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11 LION SUPERMARKET

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE CITY AND COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION
16

17 RUSSELL BRIMER

18 Plaintiff,

19 v.

20 LION SUPERMARKET; and DOES 1 through
150, inclusive,

21 Defendants.
22

Case No. CGC-05-447016

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer And Lion Supermarket**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (Brimer or
4 plaintiff) and defendant Lion Supermarket, (Lion or defendant), with Brimer and Lion collectively
5 referred to as the "parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Lion employs ten or more persons and is a person in the course of doing business for purposes of
12 the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
13 §§25249.5 et seq. ("Proposition 65").

14 **1.4 General Allegations**

15 Brimer alleges that Lion has manufactured, distributed, and/or sold in the State of California
16 certain glass bottles and other glassware intended for the consumption of food or beverages with colored
17 artwork or designs (containing lead) on the exterior. Lead is listed pursuant to Proposition 65 as a
18 chemical known to the State of California to cause birth defects and other reproductive harm. Lead shall
19 be referred to herein as the "Listed Chemical."

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: glass bottles and
22 other glassware intended for the consumption of food or beverages with colored artwork or designs
23 (containing lead) on the exterior including, but not limited to, the glass products identified in Exhibit A
24 to this Consent Judgment. All such glass bottles and other glassware intended for the consumption of
25 food or beverages with colored artwork or designs (containing lead) on the exterior shall be referred to
26 herein as the "Products."

27 ///

28 ///

1 **1.6 Notices of Violation**

2 On or about September 9, 2005, Brimer served Lion and various public enforcement agencies
3 with a document entitled "60-Day Notice of Violation" (the "Notice") that provided Lion and such public
4 enforcers with notice that alleged that Lion was in violation of California Health & Safety Code
5 §25249.6 for failing to warn consumers and customers that the Products that Lion sold exposed users in
6 California to the Listed Chemical.

7 **1.7 Complaint**

8 On November 23, 2005, Brimer, who is acting in the interest of the general public in California,
9 filed a complaint (hereinafter referred to as the "Complaint" or the "Action") in the Superior Court in and
10 for the City and County of San Francisco against Lion Supermarket and Does 1 through 150, (Brimer v.
11 Lion Supermarket, CGC-05-447016), alleging violations of Health & Safety Code §25249.6 based on
12 the alleged exposures to the Listed Chemical contained in the Products sold by Lion.

13 **1.8 No Admission**

14 Lion denies the material factual and legal allegations contained in Brimer's Notice and Complaint
15 and maintains that all products that it has sold and distributed in California, including the Products, have
16 been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an
17 admission by Lion of any fact, finding, issue of law, or violation of law, nor shall compliance with this
18 Consent Judgment constitute or be construed as an admission by Lion of any fact, finding, conclusion,
19 issue of law or violation of law, such being specifically denied by Lion. However, this Section shall not
20 diminish or otherwise affect the obligations, responsibilities, and duties of Lion under this Consent
21 Judgment.

22 **1.9 Consent to Jurisdiction**

23 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction
24 over Lion as to the allegations contained in the Complaint, that venue is proper in the County of San
25 Francisco, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
26 Judgment.

27 **1.10 Effective Date**

28 For purposes of this Consent Judgment, the term "Effective Date" shall mean October 5, 2006.

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

2 **2.1** After the Effective Date, Lion shall not sell, ship, or offer to be shipped for sale in
3 California Products containing the Listed Chemical unless such Products are sold or shipped with the
4 clear and reasonable warnings set out in Section 2.2 or comply with the Reformulation Standards set
5 forth in Section 2.3.

6 Any warning issued for Products pursuant to Section 2.2 below shall be prominently placed with
7 such conspicuousness as compared with other words, statements, designs, or devices as to render it
8 likely to be read and understood by an ordinary individual under customary conditions before purchase
9 or, for Products shipped directly to an individual in California, before use.

10 **2.2 Product Warnings**

11 **2.2.1** Clear and Reasonable Warnings. This Section describes Lion's options for
12 satisfying the warning obligations required by Section 2.1, depending, in part, on the manner of sale:

13 **(a) Retail Store Sales**

14 **(I) Product Labeling.** From the Effective Date, a warning will be
15 affixed to the packaging, labeling, or directly on the Product by Lion or its agent, that states:

16 **WARNING:** The colored artwork or designs used on this product
17 contains lead, a chemical known to the State of
18 California to cause birth defects and other
reproductive harm.

19 **(ii) Point-of-Sale Warnings.** Lion may perform its warning
20 obligations by ensuring to the greatest extent possible that signs are posted at retail outlets in the State of
21 California where the Products are sold. Lion must receive a written commitment from each retailer to
22 whom Lion sells Products directly that it will post the warning signs. Point-of-sale warnings shall be
23 provided through one or more signs posted in close proximity to the point of display of the Products that
24 state:

25 **WARNING:** The colored artwork or designs used on this product
26 contains lead, a chemical known to the State of
California to cause birth defects and other
reproductive harm.

27 A point-of-sale warning shall be provided in a manner such that the consumer understands to
28 which *specific* Products the warning applies so as to minimize if not eliminate the chance that an

1 overwarning situation will arise.

2 **(b) Mail Order Catalog and Internet Sales.** Defendant shall satisfy its
3 warning obligations for Products that are sold by mail order catalog or from the internet to California
4 residents, by providing a warning: (a) in the mail order catalog and/or on the website; or (b) with the
5 Product when it is shipped to an address in California. Warnings given in the mail order catalog or on
6 the website shall identify the specific Product to which the warning applies as further specified in
7 Sections 2.2.1(b)(I), (ii), and/or (iii) as applicable:

8 **(I) Mail Order Catalog.** Any warning provided in a mail order
9 catalog must be in the same type size or larger as the product description text within the catalog. The
10 following warning shall be provided on the same page and in the same location as the display and/or
11 description of the Product:

12 **WARNING:** The colored artwork or designs used on this product
13 contains lead, a chemical known to the State of
14 California to cause birth defects and other
 reproductive harm.

15 Where it is impracticable to provide the warning on the same page and in the same location as
16 the display and/or description of the Product, Lion may utilize a designated symbol to cross reference the
17 applicable warning ("Designated Symbol") and shall provide the following language on the inside of the
18 front cover of the catalog or on the same page as any order form for the Product(s):

19 **WARNING:** The colored artwork or designs used on certain
20 products identified with this symbol ▼ and offered
21 for sale in this catalog contain lead, a chemical
 known to the State of California to cause birth
 defects and other reproductive harm.

22 The Designated Symbol (shown on Exhibit A attached hereto) must appear on the same page and
23 in close proximity to the display and/or description of the Product. On each page where the Designated
24 Symbol appears, Lion must provide a header or footer directing the consumer to the warning language
25 and definition of the Designated Symbol.

26 If Defendant elects to provide warnings in the mail order catalog, then the warnings must be
27 included in all catalogs offering to sell one or more Products printed after October 1, 2006.

28 ////

1 (ii) **Internet Web Sites and Pages.** A warning may be given in
2 conjunction with the sale of the Product via the internet, provided it appears either: (a) on the same web
3 page on which the Product is displayed; (b) on the same web page as the order form for the Product; ©
4 on the same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
5 during the checkout process. The following warning statement shall be used and shall appear in any of
6 the above instances adjacent to or immediately following the display, description, or price of the Product
7 for which it is given in the same type size or larger as the product description text:

8 **WARNING:** The colored artwork or designs used on this product
9 contains lead, a chemical known to the State of
California to cause birth defects and other
10 reproductive harm.

11 Alternatively, the Designated Symbol may appear adjacent to or immediately following the
12 display, description or price of the Product for which a warning is being given, provided that the
13 following warning statement also appears elsewhere on the same web page:

14 **WARNING:** Products identified on this page with the following
15 symbol use colored artwork or designs that contains
lead, a chemical known to the State of California to
16 cause birth defects and other reproductive harm: ▼

17 (iii) **Package Insert or Label.** For all Products sold by catalog or via
18 the internet, a warning may be provided with the Product when it is shipped directly to an individual in
19 California, by either: (a) affixing the following warning language to the packaging, labeling or directly to
20 a specific Product; (b) inserting a warning card measuring at least 4" x 6" in the shipping carton which
21 contains the following warning language; or (c) by placing the following warning statement on the
22 packing slip or customer invoice on the line directly below the description of the Product on the packing
slip or customer invoice:

23 **WARNING:** The colored artwork or designs used on this product
24 contains lead, a chemical known to the State of
California to cause birth defects and other
25 reproductive harm.

26 Alternatively, Lion may place the following language on the packing slip or invoice and
27 specifically identify the Product in lettering of the same size or larger as the description of the Product:

28 ////

1 **WARNING:** The colored artwork or designs used in the
2 following product(s) contains lead, a chemical
3 known to the State of California to cause birth
4 defects or other reproductive harm: *[list products*
5 *for which warning is given]*.

6 The Defendant shall, in any of these instances, in conjunction with providing the warning, also
7 inform the consumer, in a conspicuous manner, that he or she may return the Product for a full refund
8 (including shipping costs for both the receipt and the return of the Product) within thirty (30) days of his
9 or her receipt of the Product.

10 **2.2.2 Exceptions**

11 The warning requirements set forth in Section 2.2.1 shall not apply to:

- 12 (I) Any Products shipped to a third party before the Effective Date; or
13 (ii) Reformulated Products (as defined in Section 2.3 below).

14 **2.3 Reformulation Standards**

15 The following Reformulated Products shall be deemed to comply with Proposition 65 and be
16 exempt from any Proposition 65 warning requirements under Sections 2.2:

- 17 (a) Any Product containing .06% lead or less by weight in each material used in the
18 Products (such as colored artwork or designs).

19 **2.4 Reformulation Commitment**

20 Lion hereby commits that all Products that it offers for sale in California after January 1, 2007,
21 shall qualify as Reformulated Products.

22 **3. MONETARY PAYMENTS**

23 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

24 The total settlement amount shall be \$6,000, which shall be paid by Lion as set forth herein.
25 Lion shall receive a credit of \$3,000 against the penalty amount in light of its prompt cooperation with
26 Brimer in resolving this matter. Pursuant to Health & Safety Code §25249.7(b), Lion shall pay the
27 remaining \$3,000 in civil penalties in two installments. The first installment of \$1,500 shall be made on
28 or before October 15, 2006. The second installment of \$1,500 shall be payable February 1, 2007. The
 second payment shall be waived in the event that Lion certifies in writing under penalty of perjury with

1 supporting facts and documentation, not later than January 1, 2007, that it has complied with the
2 Reformulation Commitment set forth in Section 2.4. Said payments shall be made payable to the
3 "HIRST & CHANLER LLP in Trust For Russell Brimer" and shall be delivered to plaintiff's counsel at
4 the following address:

5 HIRST & CHANLER LLP
6 Attn: Proposition 65 Controller
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710-2565

8 **3.2 Apportionment of Penalties Received**

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

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

16 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
17 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue
18 to be resolved after the material terms of the agreement had been settled. Lion then expressed a desire to
19 resolve the fee and cost issue after the other settlement terms had been finalized. The Parties then
20 attempted to (and did) reach an accord on the compensation due to Brimer and his counsel under the
21 private attorney general doctrine codified at California Code of Civil Procedure §1021.5 for all work
22 performed through the Court's approval of this agreement. Under the private attorney general doctrine,
23 Lion shall reimburse Brimer and his counsel for fees and costs incurred as a result of investigating,
24 bringing this matter to Lion's attention, litigating and negotiating a settlement in the public interest and
25 seeking the Court's approval of the settlement agreement. Lion shall pay Brimer and his counsel
26 \$13,500 for all attorneys' fees, expert and investigation fees, litigation and related costs. The payment
27 shall be made payable to HIRST & CHANLER LLP and shall be delivered in installments as follows:
28

1 \$2,250 on or before October 31, 2006; \$2,250 on or before November 30, 2006; \$2,250 on or before
2 December 31, 2006; and \$2,250 on or before January 31, 2007; \$2,250 on or before February 28, 2007;
3 \$2,250 on or before March 31, 2007 at the following address:

4 HIRST & CHANLER LLP
5 Attn: Proposition 65 Controller
6 2560 Ninth Street
7 Parker Plaza, Suite 214
8 Berkeley, CA 94710-2565

9 **5. RELEASE OF ALL CLAIMS**

10 **5.1 Release of Lion and Downstream Customers**

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

25 The Parties further understand and agree that this release shall not extend upstream to any entities
26 that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold
27 the Products or any component parts thereof to Lion.

28 **5.2 Lion's Release of Brimer**

Lion waives any and all claims against Brimer, his attorneys, and other representatives, for any
and all actions taken or statements made (or those that could have been taken or made) by Brimer and

1 his attorneys and other representatives, whether in the course of investigating claims or otherwise
2 seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

3 **6. COURT APPROVAL**

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

9 **7. SEVERABILITY**

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

13 **8. ATTORNEYS' FEES**

14 In the event that a dispute arises with respect to any provision of this Consent Judgment, the
15 prevailing party shall, except as otherwise provided herein, be entitled to recover reasonable costs and
16 attorneys' fees incurred in connection with such dispute.

17 **9. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the State of California and
19 apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered
20 inapplicable by reason of law generally, or as to the Products, then Lion shall provide written notice to
21 Brimer of any asserted change in the law and shall have no further obligations pursuant to this Consent
22 Judgment with respect to, and to the extent that, the Products are so affected.

23 **10. NOTICES**

24 Unless specified herein, all correspondence and notices required to be provided pursuant to this
25 Consent Judgment shall be in writing and personally delivered or sent by: (I) first-class, (registered or
26 certified mail) return receipt requested; or (ii) overnight courier on any Party by the other party at the
27 following addresses:
28

1 To Lion:

2 Julie Lim, Owner
3 Lion Supermarket
4 7924 North El Dorado Street
5 Stockton, CA 95210

6 To Brimer:

7 Proposition 65 Controller
8 HIRST & CHANLER LLP
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710-2565

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

14 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

17 **12. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

20 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

21 Brimer and Lion agree to mutually employ their best efforts to support the entry of this
22 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
23 manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion is
24 required to obtain judicial approval of this Consent Judgment. Accordingly, the Parties agree to file a
25 Joint Motion to Approve the Agreement ("Joint Motion"), the first draft of which Lion's counsel shall
26 prepare, within a reasonable period of time after the Execution Date (i.e., not to exceed thirty (30) days
27 unless otherwise agreed to by the Parties' counsel based on unanticipated circumstances). Lion shall
28 have no additional responsibility to Plaintiff's counsel pursuant to Code of Civil Procedure §1021.5 or
otherwise with regard to reimbursement of any fees and costs incurred with respect to the preparation
and filing of the Joint Motion and its supporting declaration or with regard to Plaintiff's counsel
appearing for a hearing thereon.

1 **14. MODIFICATION**

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

7 **15. AUTHORIZATION**

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

<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>10-6-06</u></p> <p>By:  Plaintiff Russell Brimer</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Lion Supermarket</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HIRST & CHANLER LLP</p> <p>By: _____ Christopher M. Martin Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>MCDONOUGH HOLLAND & ALLEN PC</p> <p>By: _____ Stephen M. Lerner Attorneys for Defendant LION SUPERMARKET</p>

25 **IT IS SO ORDERED.**

26 Date: _____

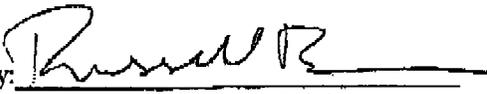
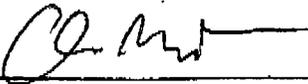
JUDGE OF THE SUPERIOR COURT

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<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>10-6-06</u></p> <p>By: <u></u> Plaintiff Russell Brimer</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Lion Supermarket</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: <u>10/6/06</u></p> <p>HIRST & CHANLER LLP</p> <p>By: <u></u> Christopher M. Martin Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>MCDONOUGH HOLLAND & ALLEN PC</p> <p>By: _____ Stephen M. Lerner Attorneys for Defendant LION SUPERMARKET</p>

IT IS SO ORDERED.

Date: _____

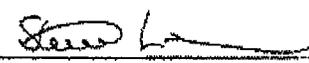
JUDGE OF THE SUPERIOR COURT

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

15. AUTHORIZATION

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

AGREED TO:	AGREED TO:
Date: _____	Date: <u>10-10-06</u>
By: _____ Plaintiff Russell Brimer	By:  Defendant Lion Supermarket
APPROVED AS TO FORM:	APPROVED AS TO FORM:
Date: _____	Date: <u>10/16/06</u>
HIRST & CHANLER LLP	MCDONOUGH HOLLAND & ALLEN PC
By: _____ Christopher M. Martin Attorneys for Plaintiff RUSSELL BRIMER	By:  Stephen M. Lerner Attorneys for Defendant LION SUPERMARKET

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT