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5 Attorneys for Plaintiff  
RUSSELL BRIMER

7 Mimi M Lee, State Bar No.: 155803  
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8 101 California Street, 41<sup>st</sup> Floor  
San Francisco, CA 94111  
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10 Attorneys for Defendant  
11 A&W BOTTLING COMPANY, INC.

ENDORSED  
FILED  
ALAMEDA COUNTY

OCT 23 2007

CLERK OF THE SUPERIOR COURT  
By: JEAN LINZMEIER  
Deputy

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 FOR THE COUNTY OF ALAMEDA  
15 UNLIMITED CIVIL JURISDICTION

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

20 A&W BOTTLING COMPANY, INC.; and DOES  
1 through 150,

21 Defendant.

Case No. RG 06 302048

~~PROPOSED AMENDED ORDER~~  
~~APPROVING PROPOSITION 65~~  
~~SETTLEMENT AND CONSENT~~  
JUDGMENT

Date: October 23, 2007  
Time: 8:30 a.m.  
Dept.: 512  
Judge: Hon. Barbara J. Miller  
Reservation No.: R749098

[PROPOSED] ORDER APPROVING PROPOSITION 65 SETTLEMENT AND CONSENT JUDGMENT

CASE NO. RG 06 302048

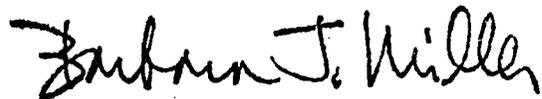
sf-2158730

1 Plaintiff RUSSELL BRIMER and Defendant A&W BOTTLING COMPANY, INC.,  
2 having agreed through their respective counsel that judgment be entered pursuant to the terms of  
3 the Consent Judgment entered into by the above-referenced parties and attached hereto as Exhibit  
4 1; and after consideration of the papers submitted and the arguments presented, the Court finds  
5 that the settlement agreement set out in the attached Consent Judgment meets the criteria  
6 established by Health & Safety Code §25249.7, in that:  
7

- 8 1. The injunction prohibiting the sale in California of any products containing the listed  
9 chemical that is required by the Consent Judgment complies with Health & Safety  
10 Code §25249.7;
- 11 2. The reimbursement of fees and costs to be paid pursuant to the parties' Consent  
12 Judgment is reasonable under California law; and
- 13 3. The civil penalty amount to be paid pursuant to the parties' Consent Judgment is  
14 reasonable.  
15

16 Accordingly, IT IS HEREBY ORDERED that Judgment be entered in accordance with  
17 the terms of the Consent Judgment, attached hereto as Exhibit 1.  
18

19  
20 Dated: October 23, 2007



21 Hon. Barbara J. Miller  
22 JUDGE OF THE SUPERIOR COURT  
23  
24  
25  
26  
27  
28

Exhibit 1

1 GEORGE W. DOWELL (BAR NO. 234759)  
2 D. JOSHUA VOORHEES (BAR NO. 241436)  
3 HIRST & CHANLER LLP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
10 RUSSELL BRIMER

11 MIMI M. LEE (BAR NO. 155803)  
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14 41st Floor  
15 San Francisco, CA 94111  
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18 Attorneys for Defendant  
19 A&W BOTTLING COMPANY, INC.

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
21 COUNTY OF ALAMEDA

22 RUSSELL BRIMER,  
23 Plaintiff,  
24 v.  
25 A&W BOTTLING COMPANY, INC.; and  
26 DOES 1 through 150, inclusive,  
27 Defendants.

28 CASE NO. RG-06-302048  
STIPULATION AND [PROPOSED]  
ORDER RE: CONSENT JUDGMENT

1     **1. INTRODUCTION**

2             **1.1 Russell Brimer and A&W Bottling Company**

3             This Consent Judgment is entered into by and between plaintiff Russell Brimer, (Brimer  
4     or plaintiff) and defendant A&W Bottling Company, Inc., (A&W or defendant) with Brimer and  
5     A&W collectively referred to as the "parties."

6             **1.2 Plaintiff**

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

10            **1.3 Defendant**

11            A&W is a Washington corporation that employs ten or more persons.

12            **1.4 General Allegations**

13            Brimer contends that A&W has packaged, distributed and/or sold in the State of  
14     California certain glass soda bottles with colored artwork or designs containing lead on their  
15     exterior. Lead is listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986,  
16     California Health & Safety Code '25249.6 et seq. (Proposition 65), to cause birth defects and  
17     other reproductive harm. Lead shall be referred to herein as the "Listed Chemical."<sup>1</sup>

18            **1.5 Product Description**

19            The products that are covered by this Consent Judgment are glass soda bottles with  
20     painted exterior decorations packaged by A&W including but not limited to: Green River Soda.  
21     Said products are referred to herein as the "Products."

22            **1.6 Notice of Violation**

23            On July 14, 2006, Brimer served A&W and various public enforcement agencies with a  
24     document entitled "60 Day Notice of Violation" (the "Notice") that provided A&W and such  
25     public enforcers with notice of allegations asserting that A&W was in violation of California  
26

27     \_\_\_\_\_

28     <sup>1</sup> Testing of the Products conducted by Plaintiff was negative for Cadmium.

1 Health & Safety Code §25249.6 for failing to warn consumers and customers that the Products  
2 that A&W sold exposed users in California to the Listed Chemical.

3 **1.7 Complaint**

4 On December 13, 2006, Brimer, acting in the public interest, filed a complaint (the  
5 "Complaint" or "Action") in the Superior Court in and for the County of Alameda against A&W  
6 Bottling Company, Incorporated, and Does 1 through 150, (Brimer v. A&W Bottling Company,  
7 Incorporated, Alameda County Superior Court Case No. RG-06-302048) alleging violations of  
8 California Health & Safety Code §25249.6 based on the alleged exposures to the Listed Chemical  
9 contained in the Products sold by A&W.

10 **1.8 No Admission**

11 A&W denies the material factual and legal allegations contained in Brimer's Notice and  
12 Complaint, denies that it has sold Products in California in violation of Health & Safety Code  
13 §25249.6 et seq., and maintains that its products, including the Products defined in Section 1.5,  
14 have been and are in compliance with all laws. Nothing in this Consent Judgment shall be  
15 construed as an admission by A&W of any fact, finding, issue of law, or violation of law, nor  
16 shall compliance with this Consent Judgment constitute or be construed as an admission by A&W  
17 of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by  
18 A&W. However, this Section shall not diminish or otherwise affect the obligations,  
19 responsibilities and duties of A&W 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 A&W, limited to entry and enforcement of the provisions of this Consent  
23 Judgment.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term "Effective Date" shall mean August 23,  
26 2007.

27 ///

28 ///

1     **2.     INJUNCTIVE RELIEF: REFORMULATION**

2             **2.1     Agreement to Sell Only Lead Free Products to California in the Future**

3             After the Effective Date, A&W agrees that it will not sell, ship or offer to ship for sale in  
4     California, nor allow any downstream customer that purchases the Products directly from A&W  
5     to sell, ship or offer to ship for sale in California unless such Products are sold or shipped without  
6     any detectable lead as defined below in sub-section 2.3.

7             **2.2     Clear and Reasonable Warnings for Past Sales**

8             Under Proposition 65, consumers in California have the right to be warned of chemicals  
9     known to the State to cause cancer or reproductive toxicity to which they are exposed. The  
10    Notice and Complaint allege that A&W has sold and/or distributed Products without such a  
11    warning and, thereby, has exposed consumers and workers who have purchased or handled  
12    Products containing lead without receiving any such health hazard advisory.

13            Since June 2, 2006, A&W had ceased all sales and shipment of Products into California  
14    and has undertaken to recover all Products shipped for sale into California during the two (2)  
15    years prior to the Effective Date. Further, A&W will undertake good faith efforts to provide clear  
16    and reasonable warnings, pursuant to California Health & Safety Code §25249.6, for Products  
17    previously sold during the two years prior to the Effective Date. To comply with this portion of  
18    the injunction, the defendant will advise its direct customer that they may exchange, (without  
19    cost), any of the Products remaining in their possession which bear the ink-jet date coding that  
20    commences with the letters "EV" followed by the date and time of day and which is located on or  
21    around the neck or shoulder of the bottle, for a full refund of the purchase price. Only those  
22    products which bear the ink-jet date coding commencing with the letters "EV" and which were  
23    produced by A&W during the two (2) years prior to the Effective Date (as evidenced by the  
24    production date following the letters "EV") are subject to the provisions of this Section 2.2 and  
25    A&W's obligations hereunder. This advice will be provided through A&W's direct mailing to its  
26    known customer.

27            A&W shall comply with this sub-section no later September 24, 2007.

28            **2.3     Reformulation Standards - Lead Free Products**

1 Products satisfying the conditions of Sections 2.3 (a) and (b) are referred to as "Lead  
2 Free".

3 (a) For Products containing colored artwork or designs on the exterior of the  
4 soda bottle, the Products must utilize paints, decals, or other materials for colored artwork,  
5 designs or markings containing six one hundredths of one percent (0.06%) lead by weight or less  
6 as measured at A&W's option, either before or after the material is fired onto (or otherwise  
7 affixed to) the Products, using a sample size of the materials in question measuring approximately  
8 50-100 mg and a test method of sufficient sensitivity to establish a limit of quantitation (as  
9 distinguished from detection) of less than 600 parts per million ("ppm").

10 (b) For Products with decorations within the "Lip and Rim Area"<sup>2</sup>, the paints,  
11 decals, or other materials shall contain two one-hundredths of one percent (0.02%) lead by weight  
12 or less, as measured at A&W's option, either before or after the material is fired onto (or  
13 otherwise affixed to) the Products, using a sample size of the materials in question measuring  
14 approximately 50-100 mg and a test method of sufficient sensitivity to establish a limit of  
15 quantitation (as distinguished from detection) of less than 200 parts per million ("ppm").

16 **3. MONETARY PAYMENTS**

17 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

18 A&W represents and warrants that within days of making its final shipment of Products  
19 for sale in California, which occurred on June 2, 2006, A&W voluntarily undertook to retrieve the  
20 shipment and all but 120 cases were returned to Washington. Since June 2, 2006, A&W has not  
21 shipped Products for sale in California.

22 Pursuant to California Health & Safety Code Section 25249.7(b), A&W shall pay \$15,000  
23 in civil penalties. As a direct result of defendant's efforts to retrieve its Products from California  
24 at its own expense upon learning that its Products may be in violation of Health & Safety Code  
25 §25249.6 et seq., plaintiff agrees to waive \$11,000 of the penalty amount. Thus, defendant will  
26

27 <sup>2</sup>"Lip and Rim Area" is defined as the exterior top 20 millimeters of the soda bottle.

1 pay the remaining \$4,000 in civil penalties, with such funds being made payable to "Hirst &  
2 Chanler LLP in Trust For Russell Brimer," on or before August 23, 2007.

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

9 **3.2 Apportionment of Penalties Received**

10 All penalty monies received shall be apportioned by Brimer in accordance with California  
11 Health & Safety Code §25192, with 75% of these funds remitted by Brimer to the State of  
12 California's Office of Environmental Health Hazard Assessment and the remaining 25% of these  
13 penalty monies retained by Brimer as provided by California Health & Safety Code  
14 §25249.12(d). Brimer shall bear all responsibility for apportioning and paying to the State of  
15 California the appropriate civil penalties paid in accordance with this Section.

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. A&W  
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 and contractual principles of law for all work performed  
24 through the Court's approval of this agreement. Under the private attorney general doctrine,  
25 A&W shall reimburse Brimer and his counsel for fees and costs incurred as a result of  
26 investigating, bringing this matter to A&W's attention, litigating and negotiating a settlement in  
27 the public interest and seeking the Court's approval of the settlement agreement. A&W shall pay  
28 Brimer and his counsel \$23,000 for all attorneys' fees, expert and investigation fees, litigation and  
related costs. Brimer shall be solely responsible for paying any and all additional sums to which

1 his attorneys assert they are entitled. The payment shall be made payable to "Hirst & Chanler  
2 LLP" and shall be delivered on or before August 23, 2007, at the following address:

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

6 **5. RELEASE OF ALL CLAIMS**

7 **5.1 Release of A&W and Downstream Customers**

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

23 The parties further understand and agree that this release shall extend to Vernor's to the  
24 extent not already covered (if any) by the Consent Judgment entered into by and between the  
25 People of the State of California and Dr. Pepper/Seven-Up, Inc. Case Number BC 363378.

26 Finally, the parties understand and agree that this release shall not extend upstream to any  
27 entities that manufactured the Products or any component parts thereof, or any distributors or  
28 suppliers who sold the Products or any component parts thereof to A&W.

1           **5.2    A&W's Release of Brimer**

2           A&W waives any and all claims against Brimer, his attorneys and other representatives,  
3 for any and all actions taken or statements made (or those that could have been taken or made) by  
4 Brimer and his attorneys and other representatives, whether in the course of investigating claims  
5 or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect  
6 to the Products.

7           **6.       COURT APPROVAL**

8           This Consent Judgment is not effective until it is approved and entered by the Court and  
9 shall be null and void if, for any reason, it is not approved and entered by the Court within one  
10 year after it has been fully executed by all parties, in which event any monies that have been  
11 provided to Plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, shall be  
12 refunded to A&W within fifteen (15) days after receiving written notice from A&W that the one  
13 year period has expired.

14          **7.       SEVERABILITY**

15          If, subsequent to court approval of this Consent Judgment, any of the provisions of this  
16 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable  
17 provisions remaining shall not be adversely affected; provided, however, that this Consent  
18 Judgment shall be null and void if any portion of the waivers contained within Section 5 are held  
19 to be unenforceable.

20          **8.       ATTORNEYS' FEES**

21          If after Court approval: (1) A&W seeks modification of this Consent Judgment pursuant  
22 to Section 14 below or (2) Brimer takes reasonable and necessary steps to successfully enforce  
23 the terms of this Consent Judgment, then Brimer shall be entitled to his reasonable attorneys' fees  
24 and costs pursuant to CCP §1021.5.

25          **9.       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, then A&W

1 shall provide written notice to Brimer of any asserted change in the law, and shall have no further  
2 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products  
3 are so affected.

4 **10. NOTICES**

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

9 To A&W:

10 Mimi M. Lee, Esq.  
11 McKENNA LONG & ALDRIDGE LLP  
12 101 California Street  
13 41<sup>st</sup> Floor  
14 San Francisco, CA 94111

13 and to

14 Joseph I. Hochman, Esq.  
15 Hochman Legal Group, PLLC  
16 25739 S.E. 34<sup>th</sup> Street  
Sammamish, WA 98075

16 To Brimer:

17 Proposition 65 Coordinator  
18 HIRST & CHANLER LLP  
19 2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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

22 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

26 **12. COMPLIANCE WITH HEALTH AND SAFETY CODE § 25249.7(f)**

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

1 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

2 Brimer and A&W agree to mutually employ their best efforts to support the entry of this  
3 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a  
4 timely manner. The parties acknowledge that, pursuant to California Health & Safety Code  
5 §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.  
6 Accordingly, the Plaintiff agrees to file a Motion to Approve the Agreement ("Motion"). A&W  
7 shall have no additional responsibility or liability to plaintiff and/or his counsel pursuant to Code  
8 of Civil Procedure §1021.5 or otherwise with regard to reimbursement of any fees and/or costs  
9 incurred with respect to the preparation and filing of the Motion and/or with regard to plaintiff's  
10 counsel appearing for a hearing thereon or any other post-execution activity.

11 **14. MODIFICATION**

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

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1 **15. AUTHORIZATION**

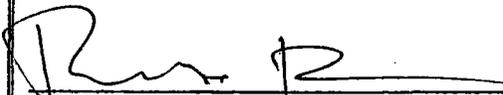
2 The undersigned are authorized to execute this Consent Judgment on behalf of their  
3 respective parties and have read, understood and agree to all of the terms and conditions of this  
4 Consent Judgment.

5  
6 **AGREED TO:**

7 Dated: 8-8-07

**AGREED TO:**

Dated: August 2nd 2007

8  
9 

10 **PLAINTIFF**  
**RUSSELL BRIMER**



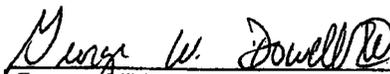
**DEFENDANT**  
**A&W BOTTLING COMPANY, INC.**

11  
12  
13  
14 **APPROVED AS TO FORM:**

15 Dated: August 8, 2007

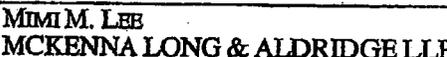
**APPROVED AS TO FORM:**

Dated: \_\_\_\_\_

16  
17 

18 **GEORGE W. DOWELL**  
**HIRST & CHANLER LLP**

19 *Attorneys for Plaintiff*  
**RUSSELL BRIMER**

  
**MIMI M. LEE**  
**MCKENNA LONG & ALDRIDGE LLP**

*Attorneys for Defendant*  
**A&W BOTTLING COMPANY, INC.**

20  
21  
22 **IT IS SO ORDERED.**

23  
24 Dated: \_\_\_\_\_

\_\_\_\_\_  
**JUDGE OF THE SUPERIOR COURT**

25  
26 **SP:27253324.1**

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.

6 **AGREED TO:**

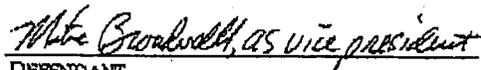
7 Dated: 8-8-07

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9 PLAINIFF  
10 RUSSELL BRIMER

**AGREED TO:**

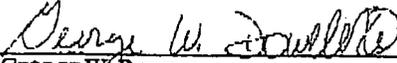
7 Dated: August 2nd 2007

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9 DEFENDANT  
10 A&W BOTTLING COMPANY, INC.

14 **APPROVED AS TO FORM:**

15 Dated: August 8, 2007

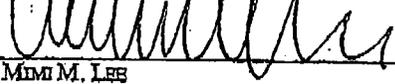
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17 GEORGE W. DOWELL  
18 HIRST & CHANLER LLP

19 Attorneys for Plaintiff  
20 RUSSELL BRIMER

**APPROVED AS TO FORM:**

15 Dated: August 14, 2007

16 

17 MIMI M. LEE  
18 MCKENNA LONG & ALDRIDGE LLP

19 Attorneys for Defendant  
20 A&W BOTTLING COMPANY, INC.

22 **IT IS SO ORDERED.**

24 Dated: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

26 SP:27258324.1