the other
8 hand, of any violation of Proposition 65, of all claims made or which could have been made in the
9 Notice and/or the Complaint, and of any other statutory, regulatory or common law claim that
10 could have been asserted against Beverages and/or its affiliates, subsidiaries, divisions,
11 successors, assigns, and/or customers for failure to provide clear, reasonable, and lawful warnings
12 of exposure to lead or cadmium contained in or otherwise associated with Products manufactured,
13 sold or distributed by, for, or on behalf of Beverages. As to Products, compliance with the terms
14 of this Consent Judgment resolves any issue, now and in the future, concerning compliance by
15 Beverages and/or its affiliates, subsidiaries, divisions, successors, and assigns with the
16 requirements of Proposition 65 with respect to the Products.

17 5.2 In further consideration of the promises and agreements herein contained, and for
18 the payments to be made pursuant to sections 3 and 4, Plaintiff, on behalf of himself, his past and
19 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
20 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
21 form of legal action and releases all claims, including, without limitation, all actions, causes of
22 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
23 losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys'
24 fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively
25 "Claims"), against Beverages and each of its customers, owners, purchasers, users, parent
26 companies, corporate affiliates, subsidiaries and their respective officers, directors, attorneys,
27 representatives, shareholders, agents, and employees (collectively, "Beverages Releasees")
28 arising under Proposition 65, Business & Professions Code Section 17200 et seq. and Business &

1 Professions Code Section 17500 et seq., related to Beverages's or Beverages Releasees' alleged
2 failure to warn about exposures to or identification of Listed Chemicals contained in the Products.

3 The Parties further agree and acknowledge that this Consent Judgment is a full, final, and
4 binding resolution of any violation of Proposition 65, Business & Professions Code
5 Sections 17200 *et seq.* and Business & Professions Code Sections 17500 et seq., that have been or
6 could have been asserted in the Complaint against Beverages for its alleged failure to provide
7 clear and reasonable warnings of exposure to or identification of Listed Chemicals in the
8 Products.

9 In addition, Plaintiff, on behalf of himself, his attorneys, and their agents, waive all rights
10 to institute or participate in, directly or indirectly, any form of legal action and releases all Claims
11 against the Beverages Releasees arising under Proposition 65, Business & Professions Code
12 Sections 17200 et seq. and Business & Professions Code Sections 17500 et seq., related to each of
13 the Beverages Releasees' alleged failures to warn about exposures to or identification of Listed
14 Chemicals contained in the Products and for all actions or statements made by Beverages or its
15 attorneys or representatives, in the course of responding to alleged violations of Proposition 65,
16 Business & Professions Code Sections 17200 or Business & Professions Code Sections 17500 by
17 Beverages. Provided however, Plaintiff shall remain free to institute any form of legal action to
18 enforce the provisions of this Consent Judgment. It is specifically understood and agreed that the
19 Parties intend that Beverages's compliance with the terms of this Consent Judgment resolves all
20 issues and liability, now and in the future (so long as Beverages complies with the terms of the
21 Consent Judgment) concerning Beverages and the Beverages Releasees' compliance with the
22 requirements of Proposition 65, Business and Professions Code Sections 17200 *et seq.* and
23 Business & Professions Code Sections 17500 *et seq.*, as to the Products.

24 The Parties understand and agree that the release provided by Plaintiff herein shall not
25 extend upstream to the Product manufacturers or to any distributor or supplier from whom
26 Beverages purchased any of the Products covered by Exhibit A. It is further understood and
27 agreed by the Parties (including Beverages' Releasees) that this Consent Judgment does not in
28 any way involve, and that that the release provided by Plaintiff specifically excludes, any and all

1 products that are marketed by The Coca-Cola Company, or any other entity, under the name
2 "Coca Cola" or that are manufactured, distributed, bottled, or sold by or on behalf of The Coca-
3 Cola Company, or any other entity, regardless of whether the products were bottled in the United
4 States, Mexico or any other country, including but not limited to products such as the "Mexican
5 Coke" products identified in Plaintiff's 60-Day Notice of Violation dated January 3, 2005.

6 **5.3 Beverages' Release of Plaintiff.** Beverages waives all rights to institute any form
7 of legal action against Plaintiff, or his attorneys or representatives, for all actions taken or
8 statements made by Plaintiff and his attorneys or representatives, in the course of seeking
9 enforcement of Proposition 65, Business & Professions Code Sections 17200 et seq. or
10 Business & Professions Code Sections 17500 et seq. in this Action.

11 **6. COURT APPROVAL**

12 This Consent Judgment is not effective until it is approved and entered by the Court and
13 shall be null and void if, for any reason, it is not approved and entered by the Court within one
14 year after it has been fully executed by all Parties, in which event any monies that have been
15 provided to Plaintiff or his counsel pursuant to section 3 and/or section 4 above, shall be refunded
16 within fifteen (15) days.

17 **7. ENFORCEMENT OF CONSENT JUDGMENT**

18 **7.1** Before moving to enforce the terms and conditions of Section 2 of this Consent
19 Judgment against Beverages with respect to an alleged violation occurring at a retail store located
20 in California, Plaintiff and others must follow the procedures set forth in subsections 7.2 through
21 7.4.

22 **7.2** In the event that Plaintiff and/or their attorneys, agents, assigns, or any other
23 person acting in the public interest under Health & Safety Code Section 25249.7(d) (hereinafter
24 "Notifying Person") identifies one or more retail stores owned and operated by Beverages at
25 which Products are sold (hereinafter "retail outlet") for which the warnings for those Products
26 required under Section 2 of this Consent Judgment are not being given, such Notifying Person
27 shall notify, in writing, Beverages of such alleged failure to warn (the "Notice of Breach"). The
28 Notice of Breach shall be sent by first class mail, with proof of service, to the persons identified

1 in Section 11 of this Consent Judgment, and must be served within sixty (60) days of the date the
2 alleged violation was observed. The Notice of Breach shall identify the date the alleged violation
3 was observed and the retail outlet in question, and reasonably describe the nature of the alleged
4 violation with sufficient detail to allow Beverages to determine the basis of the claim being
5 asserted and the identities of the Products to which those assertions apply.

6 7.3 In the event that the Notifying Person identifies a specific retail outlet, other than
7 the specific one identified in subsection 7.2 of this Consent judgment, not giving warnings for the
8 Products as required under Section 2 of this Consent Judgment, such Notifying Person shall serve
9 Beverages with another Notice of Breach in the manner described in subsection 7.2 and provide
10 the information required in subsection 7.2.

11 7.4 The Notifying Person shall take no further action against Beverages unless the
12 Notifying Person discovers, at least thirty (30) days after service of the Notices of Breach served
13 pursuant to subsections 7.2 and 7.3, another failure to warn for any Products whether or not the
14 alleged failure to warn is at the same retail outlet(s) identified in the Notices of Breach served
15 pursuant to subsections 7.2 and 7.3.

16 **8. SEVERABILITY**

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

20 **9. ATTORNEYS' FEES**

21 In the event that a dispute arises with respect to any provision(s) of this Consent
22 Judgment, the prevailing party shall, except as otherwise provided herein, be entitled to recover
23 reasonable and necessary costs and reasonable attorneys' fees incurred from the resolution of
24 such dispute.

25 **10. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
28 is otherwise rendered inapplicable by reason of law generally, or as to the Products specifically,

1 then Beverages shall have no further obligations pursuant to this Consent Judgment with respect
2 to, and to the extent that, those Products are so affected.

3 **11. NOTICES**

4 All correspondence and notices required to be provided pursuant to this Consent Judgment
5 shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail,
6 return receipt requested or (ii) overnight courier on either Party by the other at the following
7 addresses. (Either Party, from time to time, may, pursuant to the methods prescribed above,
8 specify a change of address to which all future notices and other communications shall be sent.)

9 To Beverages:

10 Bannus Hudson, President
11 Beverages & More, Inc.
12 1470 Enea Circle, Suite 1600
Concord, CA 94520

13 With a copy to:

14 Richard C. Jacobs, Esq.
15 Howard Rice Nemerovski Canady Falk & Rabkin
16 Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4024

17 To Plaintiff:

18 Clifford A. Chanler, Esq.
19 Chanler Law Group
20 71 Elm Street, Suite 8
New Canaan, CT 06840

1
2 **12. NO ADMISSIONS**

3 Nothing in this Consent Judgment shall constitute or be construed as an admission by
4 Beverages of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance
5 with this Consent Judgment constitute or be construed as an admission by Beverages of any fact,
6 finding, conclusion, issue of issue of law, or violation of law, such being specifically denied by
7 Beverages. Beverages reserves all of its rights and defenses with regard to any claim by any
8 party under Proposition 65 or otherwise. However, this section shall not diminish or otherwise
9 affect Beverages's obligations, responsibilities and duties under this Consent Judgment.

10 **13. COUNTERPARTS; FACSIMILE SIGNATURES**

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

14 **14. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

15 Plaintiff agrees to comply with the reporting form requirements referenced in Health &
16 Safety Code Section 25249.7(f). Pursuant to regulations promulgated under that section, Plaintiff
17 shall present this Consent Judgment to the California Attorney General's Office within two (2)
18 days after receiving all of the necessary signatures. A noticed motion to enter the Consent
19 Judgment will then be served on the Attorney General's Office at least forty-five (45) days prior
20 to the date a hearing is scheduled on such motion in the Superior Court for the City and County of
21 San Francisco unless the Court allows a shorter period of time.

22 **15. ADDITIONAL POST EXECUTION ACTIVITIES**

23 The Parties shall mutually employ their best efforts to support the entry of this Agreement
24 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
25 manner. The Parties acknowledge that, pursuant to Health & Safety Code Section 25249.7, a
26 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the
27 Parties agree to file a Joint Motion to Approve the Agreement ("Joint Motion"), the first draft of
28

1 which Brimer's counsel shall prepare, within a reasonable period of time after the Effective Date
2 (*i.e.*, not to exceed thirty (30) days unless otherwise agreed to by the Parties' counsel based on
3 unanticipated circumstances). Plaintiff's counsel shall prepare a declaration in support of the
4 Joint Motion which shall, *inter alia*, set forth support for the fees and costs to be reimbursed
5 pursuant to Section 4. Beverages shall have no additional responsibility to Plaintiff's counsel
6 pursuant to Code of Civil Procedure Section 1021.5 or otherwise with regard to reimbursement of
7 any fees and costs incurred with respect to the preparation and filing of the Joint Motion and its
8 supporting declaration or with regard to Plaintiff's counsel appearing for a hearing or related
9 proceedings thereon.

10 **16. MODIFICATION**

11 This Consent Judgment may be modified only by: (1) written agreement of the Parties
12 and upon entry of a modified Consent Judgment by the Court thereon, or (2) motion of any Party
13 as provided by law and upon entry of a modified Consent Judgment by the Court. The Attorney
14 General shall be served with notice of any proposed modification to this Consent Judgment at
15 least fifteen (15) days in advance of its consideration by the Court.

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17. 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.

AGREED TO:

AGREED TO:

Date: 5-20-05

Date: _____

By: 
Plaintiff Russell Brimer


By: _____
Defendant BEVERAGES & MORE, INC.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: 5/20/05

Date: _____

CHANLER LAW GROUP
By: 
Clifford A. Chanler
Attorneys for Plaintiff
RUSSELL BRIMER

HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
By: _____
Richard C. Jacobs, Esq.
Attorney for Defendant
BEVERAGES & MORE, INC

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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17. 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.

AGREED TO:

AGREED TO:

Date: _____

Date: May 18, 2005

By: _____
Plaintiff Russell Brimer

By: J. N. Hy - CFO
Defendant BEVERAGES & MORE, INC.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: _____

Date: May 24, 2005

CHANLER LAW GROUP

HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN

By: _____
Clifford A. Chanler
Attorneys for Plaintiff
RUSSELL BRIMER

By: Richard C. Jacobs
Richard C. Jacobs, Esq.
Attorney for Defendant
BEVERAGES & MORE, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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Exhibit A

All glass and/or ceramic glasses, mugs, bowls, teapots, and other glassware with colored designs and/or artwork on the exterior, including but not limited to:

- Pub Glass Coastal Fog
- Beer Glass Sierra Nevada
- Beer Glass Orval
- 1800 Party Bucket (with Margarita glass)
- NEHI Peach Longnecks Soda bottle

1 Clifford A. Chanler (State Bar No. 135534)
Stephen S. Sayad (State Bar No. 104866)
2 CHANLER LAW GROUP
71 Elm Street, Suite 8
3 New Canaan, CT 06840
Telephone: (203) 966-9911
4 Facsimile: (203) 801-5222

**ENDORSED
FILED**
San Francisco County Superior Court

OCT 6 2005

5 Daniel Bornstein (State Bar No. 181711)
Laralei S. Paras (State Bar No. 203319)
6 PARAS LAW GROUP
655 Redwood Highway, Suite 216
7 Mill Valley, CA 94941
Telephone: (415) 380-9222
8 Facsimile: (415) 380-9223

GORDON PARK-LI, Clerk
BY: JOCELYN C. FOQUE
Deputy Clerk

9 Attorneys for Plaintiff
Russell Brimer

10 Richard C. Jacobs (State Bar No. 49538)
11 HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
12 San Francisco, CA 94111-4024
Telephone: (415) 434-1600
13 Facsimile: (415) 217-5910

14 Attorneys for Defendant
Beverages & More, Inc.

15
16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
18 UNLIMITED CIVIL JURISDICTION
19

20 RUSSELL BRIMER,
21 Plaintiff,

22 v.

23 BEVERAGES & MORE, INC.; and DOES 1
24 through 150,
25 Defendants.

Case No. CGC-04-435215

(JCR)
**[PROPOSED] SECOND AMENDED
JUDGMENT PURSUANT TO TERMS
OF CONSENT JUDGMENT**

Date: October 6, 2005

Time: 9:30 A.M.

Dept.: 301

Judge: Hon. James L. Warren

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[PROPOSED] JUDGMENT PURSUANT TO TERMS OF CONSENT JUDGMENT

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant BEVERAGES
2 & MORE, INC., having agreed through their respective counsel that judgment be entered
3 pursuant to the terms of the Stipulation and [Proposed] Order Re: Consent Judgment (“Consent
4 Judgment”) entered into by the parties, and after issuing an Order Approving Proposition 65
5 Settlement Agreement and Consent Judgment on October 6, 2005.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of
7 Civil Procedure §664.5, judgment is entered in accordance with the terms of the Order Approving
8 Proposition 65 Settlement Agreement and Consent Judgment, between the parties.

9 **IT IS SO ORDERED.**

10 Dated: October 6, 2005

JAMES L. WARREN

Hon. James L. Warren
JUDGE OF THE SUPERIOR COURT

Exhibit A

1 Clifford A. Chanler (State Bar No. 135534)
2 CHANLER LAW GROUP
3 71 Elm Street, Suite 8
4 New Canaan, CT 06840
5 Telephone: (203) 966-9911
6 Facsimile: (203) 801-5222

7 Attorneys for Plaintiff
8 Russell Brimer

9 Richard C. Jacobs (State Bar No. 49538)
10 HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
11 Three Embarcadero Center, 7th Floor
12 San Francisco, CA 94111-4024
13 Telephone: (415) 434-1600
14 Facsimile: (415) 217-5910

15 Attorneys for Defendant
16 Beverages & More, Inc.

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

RUSSELL BRIMER,

Plaintiff,

v.

BEVERAGES & MORE, INC.; and DOES 1
through 150,

Defendants.

Case No. CGC-04-435215

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

1 **1. INTRODUCTION**

2 **1.1 Plaintiff and Settling Defendant.** This Consent Judgment is entered into by and
3 between plaintiff Russell Brimer (hereafter “Brimer” or “Plaintiff”) and Beverages & More, Inc.
4 (hereafter “Beverages”), with Plaintiff and Beverages collectively referred to as the “Parties” and
5 Brimer and Beverages each being a “Party.”

6 **1.2 Plaintiff.** Brimer is an individual residing in Alameda County, California, whose
7 complaint alleges that he seeks to promote awareness of exposures to toxic chemicals and
8 improve human health by reducing or eliminating hazardous substances contained in consumer
9 and industrial products.

10 **1.3 General Allegations.** Plaintiff alleges that Beverages has manufactured,
11 distributed and/or sold in the State of California glass sets, drinking glasses, glass soda bottles,
12 and other glassware with colored artwork, designs or markings on the exterior surface with
13 materials that contain lead and/or lead compounds and cadmium that are listed pursuant to the
14 Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
15 Sections 25249.5 et seq., also known as Proposition 65, to cause cancer and birth defects and/or
16 other reproductive harm. Lead and/or lead compounds and cadmium are referred to herein as
17 “Listed Chemicals.”

18 **1.4 Product Descriptions.** The products that are covered by this Consent Judgment
19 are defined as follows: glassware products manufactured, sold and/or distributed by Beverages
20 with colored artwork, designs or markings on the exterior surface, including, by way of example
21 and without limitation, the glassware listed at Exhibit A. Such products collectively are referred
22 to herein as the “Products.”

23 **1.5 Notices of Violation.** Beginning on July 30, 2004, Brimer served Beverages and
24 various public enforcement agencies with documents, entitled “60-Day Notice of Violation”
25 (“Notice”) that provided Beverages and such public enforcers with notice that alleged that
26 Beverages was in violation of Health & Safety Code Section 25249.6 for failing to warn
27 purchasers that certain products that it sold expose users in California to lead and/or lead
28 compounds and cadmium.

1 1.6 **Complaint.** On October 5, 2004, Brimer, alleging that he was acting in the
2 interest of the general public in California, filed a complaint (hereafter referred to as the
3 “Complaint” or the “Action”) in the Superior Court for the City and County of San Francisco
4 against Beverages and Does 1 through 150, alleging violations of Health & Safety Code
5 Section 25249.6 based on the alleged exposures to one or more of the Listed Chemicals contained
6 in certain products sold by Beverages.

7 1.7 **No Admission.** Beverages denies the material factual and legal allegations
8 contained in Plaintiff’s Notices and Complaint and maintains that all products that it has sold in
9 California, including the Products, have been and are in compliance with all laws. Nothing in this
10 Consent Judgment shall be construed as an admission by Beverages of any fact, finding, issue of
11 law, or violation of law, nor shall compliance with this Agreement constitute or be construed as
12 an admission by Beverages of any fact, finding, conclusion, issue of law or violation of law.
13 However, this section shall not diminish or otherwise affect the obligations, responsibilities and
14 duties of Beverages under this Consent Judgment.

15 1.8 **Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
16 stipulate that this Court has jurisdiction over the allegations of violations contained in the
17 Complaint and personal jurisdiction over Beverages as to the acts alleged in the Complaint, that
18 venue is proper in the County of San Francisco, that this Court has jurisdiction to enter this
19 Consent Judgment as a full and final settlement and resolution of the allegations contained in the
20 Complaint and of all claims which were or could have been raised based on the facts alleged
21 therein or arising therefrom, and to enforce the provisions thereof.

22 1.9 **Effective Date.** For purposes of this Consent Judgment, the “Effective Date” shall
23 be May 17, 2005.

24 **2. INJUNCTIVE RELIEF: PROPOSITION 65**

25 2.1 **WARNINGS AND REFORMULATION OBLIGATIONS**

26 (a) **Required Warnings.** No later than July 1, 2005, Beverages shall not sell
27 or offer for sale in California any Products containing the Listed Chemicals, unless warnings are
28 given in accordance with one or more provisions in subsection 2.2 below.

1 (b) **Exceptions.** The warning requirements set forth in subsections 2.1(a) and
2 2.2 below shall not apply to reformulated Products as defined in subsection 2.3 below.

3 **2.2 CLEAR AND REASONABLE WARNINGS**

4 (a) **Product Labeling.** A warning is affixed to the packaging, labeling or
5 directly to or on a Product by Beverages, its agent, or the manufacturer, importer, wholesaler or
6 distributor of the Product that states:

7 **WARNING: The materials used as colored decorations on the**
8 **exterior of this product contain lead and/ or**
9 **cadmium, chemicals known to the State of**
10 **California to cause birth defects or other**
11 **reproductive harm.**

12 **or**

13 **WARNING: The materials used as colored decorations on the**
14 **exterior of these products contain chemicals**
15 **known to the State of California to cause birth**
16 **defects or other reproductive harm.**

17 Warnings issued for Products pursuant to this subsection shall be prominently placed with
18 such conspicuousness as compared with other words, statements, designs, or devices as to render
19 it likely to be read and understood by an ordinary individual under customary conditions of use or
20 purchase. Any changes to the language or format of the warning required by this subsection shall
21 only be made following: (1) approval of Plaintiff; (2) approval from the California Attorney
22 General's Office, provided that written notice of at least fifteen (15) days is given to Plaintiff for
23 the opportunity to comment; or (3) Court approval.

24 (b) **Point-of-Sale Warnings.** Beverages may execute its warning
25 obligations, where applicable, through the posting of signs at its retail outlets in the State of
26 California at which Products are sold, in accordance with the terms specified in
27 subsections 2.2(b)(i) and 2.2(b)(ii).

28 (i) Point of Sale warnings may be provided through one or more signs
posted at or near the point of sale or display of the Products that state:

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

6 **or**

7 **WARNING: The materials used as colored decorations on the**
8 **exterior of these products contain lead and/or**
9 **cadmium, chemicals known to the State of**
10 **California to cause birth defects or other**
11 **reproductive harm.**

12 **or**

13 **WARNING: The materials used as colored decorations on the**
14 **exterior of the decorated beverageware products**
15 **sold in this store contain lead or cadmium,**
16 **chemicals known to the State of California to**
17 **cause birth defects or other reproductive harm.¹**

18 **or**

19 **WARNING: The materials used as colored decorations on the**
20 **exterior of the following products sold in this**
21 **store contain lead or cadmium, chemicals**
22 **known to the State of California to cause birth**
23 **defects or other reproductive harm. [List the**
24 **specific products for which a warning is given.]**

25 If Beverages wishes, in its discretion, to combine the warning required herein with a
26 warning requirements previously imposed with regard to leaded crystal products, the warnings for
27 the Products and such leaded crystal products may provide:

28 **Proposition 65 WARNING: Consuming foods or beverages that have**
 been kept or served in leaded crystal products,
 or handling such products, will expose you to
 lead, a chemical known to the State of California
 to cause birth defects or other reproductive harm
 harm.

¹ This formulation of the warning may only be used where the store sells only Products which are not Reformulated Products as defined in subsection 2.3 below.

1 material is fired onto (or otherwise affixed to) the Product, using a sample size of the materials in
2 question measuring approximately 50-100 mg and a test method of sufficient sensitivity to
3 establish a limit of quantitation (as distinguished from detection) of less than 600 parts per million
4 (“ppm”) such Product is a Reformulated Product; or

5 (c) If the Product utilizes paints, decals, or other materials for colored artwork,
6 designs or markings containing six one-hundredths of one percent (0.06%) lead by weight or less
7 as measured at Beverages’s option, either before or after the material is fired onto (or otherwise
8 affixed to) the Product, using a sample size of the materials in question measuring approximately
9 50-100 mg and a test method of sufficient sensitivity to establish a limit of quantitation (as
10 distinguished from detection) of less than 600 parts per million (“ppm”), such Product is a
11 Reformulated Product.

12 **Reformulation Standards Regarding Cadmium**

13 (a) If the colored artwork, designs or markings on the exterior surface of the
14 Product that do not extend into the Lip and Rim Area produce a test result no higher than 4.0
15 micrograms (ug) of cadmium using a Ghost Wipe™ test applied on the decorated portions of the
16 surface of the Product performed as outlined in NIOSH method no. 9100, then such Product is a
17 reformulated Product; and

18 (b) If the Product utilizes paints, decals, or other materials for colored artwork,
19 designs or markings containing twenty-four one-hundredths of one percent (0.24%) cadmium by
20 weight or less as measured at Beverages’s option, either before or after the material is fired onto
21 (or otherwise affixed to) the Product, using a sample size of the materials in question measuring
22 approximately 50-100 mg and a test method of sufficient sensitivity to establish a limit of
23 quantitation (as distinguished from detection) of less than 600 ppm, then such Product is a
24 Reformulated Product; or

25 (c) If the colored artwork, designs or markings on the exterior surface of the
26 Product do extent into the Lip and Rim Area, then the colored artwork, designs, or markings
27 appearing within the Lip and Rim Area must contain eight one-hundredths of one percent (0.08%)
28 cadmium by weight or less as measured at Beverage’s option, either before or after the material is

1 fired onto (or otherwise affixed to) the Product, using a sample size of the materials in question
2 measuring approximately 50-100 mg and a test method of sufficient sensitivity to establish a limit
3 of quantitation (as distinguished from detection) of less than 600 ppm, then such Product is a
4 Reformulated Product.

5 2.4 **REFORMULATION COMMITMENT.** By entering into this Stipulation and
6 Consent Judgment, Beverages hereby commits that: (a) as a continuing matter of corporate
7 policy, Beverages intends to undertake good faith efforts, taking into consideration Beverages'
8 operational and product licensing restrictions, to ensure that as many Products as reasonably
9 possible shall qualify as Reformulated Products; (b) to reach 80% (eighty percent) or more
10 Reformulated Products for Products offered for sale by Beverages by January 1, 2007; and (c) to
11 make commercially reasonable efforts thereafter to reach 100% (one-hundred percent)
12 Reformulated Products.

13 **3. MONETARY RELIEF**

14 3.1 **Penalties Pursuant to Health & Safety Code Section 25249.7(b).** Pursuant to
15 Health & Safety Code Section 25249.7(b), Beverages shall pay \$15,000 in civil penalties. The
16 penalty payment shall be made payable to "Chanler Law Group in Trust For Russell Brimer," and
17 shall be delivered to Plaintiff's counsel on or before June 1, 2005, at the following address:

18
19 CHANLER LAW GROUP
20 Attn: Clifford A. Chanler
21 71 Elm Street, Suite 8
22 New Canaan, CT 06840

23 (a) In the event that Beverages pays any penalty and the Consent Judgment is
24 not thereafter approved and entered by the Court, Brimer shall return any penalty funds paid
25 under this agreement within fifteen (15) days of receipt of a written request from Beverages
26 following notice of the issuance of the Court's decision.

27 (b) The Parties agree that Beverages's interest in and ability to acquire and
28 market Reformulated Products is to be accounted for in this section and, since it is not a remedy

1 provided for by law, the absence of Beverages previously marketing or selling Reformulated
2 Products is not relevant to the establishment of a penalty amount pursuant to section 3.1 above.

3 (c) **Apportionment of Penalties Received.** After Court approval of this
4 Consent Judgment pursuant to section 6, all penalty monies received shall be apportioned by
5 Plaintiff in accordance with Health & Safety Code Section 25192, with 75% of these funds
6 remitted to the State of California's Office of Environmental Health Hazard Assessment and the
7 remaining 25% of these penalty monies retained by Plaintiff as provided by Health & Safety
8 Code Section 25249.12(d). Plaintiff shall bear all responsibility for apportioning and paying to
9 the State of California the appropriate civil penalties paid in accordance with this section.

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

11 4.1 The Parties acknowledge that Plaintiff and his counsel offered to resolve this
12 dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
13 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
14 Beverages then expressed a desire to resolve the fee and cost issue shortly after the other
15 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
16 the compensation due to Plaintiff and his counsel under the private attorney general doctrine
17 codified at Code of Civil Procedure Section 1021.5 for all work performed through the Effective
18 Date of the Agreement. Under the private attorney general doctrine codified at Code of Civil
19 Procedure Section 1021.5, Beverages shall reimburse Plaintiff and his counsel for fees and costs,
20 incurred as a result of investigating, bringing this matter to Beverages's attention, litigating and
21 negotiating a settlement in the public interest. Beverages shall pay Plaintiff and his counsel
22 \$50,000 for all attorneys' fees, expert and investigation fees, and litigation costs. The payment
23 shall be made payable to the "Chanler Law Group" and shall be delivered to Plaintiff's counsel
24 on or before June 1, 2005 at the following address:

25 CHANLER LAW GROUP
26 Attn: Clifford A. Chanler
27 71 Elm Street, Suite 8
28 New Canaan, CT 06840

1 4.2 Except as specifically provided in this Consent Judgment, Beverages shall have no
2 further obligation with regard to reimbursement of Plaintiff's attorney's fees and costs with
3 regard to the Products covered in this Action.

4 **5. RELEASE OF ALL CLAIMS**

5 5.1 **Plaintiff's Release of Beverages.** As to Products, this Consent Judgment is a full,
6 final and binding resolution between the Plaintiff, acting on behalf of the public interest pursuant
7 to Health and Safety Code Section 25249.7(d), on the one hand, and Beverages, on the other
8 hand, of any violation of Proposition 65, of all claims made or which could have been made in the
9 Notice and/or the Complaint, and of any other statutory, regulatory or common law claim that
10 could have been asserted against Beverages and/or its affiliates, subsidiaries, divisions,
11 successors, assigns, and/or customers for failure to provide clear, reasonable, and lawful warnings
12 of exposure to lead or cadmium contained in or otherwise associated with Products manufactured,
13 sold or distributed by, for, or on behalf of Beverages. As to Products, compliance with the terms
14 of this Consent Judgment resolves any issue, now and in the future, concerning compliance by
15 Beverages and/or its affiliates, subsidiaries, divisions, successors, and assigns with the
16 requirements of Proposition 65 with respect to the Products.

17 5.2 In further consideration of the promises and agreements herein contained, and for
18 the payments to be made pursuant to sections 3 and 4, Plaintiff, on behalf of himself, his past and
19 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
20 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
21 form of legal action and releases all claims, including, without limitation, all actions, causes of
22 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
23 losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys'
24 fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively
25 "Claims"), against Beverages and each of its customers, owners, purchasers, users, parent
26 companies, corporate affiliates, subsidiaries and their respective officers, directors, attorneys,
27 representatives, shareholders, agents, and employees (collectively, "Beverages Releasees")
28 arising under Proposition 65, Business & Professions Code Section 17200 et seq. and Business &

1 Professions Code Section 17500 et seq., related to Beverages's or Beverages Releasees' alleged
2 failure to warn about exposures to or identification of Listed Chemicals contained in the Products.

3 The Parties further agree and acknowledge that this Consent Judgment is a full, final, and
4 binding resolution of any violation of Proposition 65, Business & Professions Code
5 Sections 17200 *et seq.* and Business & Professions Code Sections 17500 et seq., that have been or
6 could have been asserted in the Complaint against Beverages for its alleged failure to provide
7 clear and reasonable warnings of exposure to or identification of Listed Chemicals in the
8 Products.

9 In addition, Plaintiff, on behalf of himself, his attorneys, and their agents, waive all rights
10 to institute or participate in, directly or indirectly, any form of legal action and releases all Claims
11 against the Beverages Releasees arising under Proposition 65, Business & Professions Code
12 Sections 17200 et seq. and Business & Professions Code Sections 17500 et seq., related to each of
13 the Beverages Releasees' alleged failures to warn about exposures to or identification of Listed
14 Chemicals contained in the Products and for all actions or statements made by Beverages or its
15 attorneys or representatives, in the course of responding to alleged violations of Proposition 65,
16 Business & Professions Code Sections 17200 or Business & Professions Code Sections 17500 by
17 Beverages. Provided however, Plaintiff shall remain free to institute any form of legal action to
18 enforce the provisions of this Consent Judgment. It is specifically understood and agreed that the
19 Parties intend that Beverages's compliance with the terms of this Consent Judgment resolves all
20 issues and liability, now and in the future (so long as Beverages complies with the terms of the
21 Consent Judgment) concerning Beverages and the Beverages Releasees' compliance with the
22 requirements of Proposition 65, Business and Professions Code Sections 17200 *et seq.* and
23 Business & Professions Code Sections 17500 *et seq.*, as to the Products.

24 The Parties understand and agree that the release provided by Plaintiff herein shall not
25 extend upstream to the Product manufacturers or to any distributor or supplier from whom
26 Beverages purchased any of the Products covered by Exhibit A. It is further understood and
27 agreed by the Parties (including Beverages' Releasees) that this Consent Judgment does not in
28 any way involve, and that that the release provided by Plaintiff specifically excludes, any and all

1 products that are marketed by The Coca-Cola Company, or any other entity, under the name
2 "Coca Cola" or that are manufactured, distributed, bottled, or sold by or on behalf of The Coca-
3 Cola Company, or any other entity, regardless of whether the products were bottled in the United
4 States, Mexico or any other country, including but not limited to products such as the "Mexican
5 Coke" products identified in Plaintiff's 60-Day Notice of Violation dated January 3, 2005.

6 **5.3 Beverages' Release of Plaintiff.** Beverages waives all rights to institute any form
7 of legal action against Plaintiff, or his attorneys or representatives, for all actions taken or
8 statements made by Plaintiff and his attorneys or representatives, in the course of seeking
9 enforcement of Proposition 65, Business & Professions Code Sections 17200 et seq. or
10 Business & Professions Code Sections 17500 et seq. in this Action.

11 **6. COURT APPROVAL**

12 This Consent Judgment is not effective until it is approved and entered by the Court and
13 shall be null and void if, for any reason, it is not approved and entered by the Court within one
14 year after it has been fully executed by all Parties, in which event any monies that have been
15 provided to Plaintiff or his counsel pursuant to section 3 and/or section 4 above, shall be refunded
16 within fifteen (15) days.

17 **7. ENFORCEMENT OF CONSENT JUDGMENT**

18 **7.1** Before moving to enforce the terms and conditions of Section 2 of this Consent
19 Judgment against Beverages with respect to an alleged violation occurring at a retail store located
20 in California, Plaintiff and others must follow the procedures set forth in subsections 7.2 through
21 7.4.

22 **7.2** In the event that Plaintiff and/or their attorneys, agents, assigns, or any other
23 person acting in the public interest under Health & Safety Code Section 25249.7(d) (hereinafter
24 "Notifying Person") identifies one or more retail stores owned and operated by Beverages at
25 which Products are sold (hereinafter "retail outlet") for which the warnings for those Products
26 required under Section 2 of this Consent Judgment are not being given, such Notifying Person
27 shall notify, in writing, Beverages of such alleged failure to warn (the "Notice of Breach"). The
28 Notice of Breach shall be sent by first class mail, with proof of service, to the persons identified

1 in Section 11 of this Consent Judgment, and must be served within sixty (60) days of the date the
2 alleged violation was observed. The Notice of Breach shall identify the date the alleged violation
3 was observed and the retail outlet in question, and reasonably describe the nature of the alleged
4 violation with sufficient detail to allow Beverages to determine the basis of the claim being
5 asserted and the identities of the Products to which those assertions apply.

6 7.3 In the event that the Notifying Person identifies a specific retail outlet, other than
7 the specific one identified in subsection 7.2 of this Consent judgment, not giving warnings for the
8 Products as required under Section 2 of this Consent Judgment, such Notifying Person shall serve
9 Beverages with another Notice of Breach in the manner described in subsection 7.2 and provide
10 the information required in subsection 7.2.

11 7.4 The Notifying Person shall take no further action against Beverages unless the
12 Notifying Person discovers, at least thirty (30) days after service of the Notices of Breach served
13 pursuant to subsections 7.2 and 7.3, another failure to warn for any Products whether or not the
14 alleged failure to warn is at the same retail outlet(s) identified in the Notices of Breach served
15 pursuant to subsections 7.2 and 7.3.

16 **8. SEVERABILITY**

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

20 **9. ATTORNEYS' FEES**

21 In the event that a dispute arises with respect to any provision(s) of this Consent
22 Judgment, the prevailing party shall, except as otherwise provided herein, be entitled to recover
23 reasonable and necessary costs and reasonable attorneys' fees incurred from the resolution of
24 such dispute.

25 **10. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
28 is otherwise rendered inapplicable by reason of law generally, or as to the Products specifically,

1 then Beverages shall have no further obligations pursuant to this Consent Judgment with respect
2 to, and to the extent that, those Products are so affected.

3 **11. NOTICES**

4 All correspondence and notices required to be provided pursuant to this Consent Judgment
5 shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail,
6 return receipt requested or (ii) overnight courier on either Party by the other at the following
7 addresses. (Either Party, from time to time, may, pursuant to the methods prescribed above,
8 specify a change of address to which all future notices and other communications shall be sent.)

9 To Beverages:

10 Bannus Hudson, President
11 Beverages & More, Inc.
12 1470 Enea Circle, Suite 1600
13 Concord, CA 94520

14 With a copy to:

15 Richard C. Jacobs, Esq.
16 Howard Rice Nemerovski Canady Falk & Rabkin
17 Three Embarcadero Center, 7th Floor
18 San Francisco, CA 94111-4024

19 To Plaintiff:

20 Clifford A. Chanler, Esq.
21 Chanler Law Group
22 71 Elm Street, Suite 8
23 New Canaan, CT 06840
24
25
26
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28

1
2 **12. NO ADMISSIONS**

3 Nothing in this Consent Judgment shall constitute or be construed as an admission by
4 Beverages of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance
5 with this Consent Judgment constitute or be construed as an admission by Beverages of any fact,
6 finding, conclusion, issue of issue of law, or violation of law, such being specifically denied by
7 Beverages. Beverages reserves all of its rights and defenses with regard to any claim by any
8 party under Proposition 65 or otherwise. However, this section shall not diminish or otherwise
9 affect Beverages's obligations, responsibilities and duties under this Consent Judgment.

10 **13. COUNTERPARTS; FACSIMILE SIGNATURES**

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

14 **14. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

15 Plaintiff agrees to comply with the reporting form requirements referenced in Health &
16 Safety Code Section 25249.7(f). Pursuant to regulations promulgated under that section, Plaintiff
17 shall present this Consent Judgment to the California Attorney General's Office within two (2)
18 days after receiving all of the necessary signatures. A noticed motion to enter the Consent
19 Judgment will then be served on the Attorney General's Office at least forty-five (45) days prior
20 to the date a hearing is scheduled on such motion in the Superior Court for the City and County of
21 San Francisco unless the Court allows a shorter period of time.

22 **15. ADDITIONAL POST EXECUTION ACTIVITIES**

23 The Parties shall mutually employ their best efforts to support the entry of this Agreement
24 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
25 manner. The Parties acknowledge that, pursuant to Health & Safety Code Section 25249.7, a
26 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the
27 Parties agree to file a Joint Motion to Approve the Agreement ("Joint Motion"), the first draft of
28

1 which Brimer's counsel shall prepare, within a reasonable period of time after the Effective Date
2 (i.e., not to exceed thirty (30) days unless otherwise agreed to by the Parties' counsel based on
3 unanticipated circumstances). Plaintiff's counsel shall prepare a declaration in support of the
4 Joint Motion which shall, inter alia, set forth support for the fees and costs to be reimbursed
5 pursuant to Section 4. Beverages shall have no additional responsibility to Plaintiff's counsel
6 pursuant to Code of Civil Procedure Section 1021.5 or otherwise with regard to reimbursement of
7 any fees and costs incurred with respect to the preparation and filing of the Joint Motion and its
8 supporting declaration or with regard to Plaintiff's counsel appearing for a hearing or related
9 proceedings thereon.

10 **16. MODIFICATION**

11 This Consent Judgment may be modified only by: (1) written agreement of the Parties
12 and upon entry of a modified Consent Judgment by the Court thereon, or (2) motion of any Party
13 as provided by law and upon entry of a modified Consent Judgment by the Court. The Attorney
14 General shall be served with notice of any proposed modification to this Consent Judgment at
15 least fifteen (15) days in advance of its consideration by the Court.

17. 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.

AGREED TO:

AGREED TO:

Date: 5-20-05

Date: _____

By: [Signature]
Plaintiff Russell Brimer

By: _____
Defendant BEVERAGES & MORE, INC.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: 5/20/05

Date: _____

CHANLER LAW GROUP

HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN

By: [Signature]
Clifford A. Chanler
Attorneys for Plaintiff
RUSSELL BRIMER

By: _____
Richard C. Jacobs, Esq.
Attorney for Defendant
BEVERAGES & MORE, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

1 **17. 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.

5
6 **AGREED TO:**

AGREED TO:

7
8 Date: _____

Date: May 18, 2005

9
10 By: _____
11 Plaintiff Russell Brimer

By: J. N. Hy - CFO
Defendant BEVERAGES & MORE, INC.

12
13 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

14
15 Date: _____

Date: May 24, 2005

16 **CHANLER LAW GROUP**

**HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN**

17 By: _____
18 Clifford A. Chanler
19 Attorneys for Plaintiff
RUSSELL BRIMER

By: Richard C. Jacobs
Richard C. Jacobs, Esq.
Attorney for Defendant
BEVERAGES & MORE, INC.

20
21 **IT IS SO ORDERED.**

22
23 Date: _____

JUDGE OF THE SUPERIOR COURT

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Exhibit A

All glass and/or ceramic glasses, mugs, bowls, teapots, and other glassware with colored designs and/or artwork on the exterior, including but not limited to:

- Pub Glass Coastal Fog
- Beer Glass Sierra Nevada
- Beer Glass Orval
- 1800 Party Bucket (with Margarita glass)
- NEHI Peach Longnecks Soda bottle

1 Clifford A. Chanler (State Bar No. 135534)
Stephen S. Sayad (State Bar No. 104866)
2 CHANLER LAW GROUP
71 Elm Street, Suite 8
3 New Canaan, CT 06840
Telephone: (203) 966-9911
4 Facsimile: (203) 801-5222

5 Daniel Bornstein (State Bar No. 181711)
Laralei S. Paras (State Bar No. 203319)
6 PARAS LAW GROUP
655 Redwood Highway, Suite 216
7 Mill Valley, CA 94941
Telephone: (415) 380-9222
8 Facsimile: (415) 380-9223

9 Attorneys for Plaintiff
Russell Brimer

10 Richard C. Jacobs (State Bar No. 49538)
11 HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
12 San Francisco, CA 94111-4024
Telephone: (415) 434-1600
13 Facsimile: (415) 217-5910

14 Attorneys for Defendant
Beverages & More, Inc.

15
16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
18 UNLIMITED CIVIL JURISDICTION
19

20 RUSSELL BRIMER,

21 Plaintiff,

22 v.

23 BEVERAGES & MORE, INC.; and DOES 1
24 through 150,

25 Defendants.

Case No. CGC-04-435215

(JCR)
**[PROPOSED] SECOND AMENDED
JUDGMENT PURSUANT TO TERMS
OF CONSENT JUDGMENT**

Date: October 6, 2005

Time: 9:30 A.M.

Dept.: 301

Judge: Hon. James L. Warren

ENDORSED
FILED
San Francisco County Superior Court

OCT 6 2005

GORDON PARK-LI, Clerk
BY: JOCELYN C. FOGUE
Deputy Clerk

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27
28
[PROPOSED] JUDGMENT PURSUANT TO TERMS OF CONSENT JUDGMENT

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant BEVERAGES
2 & MORE, INC., having agreed through their respective counsel that judgment be entered
3 pursuant to the terms of the Stipulation and [Proposed] Order Re: Consent Judgment ("Consent
4 Judgment") entered into by the parties, and after issuing an Order Approving Proposition 65
5 Settlement Agreement and Consent Judgment on October 6, 2005.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of
7 Civil Procedure §664.5, judgment is entered in accordance with the terms of the Order Approving
8 Proposition 65 Settlement Agreement and Consent Judgment, between the parties.

9 **IT IS SO ORDERED.**

10 Dated: October 6, 2005

JAMES L. WARREN _____
Hon. James L. Warren
JUDGE OF THE SUPERIOR COURT

1 Clifford A. Chanler (State Bar No. 135534)
Stephen S. Sayad (State Bar No. 104866)
2 CHANLER LAW GROUP
71 Elm Street, Suite 8
3 New Canaan, CT 06840
Telephone: (203) 966-9911
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9 Attorneys for Plaintiff
Russell Brimer

10
11 Richard C. Jacobs (State Bar No. 49538)
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Three Embarcadero Center, 7th Floor
12 San Francisco, CA 94111-4024
Telephone: (415) 434-1600
13 Facsimile: (415) 217-5910

14 Attorneys for Defendant
Beverages & More, Inc.

15
16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
18 UNLIMITED CIVIL JURISDICTION
19

20 RUSSELL BRIMER,

21 Plaintiff,

22 v.

23 BEVERAGES & MORE, INC.; and DOES 1
24 through 150,

25 Defendants.

Case No. CGC-04-435215
(JCN)

**[PROPOSED] SECOND AMENDED
JUDGMENT PURSUANT TO TERMS
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Date: October 6, 2005

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26
27
28
[PROPOSED] JUDGMENT PURSUANT TO TERMS OF CONSENT JUDGMENT

ENDORSED
FILED
San Francisco County Superior Court

OCT 6 2005

GORDON PARK-LI, Clerk
BY: JOCELYN C. FLOQUE
Deputy Clerk

1 In the above-entitled action, Plaintiff RUSSELL BRIMER and Defendant BEVERAGES
2 & MORE, INC., having agreed through their respective counsel that judgment be entered
3 pursuant to the terms of the Stipulation and [Proposed] Order Re: Consent Judgment (“Consent
4 Judgment”) entered into by the parties, and after issuing an Order Approving Proposition 65
5 Settlement Agreement and Consent Judgment on October 6, 2005.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of
7 Civil Procedure §664.5, judgment is entered in accordance with the terms of the Order Approving
8 Proposition 65 Settlement Agreement and Consent Judgment, between the parties.

9 **IT IS SO ORDERED.**

10 Dated: October 6, 2005

JAMES L. WARREN
Hon. James L. Warren
JUDGE OF THE SUPERIOR COURT

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