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10 Russell Brimer

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14 Attorneys for Defendants
15 Popular Imports, Inc.
16 Popular Creations
17 Gift Link, Inc.

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 COUNTY OF MARIN
20 UNLIMITED JURISDICTION

21
22 RUSSELL BRIMER,

23 Plaintiff,

24 v.

25 POPULAR IMPORT, INC.; POPULAR
26 CREATIONS; GIFT LINK, INC.;
ALBERTSON'S, INC.; and DOES 1 through
150,

27 Defendants.
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Case No. CV-045304

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

1 **1. INTRODUCTION**

2 **1.1 Plaintiff and Settling Defendants.** This Consent Judgment is entered into by and
3 between plaintiff Russell Brimer (hereafter “Brimer” or “Plaintiff”) and Popular Import, Inc.,
4 Popular Creations and Gift Link, Inc. (hereafter collectively referred to as “Defendants”), with
5 Plaintiff and Defendants collectively referred to as the “Parties” and Brimer and Defendants each
6 being a “Party.”

7 **1.2 Plaintiff.** Brimer is an individual residing in Northern California who seeks to
8 promote awareness of exposures to toxic chemicals and improve human health by reducing or
9 eliminating hazardous substances contained in consumer and industrial products.

10 **1.3 General Allegations.** Plaintiff alleges that Defendants have manufactured,
11 distributed and/or sold (without warnings) in the State of California certain glass and metal votive
12 candle holders which contain lead and/or lead compounds, substances which are listed pursuant to
13 the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
14 §§ 25249.5 *et seq.*¹, also known as Proposition 65, to cause birth defects and other reproductive
15 harm. Lead and lead compounds shall be referred to herein as the “Listed Chemicals.”

16 **1.4 Product Descriptions.** The products that are covered by this Consent Judgment
17 are defined as follows: glass and metal votive candle holders manufactured, sold and/or
18 distributed by Defendants, limited to the specific products listed on Exhibit A. Such products
19 collectively are referred to herein as the “Products.”

20 **1.5 Notices of Violation.** Beginning on September 2, 2004, Brimer served
21 Defendants and various public enforcement agencies with documents, entitled “60-Day Notice of
22 Violation” (“Notice”) that provided Defendants and such public enforcers with notice that
23 Defendants were in violation of Health & Safety Code § 25249.6 for failing to warn purchasers
24 that certain products that they sold expose users in California to lead and/or lead compounds.

25 **1.6 Complaint.** On December 6, 2004, Brimer, in the interest of the general public in
26 California, filed a complaint (hereafter referred to as the “Complaint” or the “Action”) in the

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28 ¹ Unless otherwise noted, all statutory and regulatory references are to California law.

1 Superior Court for the County of Marin against Defendants, alleging violations of Health &
2 Safety Code §25249.6 based on the alleged exposures to the Listed Chemicals contained in
3 certain products sold by Defendants.

4 **1.7 No Admission.** Defendants deny the material factual and legal allegations
5 contained in Plaintiff's Notice and Complaint, and maintain that all products that they have
6 manufactured, sold, and/or distributed in California, including the Products, have been and are in
7 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission
8 by Defendants of any fact, finding, issue of law, or violation of law, nor shall compliance with
9 this Agreement constitute or be construed as an admission by Defendants of any fact, finding,
10 conclusion, issue of law or violation of law. However, this section shall not diminish or
11 otherwise affect the obligations, responsibilities and duties of Defendants under this Consent
12 Judgment.

13 **1.8 Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
14 stipulate that this Court has jurisdiction over the allegations of violations contained in the
15 Complaint and personal jurisdiction over Defendants as to the acts alleged in the Complaint, that
16 venue is proper in the County of Marin, and that this Court has jurisdiction to enter this Consent
17 Judgment and to enforce the provisions thereof.

18 **1.9 Effective Date.** For purposes of this Consent Judgment, "Effective Date" shall
19 mean November 10, 2005.

20 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

21 **2.1 Warning Obligations for Products**

22 **(a) Required Warnings.** After the Effective Date, Defendants shall not
23 transmit to any entity to sell or otherwise offer for sale in California any Products containing the
24 Listed Chemicals, unless warnings are given in accordance with one or more provisions in
25 subsection 2.2 below.

26 **(b) Exceptions.** The warning requirement set forth in subsections 2.1(a) and
27 2.2 below shall not apply to Reformulated Products as defined in Section 2.4 below.

1 2.2 **Clear and Reasonable Warnings**

2 (a) **Product Labeling.** A warning may be given by affixing the following
3 language to the labeling or other packaging for the Product by Defendants, their agents, the
4 manufacturer, importer, distributor or retailer of the Product that states:

5 **WARNING: The materials used in this product contain lead**
6 **a chemical known to the State of California to**
7 **cause birth defects or other reproductive harm.**

8 *or*

9 **WARNING: The materials used in these products contain**
10 **lead a chemical known to the State of California**
11 **to cause birth defects or other reproductive**
12 **harm. Please wash hands thoroughly after**
13 **handling.²**

14 Warnings issued for Products pursuant to this subsection shall be prominently placed with
15 such conspicuousness as compared with other words, statements, designs, or devices as to render
16 them likely to be read and understood by an ordinary individual under customary conditions prior
17 to purchase. For purposes of this subsection, a warning placed on the bottom of the Product or
18 the Product's packaging is deemed not to be an adequate warning. Any changes to the language
19 or format of the warning required by this subsection shall only be made following: (1) approval
20 from the California Attorney General's Office, provided that written notice of at least fifteen (15)
21 days is given to Plaintiff for the opportunity to comment; or (2) Court approval.

22 (b) **Point-of-Sale Warnings.** Defendants may also satisfy their warning
23 obligations by arranging for the posting of signs at retail outlets in the State of California at which
24 the Products are sold, in accordance with the terms specified in subsections 2.2(b)(i), 2.2(b)(ii) and
25 2.2(b)(iii).

26 (i) Point of Sale warnings shall be provided through one or more signs
27 posted at each point of sale or display of the Products that state:

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² This warning is to be used only when the Products are sold as a set.

1 **WARNING: The materials used in this product contain lead a**
2 **chemical known to the State of California to**
3 **cause birth defects or other reproductive harm.**

4 When more than one Product is sold in proximity to other items that do not require a
5 warning (e.g., Reformulated Products as defined in Section 2.4 of this Consent Judgment) the
6 following warning statement must be used:

7 **WARNING: The materials used in the following glass and**
8 **metal products contain lead, a chemical known**
9 **to the State of California to cause birth defects**
10 **or other reproductive harm:**

11 [*List Each Product by Brand Name and Description*]

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

22 (iii) If Defendants intend to utilize point of sale warnings to comply
23 with this Consent Judgment, they must provide notice as required by this Consent Judgment to
24 each retailer to whom Defendants ship the Products for sale in California and obtain the written
25 consent of such retailer that it will comply with the warning requirements contained in this
26 agreement before shipping the Products. Such notice shall include any required warning
27 materials (including, as appropriate, signs and/or stickers). If Defendants have obtained the
28 written consent of a retailer to provide the warnings required by this Consent Judgment,

1 Defendants shall not be found to have violated this Consent Judgment if they have complied with
2 the terms of this Consent Judgment and have proof that they transmitted the requisite warnings
3 and received the retailer's written consent in the manner provided herein.

4 **2.3 Mail Order and Internet Sales.** Subject to Section 2.4, after November 10, 2005,
5 Defendants shall not sell or distribute the Products by mail order catalog or the Internet to
6 California residents, unless warnings are provided as set forth below.

7 For the Products that require a warning pursuant to this Consent Judgment that are sold by
8 Defendants by mail order or from the Internet to California residents, a warning containing the
9 language in subsection 2.2(a) shall be included, in the mail order catalog (if any) or on the
10 website (if any) pursuant to subsections 2.3(a) or 2.3(b). Any warnings given in the mail order
11 catalogs or on the website shall identify the *specific* Products to which the warnings apply so as to
12 minimize, if not eliminate, the chances that an over-warning situation will arise. If Defendants
13 elect to provide warnings in the mail order catalog, then such warnings (at a location designated
14 in subsection 2.3(a)) shall be included in any new galley prints of such catalogs sent to the printer
15 after November 10, 2005, for all first, subsequent or additional printings.

16 (a) **Mail Order Catalog.** The second warning message in subsection 2.2(b)
17 shall be stated on the inside front cover of any catalog. In addition, the first warning message in
18 subsection 2.2(b) shall be placed either: (a) on the same page as any order form for the Product; or
19 (b) on the same page as the price of the Product, in the same type size as the surrounding, non-
20 heading text.

21 (b) **Internet Web Sites.** The first warning message in subsection 2.2(a) shall
22 be displayed either: (a) on the same web page on which the Products are displayed; (b) on the
23 same web page as any order form for the Products; (c) on the same web page as the price for the
24 Products; or (d) on one or more web pages displayed to a purchaser over the Internet or via
25 electronic mail during the checkout and order confirmation process prior to the sale of the
26 Products.

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

2 4.1 The Parties acknowledge that Plaintiff and his counsel offered to resolve this
3 dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
4 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
5 Defendants then expressed a desire to resolve the fee and cost issue shortly after the other
6 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
7 the compensation due to Plaintiff and his counsel under the private attorney general doctrine
8 codified at Code of Civil Procedure §1021.5 for all work performed through the Effective Date of
9 the Agreement. Under the private attorney general doctrine codified at Code of Civil Procedure
10 §1021.5, Defendants shall reimburse Plaintiff and his counsel for fees and costs, incurred as a
11 result of investigating, bringing this matter to Defendants' attention, litigating and negotiating a
12 settlement in the public interest. Defendants shall pay Plaintiff and his counsel \$28,500 for all
13 attorneys' fees, expert and investigation fees, and litigation costs. The payment shall be made
14 payable to the "Chanler Law Group" and shall be delivered to Plaintiff's counsel on or before
15 November 14, 2005, at the following address:

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

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

24 **5. RELEASE OF ALL CLAIMS**

25 5.1 **Plaintiff's Release of Defendants.** In further consideration of the promises and
26 agreements herein contained, and for the payments to be made pursuant to sections 3 and 4,
27 Plaintiff, on behalf of himself, his past and current agents, representatives, attorneys, successors
28 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 release all claims, including,

1 without limitation, all actions, causes of action, in law or in equity, suits, liabilities, demands,
2 obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to,
3 investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or
4 unknown, fixed or contingent (collectively "Claims"), against Defendants and each of its
5 distributors, wholesalers, licensors, licensees, auctioneers, retailers (including Albertsons, Inc.),
6 dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries
7 and their respective officers, directors, attorneys, representatives, shareholders, agents, and
8 employees (collectively, "Defendants' Releasees") arising under Proposition 65 related to
9 Defendants' or Defendants' Releasees' alleged failure to warn about exposures to or
10 identification of Listed Chemicals contained in the Products sold or distributed by Defendants.

11 The Parties further agree and acknowledge that this Consent Judgment is a full, final, and
12 binding resolution of any violation of Proposition 65 that have been or could have been asserted
13 in the Complaint against Defendants for their alleged failure to provide clear and reasonable
14 warnings of exposure to or identification of Listed Chemicals in the Products sold by Defendants.

15 In addition, Plaintiff, on behalf of himself, his attorneys, and their agents, waives all rights
16 to institute or participate in, directly or indirectly, any form of legal action and releases all Claims
17 against Defendants' Releasees arising under Proposition 65 related to each of Defendants'
18 Releasees' alleged failures to warn about exposures to or identification of Listed Chemicals
19 contained in the Products, and for all actions or statements made by Defendants or their attorneys
20 or representatives, in the course of responding to alleged violations of Proposition 65 by
21 Defendants. Provided however, Plaintiff shall remain free to institute any form of legal action to
22 enforce the provisions of this Consent Judgment.

23 It is specifically understood and agreed that the Parties intend that Defendants'
24 compliance with the terms of this Consent Judgment resolves all issues and liability, now and in
25 the future (so long as Defendants comply with the terms of the Consent Judgment) concerning
26 Defendants and Defendants' Releasees' compliance with the requirements of Proposition 65 as to
27 the Listed Chemicals in the Products sold by Defendants.

1 Additionally, the Parties expressly agree that nothing in this Section, 5.1, shall be
2 construed to provide a release of liability: (a) to suppliers of glass and metal votive candle
3 holders other than Popular Import, Inc., Popular Creations and Gift Link, Inc.; or (b) to
4 Albertsons, Inc. for the sale of glass and metal votive candle holders other than the Products
5 supplied to Albertsons, Inc. by Popular Import, Inc., Popular Creations and Gift Link, Inc.
6 Notwithstanding the foregoing, Plaintiff agrees that he will dismiss Albertsons, Inc. without
7 prejudice within thirty (30) days of the Court's approval under Section 6, provided that
8 Albertsons, Inc. signs a declaration under penalty of perjury that it did not sell glass and metal
9 votive candle holders other than the Products supplied to Albertsons, Inc. by Popular Import, Inc.,
10 Popular Creations and Gift Link, Inc. during the period running from September 2, 2003 to
11 September 2, 2004.

12 **5.2 Defendants' Release of Plaintiff.** Defendants and Defendants' Releasees waive
13 all rights to institute any form of legal action against Plaintiff, or his attorneys or representatives,
14 for all actions taken or statements made by Plaintiff and his attorneys or representatives, in the
15 course of seeking enforcement of Proposition 65 in this Action.

16 **6. COURT APPROVAL**

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

22 **7. SALES DATA**

23 Defendants understand that the sales data that they provided to counsel for Russell Brimer
24 on October 14, 2005, was a material factor upon which Russell Brimer has relied to determine the
25 amount of civil penalties made pursuant to Health & Safety Code § 25249.7(b) in this
26 Agreement. To the best of Defendants' knowledge, the sales data provided by Defendants to
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1 counsel for Russell Brimer is a full, complete, true and accurate reflection of any and all sales of
2 the Products in California during the relevant period.

3 **8. SEVERABILITY**

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

7 **9. ATTORNEYS' FEES**

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

12 **10. GOVERNING LAW**

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

18 **11. NOTICES**

19 All correspondence and notices required to be provided pursuant to this Consent Judgment
20 shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail,
21 return receipt requested or (ii) overnight courier on either Party by the other at the addresses listed
22 below. Either Party, from time to time, may specify a change of address to which all notices and
23 other communications shall be sent.

24 To Popular Import, Inc., Popular Creations, and Gift Link, Inc.:

25 Jeffrey Margulies, Esq.
26 FULBRIGHT & JAWORSKI L.L.P.
27 865 S. Figueroa Street, 29th Floor
28 Los Angeles, California 90017

1 To Plaintiff:

2 Clifford A. Chanler, Esq.
3 CHANLER LAW GROUP
4 71 Elm Street, Suite 8
5 New Canaan, CT 06840

6 **12. NO ADMISSIONS**

7 Nothing in this Consent Judgment shall constitute or be construed as an admission by
8 Defendants of any fact, finding, conclusion, issue of law, or violation of law, nor shall
9 compliance with this Consent Judgment constitute or be construed as an admission by Defendants
10 of any fact, finding, conclusion, issue of issue of law, or violation of law, such being specifically
11 denied by Defendants. Defendants reserve all of their rights and defenses with regard to any
12 claim by any party under Proposition 65 or otherwise. However, this section shall not diminish or
13 otherwise affect Defendants' obligations, responsibilities and duties under this Consent Judgment.

14 **13. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

26 **15. ADDITIONAL POST EXECUTION ACTIVITIES**

27 The Parties shall mutually employ their best efforts to support the entry of this Agreement
28 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely

1 manner. The Parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
2 motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the Parties
3 agree to file a Joint Motion to Approve the Agreement (“Joint Motion”), the first draft of which
4 Defendant Popular Imports, Inc.’s counsel shall prepare, within a reasonable period of time after
5 the Execution Date (*i.e.*, not to exceed thirty (30) days unless otherwise agreed to by the Parties’
6 counsel based on unanticipated circumstances). Plaintiff’s counsel shall prepare a declaration in
7 support of the Joint Motion which shall, *inter alia*, set forth support for the fees and costs to be
8 reimbursed pursuant to Section 4. Defendants shall have no additional responsibility to Plaintiff’s
9 counsel pursuant to C.C.P. §1021.5 or otherwise with regard to reimbursement of any fees and
10 costs incurred with respect to the preparation and filing of the Joint Motion and its supporting
11 declaration or with regard to Plaintiff’s counsel appearing for a hearing or related proceedings
12 thereon.

13 **16. MODIFICATION**

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

19 **17. AUTHORIZATION**

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

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AGREED TO:

AGREED TO:

Date: 11-11-05

Date: _____

By:
Plaintiff Russell Brimer

Russell B

By:
Defendant Popular Import, Inc.

Date: _____

By:
Defendant Popular Creations

Date: _____

By:
Defendant Gift Link, Inc.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: Nov 16th 2005

CHANLER LAW GROUP

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

Date: _____
FULBRIGHT & JAWORSKI LLP

By:
Jeffrey B. Margulies
Attorneys for Defendants
POPULAR IMPORT, INC.
POPULAR CREATIONS
GIFT LINK, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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AGREED TO:

AGREED TO:

Date: _____

Date: 11/11/05

By:
Plaintiff Russell Brimer

By: [Signature]
Defendant Popular Import, Inc.

Date: 11/11/05

By: [Signature]
Defendant Popular Creations

Date: 11/11/05

By: [Signature]
Defendant Gift Link, Inc.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: _____
CHANLER LAW GROUP

Date: November 7, 2005
FULBRIGHT & JAWORSKI LLP

By:
Clifford A. Chanler
Attorneys for Plaintiff
RUSSELL BRIMER

By: [Signature]
Jeffrey B. Margulies / Rachel Stanger
Attorneys for Defendants
POPULAR IMPORT, INC.
POPULAR CREATIONS
GIFT LINK, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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Exhibit A

1. Stained Glass Votive Candle Holder (#7 50966 33459 5);
2. 3.5" H. Stained Glass Dragonfly Candle Holders (S-1011);
3. 5" H. Stained Glass Butterfly Candle Holder (S-1012);
4. 4.25" H. Flower Stained Glass Candle Holders (SCA07003);
5. 6" H. Bird & Butterfly Stained Glass Candle Holder (S-1007); and
6. 6" H. Stained Glass Butterfly T-Light Holders (S-1010)