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

14		
15	RUSSELL BRIMER,	} Case No. CGC-04-436839
16	Plaintiff,	
17	vs.	} <u>STIPULATION AND [PROPOSED]</u> } <u>ORDER RE: CONSENT JUDGMENT</u>
18	HOME DEPOT USA, INC.; EXPO DESIGN	
19	CENTER, INC.; EVERGREEN	
20	ENTERPRISES, INC., and DOES 2 through	
21	150,	
	Defendants.	

23 **1. INTRODUCTION**

24 **1.1 Plaintiff and Settling Defendant**

25 This Stipulation and [Proposed] Order Re: Consent Judgment (“Consent Judgment”)
26 is entered into by and between plaintiff RUSSELL BRIMER (hereinafter “Mr. Brimer” or
27 “Brimer” or “Plaintiff”), and defendants HOME DEPOT USA, INC. (hereinafter “Home
28 Depot”), EXPO DESIGN CENTER, INC. (hereinafter “Expo Design”) and EVERGREEN

1 ENTERPRISES, INC. (hereinafter “Evergreen”), collectively referred to as “Defendants”.
2 Plaintiff, Home Depot, Expo Design and Evergreen are collectively referred to as the
3 “Parties”, with Mr. Brimer, Home Depot, Expo Design and Evergreen each referred to herein
4 individually as a “Party”.

5 **1.2 Plaintiff**

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

9 **1.3 General Allegations**

10 Plaintiff alleges that Defendants have manufactured, distributed and/or sold in the
11 State of California glassware products intended for the storage or consumption of food or
12 beverages with colored artwork or designs on the exterior (“Glassware Food or Beverage
13 Products”); ceramicware products intended for the storage or consumption of food or
14 beverages with colored artwork or designs on the exterior (“Ceramicware Food or Beverage
15 Products”), glassware products which are *not* reasonably intended for the storage or
16 consumption of food or beverages with colored artwork or designs on the exterior
17 (“Glassware Non-Food or Beverage Products”); and ceramicware products which are *not*
18 reasonably intended for the storage or consumption of food or beverages with colored
19 artwork or designs on the exterior (“Ceramicware Non-Food or Beverage Products”); all of
20 which contain lead that is listed pursuant to the Safe Drinking Water and Toxic Enforcement
21 Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.*,¹ also known as Proposition
22 65, to cause birth defects and other reproductive harm. Lead shall be referred to herein as the
23 “Listed Chemical.” Defendants deny Plaintiff’s allegations.

24 **1.4 Product Descriptions**

25 The products that are covered by this Consent Judgment are defined as follows:
26 Glassware Food or Beverage Products, Ceramicware Food or Beverage Products, Glassware

27 _____
28 ¹ Unless otherwise indicated, all references to statutes and regulations contained herein are to California law.

1 Non-Food or Beverage Products and Ceramicware Non-Food or Beverage Products
2 manufactured, sold or distributed by Defendant Evergreen that contain lead. Such products
3 collectively are referred to herein as the “Products” and shall include but not be limited to the
4 specific items listed in Exhibit A attached hereto.

5 **1.5 Notices of Violation**

6 On July 30, 2004 and March 31, 2005, Mr. Brimer served Defendants, and various
7 public enforcement agencies (including the Office of the Attorney General of the State of
8 California) with documents entitled “60-Day Notice of Violation” (“Notice”), that provided
9 Defendants and such public enforcers with notice that alleged that Defendants were in
10 violation of Health & Safety Code § 25249.6 for failing to warn purchasers that the Products
11 they manufacture, distribute and or sell expose users in California to lead. On or before the
12 date for the hearing on the Motion to Approve this agreement, Plaintiff shall serve a
13 Supplemental Notice on Defendants and all required public enforcement agencies expanding
14 Plaintiff’s prior allegations concerning the Products to include glass and ceramic Tableware
15 products, including: Glassware Non-Food and Beverage Products, Ceramicware Food and
16 Beverage Products and Ceramicware Non-Food and Beverage Products.

17 **1.6 Complaint**

18 On December 6, 2004, Mr. Brimer, acting in the interest of the general public in
19 California, filed a complaint (hereafter referred to as the “Complaint” or the “Action”) in the
20 Superior Court for the City and County of San Francisco against Home Depot and Expo
21 Design, and Does 1 through 150, alleging violations of Health & Safety Code § 25249.6
22 based on the alleged exposures to the Listed Chemical contained in the Products sold by
23 Defendants. On or about August 11, 2005, Plaintiff amended his Complaint to identify Doe 1
24 as Evergreen. The Complaint against Defendants shall be deemed amended to incorporate
25 the additional noticed categories of Products as of the sixty-sixth (66th) day following the date
26 of the Supplemental Notice provided that no public enforcement authority designated under
27 Health and Safety Code § 25249.7 has filed a complaint against Defendants on behalf of the
28 public interest with respect to those categories of Products.

1 **1.7 No Admission**

2 Defendants deny the material factual and legal allegations contained in Plaintiff's
3 Notice and Complaint and maintain that all products that they have manufactured, sold
4 and/or distributed in California, including the Products, have been and are in compliance with
5 all laws. Nothing in this Consent Judgment shall be construed as an admission by Defendants
6 of any fact, finding, issue of law, or violation of law, nor shall compliance with this
7 Agreement constitute or be construed as an admission by Defendants of any fact, finding,
8 conclusion, issue of law, or violation of law, such being specifically denied by Defendants.
9 Defendants reserve all of their rights and defenses with regard to any claim by any party
10 under Proposition 65 or otherwise. However, this section shall not diminish or otherwise
11 affect the obligations, responsibilities and duties of Defendants under this Consent Judgment.

12 **1.8 Consent to Jurisdiction**

13 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
14 jurisdiction over the allegations of violations contained in the Notice and in the Complaint,
15 and personal jurisdiction over Defendants as to the acts alleged in the Complaint, that venue
16 is proper in the County of San Francisco, and that this Court has jurisdiction to enter this
17 Consent Judgment and to enforce the provisions thereof.

18 **1.9 Effective Date**

19 For purposes of this Consent Judgment, the "Effective Date" shall be the date this
20 Consent Judgment is entered by the Court.

21
22 **2. INJUNCTIVE RELIEF: PROPOSITION 65 WARNINGS AND REFORMULATION**

23 **2.1 Warning Obligations For Non-Reformulated Products**

24 **2.1.A. Required Warnings and Non-exempt Products.** After the Effective
25 Date, Defendants shall not manufacture, distribute or offer for sale in California any Products
26 containing the Listed Chemical, (or otherwise supply any Product containing a Listed
27
28

1 Chemical to any entity which may sell or distribute such Products in California) unless
2 warnings are given in accordance with one or more provisions in subsection 2.2 below.

3 **2.1.B. Exceptions.** The warning requirements set forth in subsections 2.1.A
4 and 2.2 below shall not apply to:

- 5 (i). any Products manufactured on or before 45 days following the
6 Effective Date; or
- 7 (ii). Reformulated Products.

8 **2.2 Clear And Reasonable Warnings**

9 **2.2.A. Product Labeling.** A warning is affixed to the packaging, labeling or
10 directly on a Product by Defendants or their agents, that states:

11 **WARNING: The materials used on the exterior of this product contain**
12 **lead, a chemical known to the State of California to cause**
birth defects and other reproductive harm.

13 or

14 **WARNING: The materials used on the exterior of these products**
15 **contain lead, a chemical known to the State of California to**
cause birth defects and other reproductive harm.¹

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

24 **2.2.B. Point-of-Sale Warnings.** Defendants may execute their warning
25 obligations through arranging for the posting of signs at retail outlets in the State of
26 California at which Products are sold, in accordance with the terms specified in subsections

27 _____
28 ¹ This formulation of the warning may only be used with respect to Products when sold as a set.

1 2.2.B.1, and 2.2.B.2, so long as Defendants receive a written commitment from each retailer
2 that it will post the warning signs in accordance with the terms of this agreement.

3 **2.2.B.1.** Point of Sale warnings may be provided through one or more
4 signs posted at the point of sale or display for each Product that state:

5 **WARNING: The materials used on the exterior of this product contain**
6 **lead, a chemical known to the State of California to cause**
birth defects and other reproductive harm.

7 or

8 **WARNING: The materials used on the exterior of glassware and**
9 **ceramicware products sold in this store contain lead, a**
10 **chemical known to the State of California to cause birth**
11 **defects and other reproductive harm.²**

12 or

13 **WARNING: The materials used on the exterior of the following**
14 **glassware and ceramicware products sold in this store**
15 **contain lead, a chemical known to the State of California to**
16 **cause birth defects and other reproductive harm.**

17 *(Identify products by brand name and product description.)*

18 **2.2.B.2.** A point of sale warning provided pursuant to subsection
19 2.2.B.1 shall be prominently placed with such conspicuousness as compared with other
20 words, statements, designs, or devices as to render it likely to be read and understood by an
21 ordinary individual under customary conditions prior to purchase and shall be placed or
22 written in a manner such that the consumer understands to which *specific* Products the
23 warnings apply so as to minimize if not eliminate the chances that an overwarning situation
24 will arise. Any changes to the language or format of the warning required for Products by
25 this subsection shall only be made following: (1) approval from the California Attorney
26 General's Office, (provided that written notice of at least fifteen (15) days is given to Plaintiff
27 for the opportunity to comment); or (3) Court approval upon a regularly noticed motion.

28 ² This formulation of the warning may only be used where the store in which the Products are sold certifies that
it sells only Products which are not Reformulated Products as defined in Section 2.3.

1 **2.3 Reformulation Standards**

2 Products satisfying the conditions of Section 2.3.A (for Glassware Food or Beverage
3 Products), 2.3.B (for Glassware Non-Food or Beverage Products), 2.3.C (for Ceramicware
4 Food or Beverage Products) or 2.3.D (for Ceramicware Non-Food or Beverage Products) are
5 referred to as “Reformulated Products.” The warnings required pursuant to sections 2.1.A
6 and 2.2 above shall not be required for Reformulated Products, defined as follows:

7 “Children’s Product” is defined as any Covered
8 Product intended or marketed primarily for use by children
9 such as: Products with designs on their exterior surface which
10 are affiliated with children’s toys or entertainment (*e.g.*,
11 Sesame Street, Looney Tunes, Barbie, and Winnie the Pooh);
12 Products of a reduced size so as to be marketed primarily for
13 children (*e.g.*, reduced-size juice glasses intended for use by
14 children); or Products of a type or category (*e.g.*, “piggy
15 banks”) which typically would be used by children, and all
16 similar items.

17 “Exterior Decorations” is defined as all colored
18 artwork, designs and/or markings on the exterior surface of
19 the Product.

20 “Lip and Rim Area” is defined as the exterior top
21 20 millimeters of a hollowware Glassware or Ceramicware
22 Food/Beverage Product, as defined by American Society of
23 Testing and Materials Standard Test Method C927-99.

24 “No Detectable Lead” shall mean that lead is not
25 detected at a level above two one-hundredths of one percent
26 (0.02%) of lead by weight, using a sample size of the
27 materials in question measuring approximately 50-100 mg
28

1 and a test method of sufficient sensitivity to establish a limit
2 of quantitation of less than 200 ppm.³

3 “Reformulated Product” refers to any Product that
4 meets the reformulation standards described in section 2.3 as
5 set forth below.

6 **2.3.A Reformulation Standards for Glassware Food or Beverage**
7 **Products**

8 A Glassware Food or Beverage Product is a Reformulated Product if it satisfies either
9 the standard outlined in subsection 2.3.A (i) *or* (ii), subject to the following qualifications:

10 All Children’s Products must meet the Decorative Material
11 Content-Based standard outlined in subsection 2.3.A(ii) to be considered a
12 Reformulated Product.

13 If a Glassware Food/Beverage Product has Exterior Decorations in the
14 Lip and Rim Area, it must also satisfy subsection 2.3.A(iii) to be considered a
15 Reformulated Product.

16
17 (i) If the materials on the exterior surface of the Product (1) do not
18 extend into the “Lip and Rim Area” and (2) produce a test result no higher than 1.0
19 micrograms (ug) of lead using a Ghost Wipe™ test applied on all of the decorated exterior
20 portions of the surface of the Product performed as outlined in NIOSH method no. 9100, or

21 (ii). If the materials on the exterior surface of the Product (1) do not
22 extend into the Lip and Rim area and (2) utilize paints or other materials which contain six
23 one-hundredths of one percent (0.06%) lead by weight or less as measured (at Defendant’s
24 option), either before or after the material is fired onto (or otherwise affixed to) the Product,
25 using a sample size of the materials in question measuring approximately 50-100 mg and a

26 _____
27 ³ If the decoration is tested after it is affixed to the Covered Product, the percentage of the Listed Chemical by
28 weight must relate only to the decorating material and must not include any quantity attributable to
non-decorating material (e.g., the glass substrate).

1 test method of sufficient sensitivity to establish a limit of quantitation (as distinguished from
2 detection) of less than 600 ppm pursuant to EPA Test Method 3050B, such Product is a
3 Reformulated Product;⁴

4 (iii) If the Product has colored artwork, designs or markings on the
5 exterior surface within the Lip and Rim area, it must utilize paints containing “No Detectable
6 Lead” for all colored artwork, designs or markings within the Lip and Rim area.

7 **2.3.B Reformulation Standards for Glassware Non-Food or Beverage**
8 **Products**

9 For glassware products which are not intended for the storage or
10 consumption of food or beverages (*e.g.* soap dispensers, candleholders, trivets), a Product
11 may qualify as a Reformulated Product if it achieves a test result of 4.0 ug of lead or less
12 using a Ghost Wipe™ test applied on all of the decorated exterior portions of the surface of
13 the Product as outlined in NIOSH method no. 9100.

14 **2.3.C Reformulation Standards for Ceramicware Food or Beverage**
15 **Products**

16 A Ceramicware Food or Beverage Product is a Reformulated Product
17 if it satisfies the standards outlined in subsections 2.3.C (i) *or* (ii) *or* (iii), subject to the
18 following qualifications:

19 If the Product is decorated in the Lip and Rim Area, it must also satisfy
20 subsection 2.3.C (iv) to be considered a Reformulated Product.

21 (i) **Wipe Test-Based Standard.** The Ceramicware Food or
22 Beverage Product must produce a test result no higher than 1.0 micrograms (ug) of lead
23 applied on all of the decorated exterior portions of the surface of the Product performed as
24 outlined in NIOSH method no. 9100.

25 (ii) **Decorating Material Content-Based Standard.** The
26 Exterior Decorations, exclusive of the Lip and Rim Area, must only utilize decorating

27

⁴ See footnote 3 above.
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1 materials that contain six one-hundredths of one percent (0.06%) of lead by weight or less, as
2 measured either before or after the material is fired onto (or otherwise affixed to) the Product,
3 using EPA Test Method 3050B.⁵

4 (iii) **Total Acetic-Acid Immersion Test Based Standard.** The
5 Ceramicware Food/Beverage Product must achieve a result of 0.99 ppm or less for lead after
6 correction for internal volume when tested under the protocol attached hereto as Exhibit B
7 (the ASTM C927-99 test method, modified for total immersion with results corrected for
8 internal volume).⁶

9 (iv) **Lip and Rim Area Exterior Decoration.** If the Ceramicware
10 Food/Beverage Product contains Exterior Decorations in the Lip and Rim Area:

11 (a) Any Exterior Decorations that extend into the Lip and
12 Rim Area must only utilize decorating materials that contain “No Detectable Lead” or

13 (b) The Ceramicware Food/Beverage Product must yield a
14 test result showing a concentration level of 0.5 ug/ml or less of lead using ASTM method C
15 927-99.⁷

16 **2.3.D Reformulation Standards for Ceramicware Non-Food or Beverage Products**

17 A Ceramicware Non Food/Beverage Use Product qualifies as a Reformulated
18 Product if it achieves a test result of 4.0 ug or less of lead as applied to all of the decorated
19 portions of all surfaces of the Product performed as outlined in NIOSH method no. 9100.

21 **2.4 Reformulation Goal and Commitment.**

22 Defendant Evergreen hereby commits to undertake good faith efforts to ensure that
23 one hundred percent (100%) of the Products manufactured sold or distributed on or after
24 _____

25 ⁵ See footnote 3 above.

26 ⁶ Because this method requires correction for internal volume, this method and subsections 2.3.C (ii) is only appropriate for ceramic hollowware.

27 ⁷ See footnote 6 above.

1 December 31, 2005 *and* likely to be sold in California will not require a warning pursuant to
2 this agreement or shall constitute Reformulated Products pursuant to section 2.3 above.

3 **3. MONETARY PAYMENTS**

4 **3.1 Penalties Pursuant To Health & Safety Code §25249.7(b)**

5 Pursuant to Health & Safety Code §25249.7(b), Defendant Evergreen shall pay the
6 sum of \$45,000 in civil penalties in two installments. The first payment of \$15,000 shall be
7 due on or before August 25, 2005. The second penalty payment of \$30,000 shall be paid on
8 January 30, 2007. The second penalty payment shall be waived in the event that Defendant
9 Evergreen certifies on or before January 15, 2007, that 100% of the Products they sold in
10 California in from January 1, 2006 through December 31, 2007 were Reformulated Products
11 or otherwise exempt from the warning requirements of this agreement. Said payment(s) shall
12 be made payable to "Chanler Law Group in Trust For Russell Brimer" and delivered to
13 Plaintiff's counsel at the following address:

14 CHANLER LAW GROUP
15 Attn: Clifford A. Chanler
16 71 Elm Street, Suite 8
17 New Canaan, CT 06840

18 **3.1.A.** In the event that Defendants pay any penalty and the Consent
19 Judgment is not thereafter approved and entered by the Court within one year of the
20 execution date of this agreement, Mr. Brimer shall return any penalty funds paid under this
21 agreement within fifteen (15) days of receipt of a written request from Defendants following
22 notice of the issuance of the Court's decision.

23 **3.2 Apportionment of Penalties Received**

24 After Court approval of this Consent Judgment pursuant to section 6, all penalty
25 monies received shall be apportioned by Plaintiff in accordance with Health & Safety Code
26 §25192, with 75% of these funds remitted to the State of California's Office of
27 Environmental Health Hazard Assessment and the remaining 25% of these penalty monies
28 retained by Plaintiff as provided by Health & Safety Code §25249.12(d). Plaintiff shall bear

1 all responsibility for apportioning and paying to the State of California the appropriate civil
2 penalties paid in accordance with this section.

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

4 **4.1** The Parties acknowledge that Plaintiff and his counsel offered to resolve this
5 dispute without reaching terms on the amount of fees and costs to be reimbursed to them,
6 thereby leaving this fee issue to be resolved after the material terms of the agreement had
7 been settled. Defendants then expressed a desire to resolve the fee and cost issue shortly after
8 the other settlement terms had been finalized. The Parties then attempted to (and did) reach
9 an accord on the compensation due to Plaintiff and his counsel under the private attorney
10 general doctrine codified at Code of Civil Procedure §1021.5 for all work performed through
11 the Effective Date of the Agreement. Under the private attorney general doctrine, Defendant
12 Evergreen shall reimburse Plaintiff and his counsel for fees and costs, incurred as a result of
13 investigating, bringing this matter to Defendants' attention, litigating and negotiating a
14 settlement in the public interest. Defendant Evergreen shall pay Plaintiff and his counsel
15 \$60,000 for all attorneys' fees, expert and investigation fees, and litigation costs. The
16 payment shall be made payable to the "Chanler Law Group" and shall be delivered to
17 Plaintiff's counsel on or before August 25, 2005 at the following address:

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

22 Except as specifically provided in this Consent Judgment, Defendants shall
23 have no further obligation with regard to reimbursement of Plaintiff's attorney's fees and
24 costs with regard to the Products covered in this Action.

25 **4.2** In the event that Defendants pay any attorneys' fees or costs and the Consent
26 Judgment is not thereafter approved and entered by the Court, Chanler Law Group shall
27 return any funds paid by Defendants for such fees and costs under this agreement within
28

1 fifteen (15) days of receipt of a written request from Defendants following notice of the
2 issuance of the Court's decision.

3 **5. RELEASE OF ALL CLAIMS**

4 **5.1 Plaintiff's Release of Defendants**

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

19 The Parties further agree and acknowledge that this Consent Judgment is a full, final,
20 and binding resolution of any violation of Proposition 65 that has been or could have been
21 asserted in the Complaint against Defendants for their alleged failure to provide clear and
22 reasonable warnings of exposure to or identification of the Listed Chemical in the Products.

23 In addition, Plaintiff, on behalf of himself, his attorneys, and their agents, waive all
24 rights to institute or participate in, directly or indirectly, any form of legal action and releases
25 all Claims against the Defendants' Releasees arising under Proposition 65 related to each of
26 the Defendants' Releasees' alleged failures to warn about exposures to or identification of the
27 Listed Chemical contained in the Products and for all actions or statements made by
28 Defendants or their attorneys or representatives, in the course of responding to alleged

1 violations of Proposition 65 by Defendants. Provided however, Plaintiff shall remain free to
2 institute any form of legal action to enforce the provisions of this Consent Judgment.

3 It is specifically understood and agreed that the Parties intend that Defendants'
4 compliance with the terms of this Consent Judgment resolves all issues and liability, now and
5 in the future (so long as Defendants comply with the terms of the Consent Judgment)
6 concerning Defendants' and the Defendants' Releasees' compliance with the requirements of
7 Proposition 65, as to the Listed Chemical in the Products.

8 **5.2 Defendants' Release of Plaintiff**

9 Defendants and the Defendants' Releasees waive all rights to institute any form of
10 legal action against Plaintiff, or his attorneys or representatives, for all actions taken or
11 statements made by Plaintiff and his attorneys or representatives, in the course of seeking
12 enforcement of Proposition 65 in this Action.

13 **6. COURT APPROVAL**

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

18 **7. SALES DATA**

19 Defendants understand that the sales data that they provided to counsel for Russell
20 Brimer was a material factor upon which he has relied to determine the amount of civil
21 penalties made pursuant to Health & Safety Code §25249.7(b) in this Agreement. To the best
22 of Defendants' knowledge, the sales data provided by Defendants to counsel for Russell
23 Brimer is full and complete, and is a true and accurate reflection of any and all sales of the
24 Products in California during the relevant period.

25 **8. SEVERABILITY**

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

1 **9. ATTORNEYS' FEES**

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

6 **10. GOVERNING LAW**

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

12 **11. NOTICES**

13 All correspondence and notices required to be provided pursuant to this Consent
14 Judgment shall be in writing and personally delivered or sent by: either first-class, registered,
15 certified mail, return receipt requested, or by overnight courier on either Party by the others at
16 the following addresses.

17 To Home Depot and Expo Design:

18 Karen B. Polyakov, Esq.
19 Home Depot USA, Inc. and
20 Expo Design Center, Inc.
21 3800 West Chapman Avenue
22 Orange, CA 92868

23 To Evergreen Enterprises:

24 Mr. David Earle
25 Director of Finance
26 Evergreen Enterprises
27 5915 Midlothian Turnpike
28 Richmond, VA 23225

 With a copy to:

 Michael J. Steel, Esq.
 Pillsbury Winthrop Shaw Pittman
 50 Fremont Street
 San Francisco, CA 94105

1 To Plaintiff:

2 Clifford A. Chanler
3 Chanler Law Group
4 71 Elm Street, Suite 8
5 New Canaan, CT 06840

6 Laralei S. Paras
7 Paras Law Group
8 655 Redwood Highway, Suite 216
9 Mill Valley, California 94941

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

12 **12. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

24 **14. ADDITIONAL POST EXECUTION ACTIVITIES**

25 The Parties shall mutually employ their best efforts to support the entry of this
26 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court
27 in a timely manner. The Parties acknowledge that, pursuant to Health & Safety Code
28 §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
Accordingly, the plaintiff agrees to file a Motion to Approve the Agreement ("Motion"),
within a reasonable period of time after the Execution Date. Defendants agree either to file a

1 joinder in support of the Motion or to file a Statement of Non-Opposition to the Motion.
2 Defendants shall have no additional responsibility to Plaintiff's counsel pursuant to Code of
3 Civil Procedure §1021.5 or otherwise with regard to reimbursement of any fees and costs
4 incurred with respect to the preparation and filing of the Motion or with regard to Plaintiff's
5 counsel appearing for a hearing or related proceedings thereon.

6 **15. MODIFICATION**

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

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1 **16. 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
4 this Consent Judgment.

5 **AGREED TO:**

AGREED TO:

6
7 Date: 9-20-05

Date: _____

8
9 By: 
Plaintiff Russell Brimer

By: _____
Title:
Defendants HOME DEPOT, INC. and
EXPO DESIGN CENTER, Inc.

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Date: _____

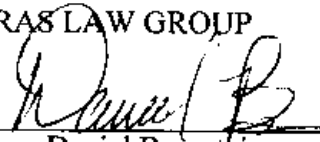
By: _____
Title:
Defendant EVERGREEN
ENTERPRISES, INC.

18 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

19 Date: 9/20/05

Date: _____

20
21 PARAS LAW GROUP
22 By: 
Daniel Bornstein
Attorneys for Plaintiff
RUSSELL BRIMER

PILSBURY WINTHROP SHAW PITTMAN,
LLP
By: _____
Michael J. Steel
Attorneys for Defendants
HOME DEPOT USA, INC.,
EXPO DESIGN CENTER, INC.
EVERGREEN ENTERPRISES, INC.

26 **IT IS SO ORDERED.**

27
28 Date: _____

JUDGE OF THE SUPERIOR COURT

09/06/2005 17:55 8842312495

EVERGREEN ENT

PAGE 82/84

1 16. AUTHORIZATION

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4 this Consent Judgment.

5
6 **AGREED TO:**

AGREED TO:

7 Date: _____

Date: Sept. 8, 2005

8
9 By: _____
Plaintiff Russell Brimer

By: Karen Polyzka
Title: CORPORATE COUNSEL
Defendants HOME DEPOT, INC. and
EXPO DESIGN CENTER, Inc.

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Date: Sept 4th, 2005

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By: [Signature]
Title: President
Defendant EVERGREEN
ENTERPRISES, INC.

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18 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

19 Date: _____

Date: 9/6/05

20

21 **PARAS LAW GROUP**

**PILLSBURY WINTHROP SHAW
PITTMAN, LLP**

22 By: _____
Daniel Bottstein
Attorneys for Plaintiff
RUSSELL BRIMER

By: Michael Steel / WS
Michael J. Steel
Attorneys for Defendants
HOME DEPOT USA, INC.,
EXPO DESIGN CENTER, INC.
EVERGREEN ENTERPRISES, INC.

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27 **IT IS SO ORDERED.**

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1000032591

1 **EXHIBIT A**

2 All glassware and ceramicware products intended to hold food and/or beverages with
3 colored artwork, designs or markings on the exterior surface as well as glassware and
4 ceramicware products which are not intended to hold food and/or beverages with colored
artwork, designs or markings on the exterior surface including, but not limited to:

- 5 Frosted Oil Bottle 3FB
6 Dipping Set with Oil Bottle 3DS
Oil Bottle 3OB
7 Crock 3UC
Canister 3CN
8 Frosted Soap Dispenser 3FD
9 Frosted Bath Set 5BS
Soap Dispenser 3SD
10 Soap Dispenser Gift Set P02
Dessert Plate 3PS
11 Condiment Server 3R
12 Entertainment Gift Set P01
Ceramic Trays
13 Trivets
Spoon Rests
14 Dessert Plates
Salt and Pepper Shakers
15 Candle Holders
16 Mugs

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EXHIBIT B
TESTING PROTOCOL

For purposes of the Reformulation Standards in this Consent Judgment, the method on the attached pages, ASTM C 927-80 (reapproved in 1999 and 2004), shall be modified for total immersion of the Covered Products.

As modified, carefully add 4% acetic acid leaching solution from a graduated cylinder to each container containing a sample until the sample is fully immersed in solution. Record the volume of solution used. The container must comply with the diameter requirements specified in the protocol, while being large enough to fully immerse the product.

The remainder of the protocol should be followed as set forth in the attached document.



Designation: C 927 – 80 (Reapproved 2004)

Standard Test Method for Lead and Cadmium Extracted from the Lip and Rim Area of Glass Tumblers Externally Decorated with Ceramic Glass Enamels¹

This standard is issued under the fixed designation C 927; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ϵ) indicates an editorial change since the last revision or reapproval.

1. Scope

1.1 This test method covers the determination of lead and cadmium extracted by acetic acid from the lip and rim area of glassware used for drinking and which is exteriorly decorated with ceramic glass enamels. The procedure of extraction may be expected to accelerate the release of lead and cadmium from the decorated area and to serve, therefore, as a severe test that is unlikely to be matched under the actual conditions of usage of such glassware. This test method is specific for lead and cadmium.

NOTE 1—For additional information see Test Method C 738.

1.2 The values stated in acceptable metric units are to be regarded as the standard. The values given in parentheses are for information only.

1.3 *This standard may involve hazardous materials, operations, and equipment. This standard does not purport to address all of the safety concerns associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.*

2. Referenced Documents

2.1 ASTM Standards:²

C 738 Test Method for Lead and Cadmium Extracted from Glazed Ceramic Surfaces

3. Terminology

3.1 Definitions:

¹ This test method is under the jurisdiction of ASTM Committee C14 on Glass and Glass Products and is the direct responsibility of Subcommittee C14.10 on Glass Decoration. It was developed jointly by ASTM Committee C-14 and C-21 on Ceramic Whitewares and Related Products, the Society of Glass Decorators A-20 Subcommittee on Ceramic Enamelled Decorated Glass Tumblers, and an Inter-agency Task Force consisting of FDA, EPA, and CPSC of the U.S. Government.

Current edition approved Oct. 1, 2004. Published October 2004. Originally approved in 1980. Last previous edition C 927 - 80 (1999).

² For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.

3.1.1 *ceramic glass decorations*—ceramic glass enamels fused to glassware at temperatures above 425°C (800°F) to produce a decoration.

3.1.2 *ceramic glass enamels (also ceramic enamels or glass enamels)*—predominately colored, silicate glass fluxes used to decorate glassware.

3.1.3 *lip and rim area*—that part of a drinking vessel which extends 20 mm below the rim on the outside of the specimen.

4. Summary of Test Method

4.1 Lead and cadmium are extracted from the lip and rim area of the article under test by leaching with a 4 % acetic acid solution at 20 to 24°C (68 to 75°F) for 24 h and are measured by atomic absorption spectrophotometry using specific hollow cathode or electrodeless discharge lamps for lead and cadmium respectively. Results are reported as micrograms per millilitre (ppm) extracted relative to the internal volume of the glass article.

5. Significance and Use

5.1 The heavy metals, lead and cadmium, are known to cause serious health effects in man if consumed in excess. It is, therefore, important to measure the amount that may be extracted from an area of the glass drinking vessel in contact with the lip. Even though the amount of lead and cadmium extracted by this test method is in no way representative of the amount of the metals extracted by actual lip contact, the relative magnitude of metals extracted from one test specimen in relation to another test specimen provides an effective tool for discrimination.

6. Interferences

6.1 Since specific hollow cathode lamps or electrodeless discharge lamps for lead and cadmium are used, there are no interferences.

7. Apparatus

7.1 *Atomic Absorption Spectrophotometer (AAS)*, equipped with a 102-mm (4-in.) single slot or Belling burner head and digital concentration readout attachment (DCR) if available. This instrument should have a sensitivity of about 0.5 µg/mL of

lead for 1 % absorption and a sensitivity of about 0.025 µg/mL of cadmium for 1 % absorption. Use the operating conditions as specified in the instrument manufacturer's analytical methods manual.

7.2 *Hollow Cathode or Electrodeless Discharge Lead Lamp*, set at 283.3 nm.

7.3 *Hollow Cathode or Electrodeless Discharge Cadmium Lamp*, set at 228.8 nm.

7.4 *Glassware* of chemically resistant borosilicate glass for use in preparing and storing reagents and solutions, and for use as test specimen containers.

7.5 Detection limits of lead and cadmium shall be determined and reported for individual instruments. In this test method, the detection limit shall be defined as twice the mean noise level at 0 µg/mL. Representative detection limits would be approximately 0.01 to 0.03 µg/mL for lead and 0.0005 to 0.0010 µg/mL for cadmium.

8. Reagents

8.1 *Purity of Reagents*—Reagent grade chemicals shall be used in all tests. Unless otherwise indicated, it is intended that all reagents shall conform to the specifications of the Committee on Analytical Reagents of the American Chemical Society, where such specifications are available.³ Other grades may be used provided it is first ascertained that the reagent is of sufficiently high purity to permit its use without lessening the accuracy of the determination. Analyze each new batch of reagents for lead and cadmium.

8.2 *Purity of Water*—Unless otherwise indicated, references to water shall be understood to mean distilled or deionized water.

8.3 *Acetic Acid* (4 volume %)—Mix 1 volume of glacial acetic acid with 24 volumes of water.

8.4 *Cadmium Standard Stock Solution* (1000 µg/mL of cadmium)—Dissolve 0.9273 g of anhydrous cadmium sulfate in 250 mL of 1 % HCl (8.6) and dilute to 500 mL with 1 % HCl. Commercially available standard cadmium solutions may also be used.

8.5 *Detergent Rinse*—Add 2 mL of hand dishwashing detergent to 1 L of lukewarm tap water.

8.6 *Hydrochloric Acid* (1 weight %)—Mix 1 volume of concentrated hydrochloric acid (HCl, sp gr 1.19) with 37 volumes of water.

8.7 *Lead Standard Stock Solution* (1000 µg/mL)—Dissolve 1.598 g of lead nitrate (Pb(NO₃)₂) in 4 % acetic acid and dilute to 1 L with 4 % acetic acid. Commercially available standard lead solutions may also be used.

9. Sampling

9.1 *Continuous Process*—Since the amount of metal released from a decoration can be affected by the firing conditions, which may not be uniform across the width of thelehr,

a minimum of six samples should be taken representing both sides and the center of the lehr.

9.2 *Load or Pile*—A minimum of six samples should be randomly selected from throughout the load.

10. Preparation of Standards

10.1 *Lead Standard Working Solutions*—Dilute lead nitrate solution (8.7) with acetic acid (8.3) to obtain working standards having final lead concentrations of 0, 5, 10, 15, and 20 µg/mL.

10.2 *Cadmium Standard Working Solutions*—Dilute cadmium stock solution (8.4) with acetic acid (8.3) to obtain working standards having final cadmium concentrations of 0.0, 0.3, 0.5, 1, 1.5, and 2.0 µg/mL.

10.3 Fresh working solutions should be prepared daily.

11. Procedure

11.1 *Preparation of Sample*—Take six identical units and cleanse each with a detergent rinse. Then rinse with tap water followed by distilled water followed by air drying. Mark each unit 7 mm below the rim. Record the internal volume of each article in millilitres by filling from a graduated cylinder to approximately 6 to 7 mm (¼ in.) of overflowing. Mark each article, in a nondecorated area (if possible), 20 mm below the rim on the outside. Invert the article in an appropriate laboratory glassware container whose diameter is a minimum of 1.25 times and a maximum of 2.0 times the diameter of the test specimen at the rim. Carefully add 4 % acetic acid leaching solution from a graduated cylinder to the 20-mm mark. Record the volume of solution used. Cover the glassware containers, if possible, to prevent evaporation and to protect them from contamination. Let stand for 24 h at room temperature (20 to 24°C) in the dark. Remove the article after the 24-h leaching period and determine the lead and cadmium by atomic absorption. Record the lead and cadmium found in micrograms per millilitre.

NOTE 2—The possibility of a significant amount of evaporation exists. The analyst should determine whether the acetic acid leaching is noticeably below the 20-mm mark before removing the article. If it is, sufficient acetic acid solution should be added to restore the leaching solution to the 20-mm mark.

11.2 *Determination of Lead*—Set the instrument (7.1) for maximum signal at 283.3 nm using the lead hollow cathode lamp (7.2) (Note 3) and air/acetylene (C₂H₂) flow rates recommended by the manufacturer. Stir the sample (leaching) solution and pour off a portion into a clean flask or aspirate from the extraction container if suitable. Flush the burner with water and check zero point between readings. Determine lead from a standard curve of absorbance against µg/mL of lead or calibrate the direct concentration reading (DCR) unit in the concentration mode with lead working solutions (11.1) and read and record the sample concentration directly. Bracket the sample solution with the next higher and lower working solutions. Dilute samples containing more than 20 µg/mL of lead with 4 % acetic acid and reanalyze.

NOTE 3—Electrodeless discharge lamps may be substituted for hollow cathode lamps.

³ *Reagent Chemicals, American Chemical Society Specifications*, American Chemical Society, Washington, DC. For suggestions on the testing of reagents not listed by the American Chemical Society, see *Analar Standards for Laboratory Chemicals*, BDH Ltd., Poole, Dorset, U.K., and the *United States Pharmacopoeia and National Formulary*, U.S. Pharmacopoeial Convention, Inc. (USPC), Rockville, MD.

11.3 *Determination of Cadmium*—Proceed as in 11.2 using the cadmium hollow cathode lamp (7.3) and cadmium standards (10.2). If the sample (leaching) solution contains more than 2 µg/mL of cadmium, dilute with 4 % acetic acid and reanalyze.

12. Calculation

12.1 Use the following equations to calculate the total amount of lead or cadmium metal released from the lip and rim area of the article expressed (1) in total micrograms and (2) parts per million of lead or cadmium metal leached relative to the internal volume of the article.

12.1.1 Determine lead or cadmium, A , in micrograms as follows:

$$A = C \times V_1 \quad (1)$$

12.1.2 Determine lead or cadmium, A , in parts per million as follows:

$$A = \frac{C \times V_1}{V_2} \quad (2)$$

where:

C = concentration of lead or cadmium in leaching solution, µg/mL;

V_1 = volume of leaching solution, mL; and

V_2 = internal volume of article, mL (Note 4).

NOTE 4—The internal volume of the article expressed in millilitres of water closely approximates its weight in grams. Therefore, in this instance microgram per millilitre equals microgram per gram which equals parts per million.

13. Report

13.1 A suggested report form is given in Fig. 1.


14. Precision and Bias

14.1 Precision for the analytical method for single or multiple operator within a single laboratory is within the sensitivity of the AAS used and as specified is about 0.5 µg/mL for lead and 0.25 µg/mL for cadmium.

14.2 The accuracy and between-laboratory precision are dependent upon the ability to obtain representative samples for the statistical universe being sampled.

15. Keywords

15.1 atomic absorption; cadmium; ceramic glass enamels; glaze; heavy metals; lead

 C 927 – 80 (2004)

LABORATORY TEST DATA

Lead and Cadmium Released from Lip and Rim Area of Drinking Glassware Decorated Externally with Ceramic Glass Enamels

Date _____

Manufacturer _____ Laboratory _____

Pattern _____

Detection Limit Lead _____ Reagent Blank Lead _____

 Cadmium _____ Cadmium _____

Internal Volume, mL _____

Sample	Volume of Leaching Solution, mL	Concentration, µg/mL Lead,	Total µg	ppm Relative to Internal Volume
1				
2				
3				
4				
5				
6				
Avg				
		Cadmium		
1				
2				
3				
4				
5				
6				
Avg				

FIG. 1 Report Form

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