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9 Attorneys for Plaintiff  
 10 RUSSELL BRIMER

ENDORSED  
 FILED  
 San Francisco County Superior Court  
 JAN - 4 2012  
 CLERK OF THE COURT  
 BY: MARTA VALLEJO  
 Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 12 COUNTY OF SAN FRANCISCO  
 13 UNLIMITED CIVIL JURISDICTION

14 RUSSELL BRIMER,  
 15 Plaintiff,  
 16 v.  
 17 ICUP, INC.; and DOES 1-150, inclusive,  
 18 Defendants.

Case No. CGC-11-508222

[PROPOSED] JUDGMENT PURSUANT  
 TO TERMS OF PROPOSITION 65  
 SETTLEMENT AND [PROPOSED]  
 CONSENT JUDGMENT

Date: January 4, 2012  
 Time: 9:30 a.m.  
 Dept. 302  
 Judge: Hon. Harold E. Kahn

REC'D DEC 28 2011

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Plaintiff Russell Brimer and Defendant ICUP, Inc., having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and following this Court's issuance of an Order approving this Proposition 65 settlement and Consent Judgment, on January 4, 2012.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health & Safety Code section 25249.7, subdivision (f)(4), and Code of Civil Procedure section 664.6, judgment is hereby entered in accordance with the terms of the Consent Judgment attached hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure section 664.6.

**IT IS SO ORDERED.**

**JAN - 4 2012**

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

**HAROLD KAHN**

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

# Exhibit 1

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Stephen S. Sayad, State Bar No. 104866  
THE CHANLER GROUP  
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Attorneys for Plaintiff  
RUSSELL BRIMER

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

RUSSELL BRIMER,

Plaintiff,

v.

ICUP, INC., *et al.*,

Defendants.

Case No. CGC-11-508222

**[PROPOSED] CONSENT JUDGMENT**

1       **1. INTRODUCTION**

2               **1.1 The Parties**

3               This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer” or  
4               “Plaintiff”) and ICUP, Inc. (“ICUP” or “Defendant”), with Plaintiff and Defendant referred to  
5               individually as a “Party” and collectively as the “Parties.”

6               **1.2 Russell Brimer**

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

10              **1.3 ICUP**

11              ICUP employs ten or more persons, and is a person in the course of doing business for  
12              purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &  
13              Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14              **1.4 General Allegations**

15              Brimer alleges that ICUP has manufactured, imported, distributed, and/or sold glassware  
16              with colored artwork or designs on the exterior containing lead and cadmium, without the requisite  
17              Proposition 65 warnings. ICUP disputes these allegations. Lead and cadmium are identified on the  
18              Proposition 65 list as chemicals known to the State of California to cause birth defects and other  
19              reproductive harm.

20              **1.5 Product Description**

21              The products that are covered by this Consent Judgment are defined as follows: any and all  
22              externally-decorated glassware manufactured, imported, or purchased by ICUP for ultimate sale in  
23              the State of California, including, without limitation, the following glassware with colored artwork,  
24              designs, or markings containing lead and/or cadmium: *ACDC Collector’s Series Pint Glass 4-Pack*  
25              *(#6 74449 31116 6); ACDC Shotglass 6-Pack, Item #31269 (#6 74449 31269); Rolling Stones*  
26              *Collector’s Series Pint Glass 4-Pack (#6 74449 30060 3); and Lynyrd Skynyrd Gimme Three Shots*  
27              *Shotglass 3-Pack, Item #30360 (#6 74449 30360 4).* The products described in this Section 1.5 are

1 hereinafter referred to as the “Products.”

2 **1.6 Notices of Violation**

3 On November 12, 2010, Brimer served ICUP and various public enforcement agencies with  
4 a document entitled “60-Day Notice of Violation” (“Notice”), along with the requisite Certificate of  
5 Merit, that provided the recipients with notice of alleged violations of California Health & Safety  
6 Code § 25249.6 based on ICUP’s alleged failure to warn consumers that the Products exposed users  
7 in California to lead.

8 On October 28, 2011, Brimer served ICUP and various public enforcement agencies with a  
9 document entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”), along with  
10 the requisite Certificate of Merit, that provided the recipients with notice of alleged violations of  
11 California Health & Safety Code § 25249.6 based on ICUP’s alleged failure to warn consumers that  
12 the Products exposed users in California to lead and/or cadmium. To the best of the Parties’  
13 knowledge, no public enforcer has prosecuted the allegations set forth in either the Notice or  
14 Supplemental Notice.

15 **1.7 Complaint**

16 On or about February 14, 2011, Brimer filed a complaint in the Superior Court in and for the  
17 County of San Francisco against ICUP and Does 1 through 150 alleging violations of California  
18 Health & Safety Code § 25249.6, based on the alleged exposures to lead contained in the Products  
19 sold by ICUP. Upon entry of this Consent Judgment, the Complaint shall be deemed amended *nunc*  
20 *pro tunc* to include the violations of Proposition 65 alleged in the Supplemental Notice.

21 **1.8 No Admission**

22 ICUP denies the material, factual, and legal allegations contained in Brimer’s Notice,  
23 Supplemental Notice, and Complaint, and maintains that all products it is alleged to have  
24 manufactured, has sold, imported, and/or distributed in California, including the Products, have  
25 been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as  
26 an admission by ICUP of any allegation, fact, finding, issue of law, or violation of law, nor shall  
27 entry of, or compliance with, this Consent Judgment constitute or be construed as an admission by

1 ICUP of any allegation, fact, finding, conclusion, issue of law, or violation of law. However, this  
2 section shall not diminish or otherwise affect ICUP's obligations, responsibilities, and duties under  
3 this Consent Judgment.

4 **1.9 Consent to Jurisdiction**

5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
6 jurisdiction over ICUP as to the allegations contained in the Complaint, that venue is proper in the  
7 County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of  
8 this Consent Judgment.

9 **1.10 Effective Date**

10 For purposes of this Consent Judgment, the term "Effective Date" shall mean December 15,  
11 2011.

12 **2. INJUNCTIVE RELIEF: REFORMULATION**

13 **2.1 Reformulation Standards**

14 Reformulated Products are defined as follows:

15 (a) those Products with exterior artwork decorations containing no detectable  
16 amount of lead or cadmium (for the purposes of this Consent Judgment, "no detectable amount of  
17 lead or cadmium" shall mean with respect to lead, less than or equal to 0.5 ug/ml (ppm), and with  
18 respect to cadmium, less than or equal to 4.0 ug/ml (ppm), both based on the ASTM C927-80  
19 Standard Test Method) in the lip-and rim area of the glassware (the top 20 millimeters of the  
20 Products); and

21 (b) those Products with exterior artwork decorations containing a total lead  
22 content of less than or equal to 90 ppm and containing a total cadmium content of less than or equal  
23 to 200 ppm, exclusive of the lip-and-rim area, when analyzed pursuant to Environmental Protection  
24 Agency testing methodologies 3050B and/or 6010B.

25 **2.2 Reformulation Commitment**

26 As of the Effective Date, all Products obtained from any manufacturer, imported,  
27 distributed, sold, or offered for sale in the State of California by ICUP shall be Products that qualify

1 as Reformulated Products as defined in Section 2.1.

2 **3. PAYMENT OF PENALTIES AND ATTORNEY'S FEES**

3 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

4 Subject to Section 5 and in accordance with Section 3.3 herein, ICUP shall make a payment  
5 of \$34,000.00 to be apportioned in accordance with Health & Safety Code section 25249.12,  
6 subdivisions (c)(1) and (d), with 75% of these funds earmarked for the State of California's Office  
7 of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of these penalty  
8 monies earmarked for Brimer. This civil penalty reflects a credit of \$20,000.00 based on ICUP's  
9 commitment to reformulate the Products pursuant to Sections 2.1 and 2.2 above.

10 **3.2 Reimbursement of Plaintiff's Fees and Costs**

11 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without  
12 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee  
13 issue to be resolved after the material terms of the agreement had been settled. ICUP then  
14 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been  
15 finalized. The Parties then attempted to, and did, reach an accord on the compensation due to  
16 Brimer and his counsel under general contract principles and the private attorney general doctrine  
17 codified at California Code of Civil Procedure ("CCP") §1021.5. Subject to Section 5 and in  
18 accordance with Section 3.3 herein, ICUP shall reimburse Brimer and his counsel \$78,000.00 for  
19 fees and costs incurred as a result of investigating, litigating, enforcing, and bringing this matter to  
20 ICUP's attention, and negotiating a settlement in the public interest. This figure includes Brimer's  
21 future fees and costs, including attorneys' fees to be incurred in seeking judicial approval of this  
22 Consent Judgment as well as any other legal work performed and fees incurred after the execution  
23 of this Consent Judgment in an effort to obtain finality of the case. However, in the event a third  
24 party were to appeal entry of this Consent Judgment, either party and their respective counsel shall  
25 be entitled to seek their reasonable attorney's fees and costs associated with all appellate work  
26 defending the entry of judgment pursuant to CCP §1021.5; provided, however, that recourse for  
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1 such attorney's fees and costs shall be limited to and against the third party and neither Party shall  
2 be entitled to recover such attorney's fees and costs from the other Party.

3 **3.3 Payment Procedures**

4 **3.3.1 Civil Penalty and Fees and Costs Held In Trust:** All payments required  
5 by Sections 3.1 and 3.2 shall be delivered on or before the Effective Date to the attorney of record  
6 for ICUP, and shall be held in trust pending the Court's approval of this Consent Judgment.

7 Payments delivered to ICUP's attorney of record, Buchanan Ingersoll & Rooney  
8 LLP shall be made payable, as follows:

- 9 (a) "Buchanan Ingersoll & Rooney LLP in Trust for OEHHA" in the  
10 amount of \$25,500.00;  
11 (b) "Buchanan Ingersoll & Rooney LLP in Trust for Russell Brimer" in  
12 the amount of \$8,500.00; and  
13 (c) "Buchanan Ingersoll & Rooney LLP in Trust for The Chanler  
14 Group" in the amount of \$78,000.00.

15 ICUP's attorney of record shall: (a) confirm in writing within five days of receipt that the  
16 funds have been deposited in a trust account; and (b) within two days after the date of the hearing  
17 and the entry of an Order on which the Court approves this Consent Judgment, deliver the  
18 payments to The Chanler Group in three separate checks, as follows:

- 19 (a) "The Chanler Group in Trust for OEHHA" in the amount of  
20 \$25,500.00;  
21 (b) "The Chanler Group in Trust for Russell Brimer" in  
22 the amount of \$8,500.00; and  
23 (c) "The Chanler Group" in the amount of \$78,000.00.

24 **3.3.2 Issuance of 1099 Forms.** After this Consent Judgment has been approved  
25 and the settlement funds required by Sections 3.1 and 3.2 have been transmitted to Brimer's  
26 counsel, ICUP shall issue three separate 1099 forms, as follows:

- 27 (a) The first 1099 shall be issued to the Office of Environmental Health

1 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN:  
2 68-0284486) in the amount of \$25,500.00;

3 (b) The second 1099 shall be issued to Russell Brimer in the amount of  
4 \$8,500.00; Brimer's address and tax identification number shall be  
5 furnished upon request; and

6 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-  
7 3171522) in the amount of \$78,000.00.

8 **3.3.3 Payment Address:** All payments to the Chanler Group shall be delivered to  
9 the following payment address:

10 The Chanler Group  
11 Attn: Proposition 65 Controller  
12 2560 Ninth Street  
13 Parker Plaza, Suite 214  
14 Berkeley, CA 94710

15 **4. RELEASE OF ALL CLAIMS**

16 **4.1 Full, Final, and Binding Resolution of Proposition 65 Allegations**

17 This Consent Judgment is a full, final and binding resolution between Brimer, on behalf of  
18 himself and the public, and ICUP, of any violation of Proposition 65 that was or could have been  
19 asserted by Brimer against ICUP, its parents, subsidiaries, affiliated entities that are under common  
20 ownership, directors, officers, employees, attorneys, and each entity to whom ICUP directly or  
21 indirectly distributes or sells Products, including downstream distributors, wholesalers, customers,  
22 retailers, franchisees, cooperative members, licensors, and licensees ("Releasees"), based on their  
23 claimed failure to warn about alleged exposures to lead and/or cadmium contained in the Products  
24 that were manufactured, imported, distributed, or sold by ICUP.

25 **4.2 Brimer's Public Release of Proposition 65 Claims**

26 In further consideration of the promises and agreements herein contained, Brimer on behalf  
27 of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and  
in the interest of the general public, hereby waives all rights to institute or participate in, directly or  
indirectly, any form of legal action and releases all claims, including, without limitation, all actions,

1 and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs,  
2 fines, penalties, losses, or expenses, including, but not limited to, investigation fees, expert fees, and  
3 attorneys' fees, but exclusive of fees and costs on appeal, limited to and arising under Proposition  
4 65, including direct or derivative violations and related claims that have or could have been  
5 asserted, with respect to lead and/or cadmium in the Products manufactured, imported, distributed,  
6 or sold by ICUP (collectively "claims"), against ICUP and Releasees.

7 **4.3 Brimer's Individual Release of Claims**

8 Brimer also, in his individual capacity only and *not* in his representative capacity, provides a  
9 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
10 actions, causes of action, direct or derivative claims, obligations, costs, expenses, attorneys' fees,  
11 damages, losses, claims, liabilities and demands of plaintiff of any nature, character or kind,  
12 whether known or unknown, suspected or unsuspected, or existing now or in the future against  
13 ICUP and Releasees, limited to and arising out of alleged or actual exposures to lead and/or  
14 cadmium in any and all externally-decorated glassware manufactured, imported, distributed, or sold  
15 by ICUP and Releasees; provided, however, that this release shall not include any obligation arising  
16 under this Consent Judgment.

17 **4.4 ICUP's Release of Brimer**

18 ICUP on behalf of itself, its past and current agents, representatives, attorneys, successors,  
19 and/or assignees, hereby waives any and all claims against Brimer in his individual capacity only,  
20 his attorneys and other representatives, for any and all actions taken or statements made (or those  
21 that could have been taken or made) by Brimer and his attorneys and other representatives, whether  
22 in the course of investigating claims or otherwise seeking to enforce Proposition 65 against them in  
23 this matter with respect to the Products; provided, however, that this release shall not include any  
24 obligation arising under this Consent Judgment.

25 **4.5 Waiver of Civil Code § 1542**

26 Except as otherwise provided for in this Consent Judgment, it is understood and agreed that  
27 the releases in Sections 4.3 and 4.4 hereof shall constitute a general release of all of the claims that

1 the Parties have or may have against each other arising from or related to the subject matter of the  
2 releases, and shall be effective as a full and final accord and satisfaction, and as a bar to all actions,  
3 administrative proceedings, causes of action, costs, expenses, attorneys' fees, damages, claims and  
4 liabilities whatsoever, whether or not now known, suspected, claimed or concealed, with respect to  
5 such claims. Each party acknowledges that it is familiar with Section 1542 of the California Civil  
6 Code which provides as follows:

7 **A general release does not extend to claims which the creditor does not**  
8 **know or suspect to exist in his or her favor at the time of executing the**  
9 **Release, which if known by him or her must have materially affected his or**  
10 **her settlement with the debtor.**

11 Each Party expressly waives and relinquishes any and all rights and benefits which such  
12 Party may have under, or which may be conferred upon such Party by the provisions of Section  
13 1542 of the California Civil Code, as well as under any other similar state or federal statute or  
14 common law principle, to the fullest extent that he or it may lawfully waive such rights or benefits  
15 pertaining to such Party's claims against the other Party.

16 Each Party represents and warrants that it has read and understood the provisions of this  
17 Section 4.5, it has had the legal effect of this settlement explained by competent counsel of its  
18 choice, and that it executes this settlement of its own free will.

19 **5. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved by entry of Court Order and shall  
21 be null and void if, for any reason, it is not approved by the Court by Order and entered within one  
22 year after it has been fully executed by all parties. In the event the Consent Judgment is not  
23 approved by the Court, any funds deposited with counsel for ICUP, as provided at Section 3.3  
24 herein, shall be returned to ICUP within ten (10) days of the entry of the Court's Order denying  
25 approval of the Consent Judgment.

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**6. SEVERABILITY**

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

**7. GOVERNING LAW**

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed, preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then ICUP shall provide written notice to Brimer of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

**8. NOTICES**

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

|                                      |                            |
|--------------------------------------|----------------------------|
| To ICUP:                             | To Brimer:                 |
| ICUP, Inc.                           | Proposition 65 Coordinator |
| Attn: Steven Trachtenberg, President | The Chanler Group          |
| 1152 Markkress Road, Suite 200       | 2560 Ninth Street          |
| Cherry Hill, New Jersey 08003        | Parker Plaza, Suite 214    |
|                                      | Berkeley, CA 94710-2565    |

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

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Consent Judgment may be executed in counterparts and by facsimile or pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute

1 one and the same document.

2 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

3 Brimer and his attorneys agree to comply with the reporting form requirements referenced in  
4 California Health & Safety Code § 25249.7(f).

5 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

6 Brimer and ICUP mutually agree to employ their best efforts to support the entry of this  
7 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a  
8 timely manner. The Parties acknowledge that, pursuant to California Health & Safety Code §  
9 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which  
10 Brimer shall draft and file, and ICUP shall join. If any third party objection to the noticed motion is  
11 filed, Brimer and ICUP shall work together to file a joint reply and appear at any hearing before the  
12 Court. This provision is a material component of the Consent Judgment and shall be treated as such  
13 in the event of a breach.

14 **12. MODIFICATION**

15 This Consent Judgment may be modified only: (1) by written agreement of the Parties and  
16 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion  
17 of any party and entry of a modified Consent Judgment by the Court.

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13. **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: 12-2-11

Date: 12/2/11

By:   
Russell Brimer

By:   
Steven Trachtenberg, President  
ICUP, Inc.

IT IS SO ORDERED

Date: \_\_\_\_\_

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