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

Attorneys for Plaintiff
Russell Brimer

Douglas A. Marshall, State Bar No. 91227
KAY & MERKLE
100 The Embarcadero, Penthouse
San Francisco, CA 94105
Telephone: (415) 357-1200

Attorneys for Defendant
The Madden Corporation

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

RUSSELL BRIMER,

Plaintiff,

v.

THE MADDEN CORPORATION; and DOES 1
through 150,

Defendants.

Case No. CGC-05-439568

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

1. INTRODUCTION

1.1 **Plaintiff and Settling Defendant.** This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereafter “Brimer” or “Plaintiff”) and The Madden Corporation (hereafter “Defendant” or “Madden”), with Plaintiff and Madden collectively referred to as the “Parties” and Brimer and Madden each being a “Party.”

1 1.2 **Plaintiff.** Brimer is an individual residing in Alameda County, California who
2 seeks to promote awareness of exposures to toxic chemicals and improve human health by
3 reducing or eliminating hazardous substances contained in consumer and industrial products.

4 1.3 **Defendant.** Madden is a corporation based in Hawaii which manufactures, sells
5 and/or distributes glassware and ceramic ware products. Madden operates three divisions, all of
6 which are included in the definition of Madden for purposes of this Consent Judgment: Island
7 Plantation; Island Heritage; and Island Bath & Body.

8 1.4 **General Allegations.** Plaintiff alleges that Madden has manufactured, distributed
9 and/or sold in the State of California glass steins, shot glasses and other glassware and ceramic
10 ware products with colored artwork, designs or markings on the exterior surface with materials
11 that contain lead and/or cadmium in amounts which require a warning pursuant to the Safe
12 Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
13 §§ 25249.5 et seq., also known as Proposition 65. Lead and cadmium are chemicals known to the
14 State of California to cause birth defects or other reproductive harm. Lead and/or cadmium shall
15 be referred to herein as “Listed Chemicals.”

16 1.5 **Product Descriptions.** The products that are covered by this Consent Judgment
17 are defined as follows: shot glasses, glass steins, and other glassware and ceramic ware
18 manufactured, sold and/or distributed by Madden with colored artwork, designs or markings on
19 the exterior surface including, but not limited to, the products identified in Exhibit A attached
20 hereto. Such products collectively are referred to herein as the “Products.”

21 1.6 **Notices of Violation.** Beginning on January 3, 2005, Brimer served Madden and
22 various public enforcement agencies with documents, entitled “60-Day Notice of Violation”
23 (“Notice”) that provided Madden and such public enforcers with notice which alleged that
24 Madden was in violation of Health & Safety Code § 25249.6 for failing to warn California
25 purchasers that certain products that it sold expose users in California to lead and/or cadmium.

26 1.7 **Complaint.** On March 16, 2005, Brimer, in the interest of the general public in
27 California, filed a complaint (hereafter referred to as the “Complaint” or the “Action”) in the
28 Superior Court for the City and County of San Francisco against Madden and Does 1 through

1 150, alleging violations of Health & Safety Code § 25249.6 based on the alleged exposures to one
2 or more of the Listed Chemicals contained in Products sold and/or distributed by Madden.

3 1.8 **No Admission.** Madden denies the material factual and legal allegations contained
4 in Plaintiff's Notice and Complaint and maintains that all products that it has sold and distributed
5 in California including the Products have been and are in compliance with all laws. Nothing in
6 this Consent Judgment shall be construed as an admission by Madden of any fact, finding, issue
7 of law or violation of law, nor shall compliance with this Agreement constitute or be construed as
8 an admission by Madden of any fact, finding, conclusion, issue of law or violation of law. This
9 section, however, shall not diminish or otherwise affect the obligations, responsibilities and duties
10 of Madden under this Consent Judgment.

11 1.9 **Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
12 stipulate that this Court has jurisdiction over the allegations of violations contained in the
13 Complaint and personal jurisdiction over Madden as to the acts alleged in the Complaint, that
14 venue is proper in the County of San Francisco and that this Court has jurisdiction to enter this
15 Consent Judgment and to enforce the provisions thereof.

16 1.10 **Effective Date.** For purposes of this Consent Judgment, "Effective Date" shall be
17 June 28, 2005.

18 **2. INJUNCTIVE RELIEF**

19 **2.1 WARNINGS AND REFORMULATION STANDARDS**

20 **Required Warnings.** After the Effective Date, Madden shall not transmit to any
21 entity to sell or offer for sale in California any Product containing one or more Listed Chemicals,
22 unless warnings are given in accordance with section 2.2 below, or the Product is a Reformulated
23 Product as defined by section 2.3 of this Agreement.

24 **2.2 CLEAR AND REASONABLE WARNINGS**

25 (a) **Product Labeling.** A warning is affixed to the packaging, labeling,
26 hangtag or otherwise directly to or on a Product by Madden, its agent, the manufacturer, the
27 importer, or the distributor of the Product that states:
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WARNING: The materials used as colored decorations on this product contain lead and/or cadmium, chemicals known to the State of California to cause birth defects or other reproductive harm.

or

WARNING: The materials used as colored decorations on these products contain lead and/or cadmium, chemicals known to the State of California to cause birth defects or other reproductive harm.¹

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

(b) **Point of Sale Warnings.** Madden may execute its warning obligations through arranging for the posting of signs at retail outlets in the State of California at which Products are sold, in accordance with the terms specified in subsections 2.2(b)(i), 2.2(b)(ii) and 2.2(b)(iii).

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

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

or

¹ This warning is to be used only when the Products are sold as a set.

² This warning may not be used where Products are sold in close proximity to other like items which do not require a warning (e.g. Reformulated Products as defined in section 2.3)

1 **WARNING: The materials used as colored decorations on the**
2 **following decorated glassware or ceramic ware**
3 **products sold in this store contain lead and/or**
4 **cadmium, chemicals known to the State of**
5 **California to cause birth defects or other**
6 **reproductive harm:**

7 [*List Each Product By Brand Name and Product Description*]

8 (ii) A Point of Sale warning provided pursuant to subsection 2.2(b)(i)
9 shall be prominently placed with such conspicuousness as compared with other words,
10 statements, designs, or devices as to render it likely to be read and understood by an ordinary
11 individual under customary conditions prior to purchase and shall be placed or written in a
12 manner such that the consumer understands to which *specific* Products the warnings apply so as
13 to minimize the chances that an overwarning situation will arise. Any changes to the language or
14 format of the warning required for Products by this subsection shall only be made following:
15 (1) approval of Plaintiff; (2) approval from the California Attorney General’s Office, provided
16 that written notice of at least fifteen (15) days is given to Plaintiff for the opportunity to comment;
17 or (3) Court approval.

18 (iii) If Madden intends to utilize Point of Sale warnings to comply with
19 this Consent Judgment, it must provide notice as required by this Consent Judgment to each entity
20 to whom Madden ships the Products for sale in California and obtain the written consent of such
21 entity to provide the warning statements in the manner agreed to herein before shipping the
22 Products. Such notice shall include any warning materials required by this Consent Judgment. If
23 Madden has obtained the consent of the entity to whom Madden ships the Products for sale in
24 California and Madden has complied with the terms of this agreement, Madden shall not be found
25 to have violated this Consent Judgment.

26 (c) **Mail Order and Internet Sales**

27 For Products that require a warning pursuant to this Consent Judgment and that are
28 sold by Defendant by mail order or from the internet to a California address, a warning containing
the language in subsection 2.2(a) shall be included, at Defendant’s sole option, either: (a) in the
mail order catalog (if any) or (b) on the website (if any). Any warnings given in the mail order

1 catalogs or on the website shall identify the *specific* Products to which the warnings apply, so as
2 to minimize the chances that an “overwarning” situation will arise. If Defendant elects to provide
3 warnings in the mail order catalog, then such warnings (at a location designated in subsection
4 2.2(c)(i)) shall be included in any new galley prints of such catalogs sent to the printer after this
5 Consent Judgment is approved by the Court.

6 (i) **Mail Order Catalog**

7 The appropriate warning message in subsection 2.2(a) shall be stated within the catalog,
8 either (a) on the inside front cover of any catalog, provided that a reference to the inside front
9 cover warning is also set forth on the page on which the Product is displayed, or (b) on the same
10 page as any order form, provided that the Products to which the warnings apply are also
11 specifically referenced on the order form, or (c) on the same page and in the same location as the
12 price for the Product, in the same type size as the product description text, with the same language
13 and specificity requirements found in subsection 2.2(a), provided that if one warning on a page
14 references multiple products on that page, the Products to which the warning applies shall be
15 specifically referenced on that page by an asterisk or other symbol next to the price or product
16 description which refers to the warning. No warning shall be required under this subsection if
17 Madden does not sell Products via catalogues to California addresses.

18 (ii) **Internet Web Sites**

19 The warning text set forth in Section 2.2(a), or a link to a page containing such warning
20 text, shall be displayed either (a) on the same page on which a Product is displayed, (b) on the
21 same page as any order form for a Product, (c) on the same page as the price for any Product, (d)
22 on one or more pages displayed to a purchaser over the Internet or via electronic mail during the
23 checkout and order confirmation process for sale of a Product, or (e) in any manner such that is
24 likely to be read and understood by an ordinary individual under customary conditions of
25 purchase of a Product. If a link is used, it shall state “Warning information for California
26 residents,” and shall be of a size equal to the size of other links on the page. No warning shall be
27 required under this subsection if Madden does not sell Products via the Internet to California
28 addresses.

1 **2.3. REFORMULATION STANDARDS**

2 Products satisfying the conditions of Section 2.3(a), or 2.3(b), are referred to as
3 “Reformulated Products.” The warnings required pursuant to sections 2.1 and 2.2 above shall not
4 be required for Reformulated Products, defined as follows:

5 (a) If the materials on the exterior surface of the Product (1) do not extend into
6 the top 20 millimeters of the ware (*i.e.*, appear only below the exterior portion of the lip and rim
7 area as defined by American Society of Testing and Materials Standard Test Method C927-99,
8 hereinafter the “Lip and Rim Area”) and (2) produce a test result no higher than 1.0 micrograms
9 (ug) of lead and 4.0 micrograms of cadmium using a Ghost Wipe™ test applied on all of the
10 decorated portions of the surface of the Product performed as outlined in NIOSH method no.
11 9100, or

12 (b) The materials on the exterior surface of the Product (1) do not extend into
13 the top 20 millimeters of the ware and (2) contain six one-hundredths of one percent (0.06%) lead
14 and twenty-four one hundredths of one percent (0.24%) cadmium by weight or less as measured
15 (at Defendant’s option), either before or after the material is fired onto (or otherwise affixed to)
16 the Product, using a sample size of the materials in question measuring approximately 50-100 mg
17 and a test method of sufficient sensitivity to establish a limit of quantitation (as distinguished
18 from detection) of less than 600 ppm pursuant to EPA Test Method 3050B.

19 **2.4 REFORMULATION COMMITMENT.** By entering into this Stipulation and
20 Consent Judgment, Madden hereby commits that as a continuing matter of corporate policy,
21 Madden intends to undertake good faith efforts, taking into consideration Madden’s operational
22 and product licensing restrictions, to ensure that as many Products sold in California as
23 reasonably possible after the Effective Date shall qualify as Reformulated Products.

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26 **3. MONETARY PAYMENTS**

1 of investigating, bringing this matter to Madden’s attention, litigating and negotiating a settlement
2 in the public interest. Madden shall pay Plaintiff and his counsel \$29,000 for all attorneys’ fees,
3 expert and investigation fees, and litigation costs. The payment shall be made payable to the
4 “Chanler Law Group” and shall be delivered to Plaintiff’s counsel on or before June 30 2005, at
5 the following address:

6 CHANLER LAW GROUP
7 Attn: Clifford A. Chanler
8 71 Elm Street, Suite 8
9 New Canaan, CT 06840

10 4.2 Except as specifically provided in this Consent Judgment, Madden shall have no
11 further obligation with regard to reimbursement of Plaintiff’s attorney’s fees and costs with
12 regard to the Products covered in this Action.

13 **5. RELEASE OF ALL CLAIMS**

14 **5.1 Plaintiff’s Release of Madden.** In further consideration of the promises and
15 agreements herein contained, and for the payments to be made pursuant to sections 3 and 4,
16 Plaintiff, on behalf of himself, his past and current agents, representatives, attorneys, successors
17 and/or assignees, and in the interest of the general public (“Releasers”), hereby (i) waives all
18 rights to institute or participate in, directly or indirectly, any form of legal action, and (ii) releases
19 all claims, including, without limitation, all actions, causes of action, in law or in equity, suits,
20 liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including,
21 but not limited to, investigation fees, expert fees and attorneys’ fees) of any nature whatsoever,
22 whether known or unknown, fixed or contingent (collectively “Claims”), against Madden and
23 each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers
24 (including, but not limited to Impulse Cards and Gift), dealers, customers, owners, purchasers,
25 users, parent companies, corporate affiliates, divisions, subsidiaries and their respective officers,
26 directors, attorneys, representatives, shareholders, agents, and employees (collectively, “Madden
27 Releasees”) arising under Proposition 65, related to Madden’s or Madden Releasees’ alleged
28 failure to warn about exposures to or identification of Listed Chemicals contained in the Products.

1 The Parties further agree and acknowledge that this Consent Judgment is a full, final, and
2 binding resolution of any violations of Proposition 65 that have been or could have been asserted
3 in the Complaints against Madden and Madden Releasees for its alleged failure to provide clear
4 and reasonable warnings of exposure to or identification of Listed Chemicals in the Products.

5 In addition, Releasors, (i) waive all rights to institute or participate in, directly or
6 indirectly, any form of legal action, and (ii) release all Claims against the Madden Releasees
7 arising under Proposition 65, related to each of the Madden Releasees' alleged failures to warn
8 about exposures to or identification of Listed Chemicals contained in the Products and for all
9 actions or statements made by Madden or its attorneys or representatives, in the course of
10 responding to alleged violations of Proposition 65 by Madden. Provided however, Plaintiff shall
11 remain free to institute any form of legal action to enforce the provisions of this Consent
12 Judgment.

13 It is specifically understood and agreed that the Parties intend that Madden's compliance
14 with the terms of this Consent Judgment resolves all issues and liability, now and in the future (so
15 long as Madden complies with the terms of the Consent Judgment) concerning Madden and the
16 Madden Releasees' compliance with the requirements of Proposition 65 as to the Listed
17 Chemicals in the Products.

18 **5.2 Madden's Release of Plaintiff.** Madden waives all rights to institute any form of
19 legal action against Plaintiff, or his attorneys or representatives, for all actions taken or statements
20 made by Plaintiff and his attorneys or representatives, in the course of seeking enforcement of
21 Proposition 65 in this Action.

22 **6. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and
24 shall be null and void if, for any reason, it is not approved and entered by the Court within one
25 year after it has been fully executed by all Parties, in which event any monies that have been
26 provided to Plaintiff or his counsel pursuant to Section 3 and/or Section 4 above, shall be
27 refunded within fifteen (15) days of written notice by Madden.

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1 **7. SALES DATA**

2 Madden understands that the sales data provided to counsel for Brimer by Madden in the
3 context of settlement negotiations was a material factor upon which Brimer has relied to
4 determine the amount of payments made pursuant to Health & Safety Code §25249.7(b) in this
5 Consent Judgment. To the best of Madden’s knowledge, the sales data provided is true and
6 accurate.

7 **8. SEVERABILITY**

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

11 **9. ATTORNEYS’ FEES**

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

16 **10. GOVERNING LAW**

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

22 **11. NOTICES**

23 All correspondence and notices required to be provided pursuant to this Consent Judgment
24 shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail,
25 return receipt requested or (ii) overnight courier on either Party by the other at the following
26 addresses. (Either Party, from time to time, may, by written notice, specify a change of address to
27 which all future notices and other communications shall be sent.)
28

1 To Madden: Dale Madden, President
2 The Madden Corporation
3 94-411 Koaki Street
4 Waipahu, HI 96797
5
6 With a copy to: Douglas A. Marshall, Esq.
7 Kay & Merkle
8 100 The Embarcadero, Penthouse
9 San Francisco, CA 94105
10
11 To Plaintiff: Clifford A. Chanler, Esq.
12 Chanler Law Group
13 71 Elm Street, Suite 8
14 New Canaan, CT 06840
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17 **12. NO ADMISSIONS**

18 Nothing in this Consent Judgment shall constitute or be construed as an admission by
19 Madden of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance
20 with this Consent Judgment constitute or be construed as an admission by Madden of any fact,
21 finding, conclusion, issue of issue of law, or violation of law, such being specifically denied by
22 Madden. Madden reserves all of its rights and defenses with regard to any claim by any party
23 under Proposition 65 or otherwise. This section, however, shall not diminish or otherwise affect
24 Madden’s obligations, responsibilities and duties under this Consent Judgment.

25 **13. COUNTERPARTS; FACSIMILE AND ELECTRONIC IMAGED SIGNATURES**

26 This Consent Judgment may be executed in counterparts and by facsimile or other
27 electronic image copy, including .pdf file, each of which shall be deemed an original, and all of
28 which, when taken together, shall constitute one and the same document.

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

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

1 **15. ADDITIONAL POST EXECUTION ACTIVITIES**

2 The Parties shall mutually employ their best efforts to support the entry of this Agreement
3 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
4 manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed
5 motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the Parties
6 agree to file a Joint Motion to Approve and Enter the Consent Judgment (“Joint Motion”), the
7 first draft of which Madden’s counsel shall prepare, within a reasonable period of time after the
8 Effective Date (*i.e.*, not to exceed forty-five (45) days unless otherwise agreed to by the Parties’
9 counsel based on unanticipated circumstances). Plaintiff’s counsel shall prepare a declaration in
10 support of the Joint Motion which shall, inter alia, set forth support for the fees and costs to be
11 reimbursed pursuant to Section 4. Madden shall have no additional responsibility to Plaintiff’s
12 counsel pursuant to Code of Civil Procedure § 1021.5 or otherwise with regard to reimbursement
13 of any fees and costs incurred with respect to the preparation and filing of the Joint Motion and its
14 supporting declaration or with regard to Plaintiff’s counsel appearing for a hearing or related
15 proceedings thereon.

16 **16. MODIFICATION**

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

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1 17. AUTHORIZATION

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

5
6 AGREED TO:

AGREED TO:

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8
9 Date: June 14, 2005

Date: June __, 2005

10
11 By: 
12 Plaintiff Russell Brimer

By:
Dale Madden, As President of
Defendant THE MADDEN CORPORATION

13
14 APPROVED AS TO FORM:


APPROVED AS TO FORM:

15 Date: June 24, 2005

Date: June __, 2005

16
17 PARAS LAW GROUP

KAY & MERKLE

18
19 By: 
20 Daniel Bornstein, Esq.
21 Attorneys for Plaintiff
RUSSELL BRIMER

By:
Douglas A. Marshall, Esq.
Attorneys for Defendant
THE MADDEN CORPORATION

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1 17. AUTHORIZATION

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


5
6 AGREED TO:

AGREED TO:

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9 Date: June __, 2005

Date: June 27, 2005

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11 By:
12 Plaintiff Russell Brimer

By: 
Dale Madden, As President of
Defendant THE MADDEN CORPORATION

13
14 APPROVED AS TO FORM:

APPROVED AS TO FORM:

15 Date: June __, 2005

Date: June 29, 2005

16
17 PARAS LAW GROUP

KAY & MERKLE

18
19 By:
20 Daniel Bornstein, Esq.
21 Attorneys for Plaintiff
RUSSELL BRIMER

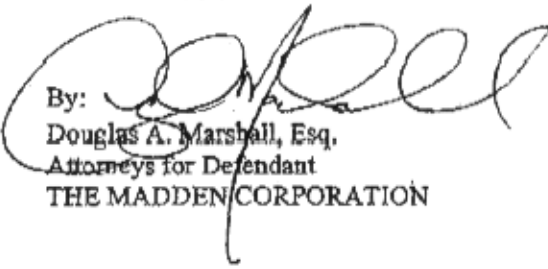
By: 
Douglas A. Marshall, Esq.
Attorneys for Defendant
THE MADDEN CORPORATION

Exhibit A

Ceramic and glass tableware products manufactured with colored artwork, designs or markings on the exterior surface including, but not limited to:

Canisters intended to hold food and/or beverages

Ceramic trivets and similar products

Espresso Mugs

Etched Stemware Glasses

Mini Mugs

Mugs (Ceramic & Porcelain)

Shot Glasses

Spoons/Ladles with decorations on non-food contact surfaces

Steins

Tumblers