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7

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12 Attorney for Defendant
ATHOME AMERICA, INC.
13

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE CITY AND COUNTY OF SAN FRANCISCO**
16 **UNLIMITED CIVIL JURISDICTION**
17

18
19 RUSSELL BRIMER

20 Plaintiff,

21 v.

22 ATHOME AMERICA, INC.; and DOES 1
through 150, inclusive,

23 Defendants.
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Case No. CGC-05-446905

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer And AtHome**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereinafter
4 "Brimer" or "Plaintiff") and defendant AtHome America, Inc., (hereinafter "AtHome" or
5 "Defendant"), with Brimer and AtHome collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 AtHome employs ten or more persons and is a person in the course of doing business for
12 purposes of Proposition 65.

13 **1.4 General Allegations**

14 Brimer alleges that AtHome has manufactured, distributed and/or sold in the State of
15 California certain wine glasses and other glassware intended for the consumption of food or
16 beverages with colored artwork or designs containing lead on the exterior. Lead is listed pursuant
17 to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
18 §§25249.5 et seq. ("Proposition 65"), as a chemical known to the State of California to cause birth
19 defects and other reproductive harm. Lead shall 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: wine
22 glasses and other glassware intended for the consumption of food or beverages with colored
23 artwork or designs containing lead on the exterior, including, but not limited to, Pepperberry Wine
24 Glasses S/4 (#32501723), identified in Exhibit A to this Consent Judgment. All such glass
25 beverageware shall be referred to herein as the "Products."

26 **1.6 Notices of Violation**

27 On or about September 9, 2005, Brimer served AtHome and various public enforcement
28 agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that provided

1 AtHome and such public enforcers with notice that alleged that AtHome was in violation of
2 California Health & Safety Code §25249.6 for failing to warn consumers and customers that the
3 Products that AtHome sold exposed users in California to the Listed Chemical.

4 **1.7 Complaint**

5 On November 21, 2005, Brimer, who is acting in the interest of the general public in
6 California, filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the
7 Superior Court in and for the City and County of San Francisco against AtHome and Does 1
8 through 150, (*Brimer v. AtHome America, Inc., San Francisco Superior Court Case No. CGC- 05-*
9 *446905*) alleging violations of Health & Safety Code §25249.6 based on the alleged exposures to
10 the Listed Chemical contained in the Products sold by AtHome.

11 **1.8 No Admission**

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

20 **1.9 Consent to Jurisdiction**

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

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean September
27 30, 2006.
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1 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

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

6 Any warning issued for Products pursuant to Section 2.2 below shall be prominently placed
7 with such conspicuousness as compared with other words, statements, designs, or devices as to
8 render it likely to be read and understood by an ordinary individual under customary conditions
9 before purchase 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 AtHome’s options
12 for satisfying the warning obligations required by Section 2.1, depending, in part, on the manner of
13 sale:

14 **(a) Retail Store Sales**

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

17 **WARNING:** The materials used as colored decorations on
18 the exterior of this product contain lead, a
19 chemical known to the State of California to
 cause birth defects and other reproductive
 harm.

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

26 **WARNING:** The materials used as colored decorations on
27 the exterior of this product contain lead, a
28 chemical known to the State of California to
 cause birth defects and other reproductive
 harm.

1 A point-of-sale warning shall be provided in a manner such that the consumer understands
2 to which specific Products the warning applies.

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

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

13 **WARNING:** The materials used as colored decorations on
14 the exterior of this product contain lead, a
15 chemical known to the State of California to
16 cause birth defects and other reproductive
17 harm.

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

23 **WARNING:** The materials used as colored decorations on
24 the exterior of certain products identified with
25 this symbol ▼ and offered for sale in this
26 catalog contain lead, a chemical known to the
27 State of California to cause birth defects and
28 other reproductive harm.

29 The Designated Symbol (shown on Exhibit B attached hereto) must appear on the same
30 page and in close proximity to the display and/or description of the Product. On each page where

1 the Designated Symbol appears, AtHome must provide a header or footer directing the consumer
2 to the warning language and definition of the Designated Symbol.

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

6 (ii) **Internet Web Sites and Pages.** A warning may be given in
7 conjunction with the sale of the Product via the Internet, provided it appears either: (a) on the
8 same web page on which the Product is displayed; (b) on the same web page as the order form for
9 the Product; (c) on the same page as the price for any Product; or (d) on one or more web pages
10 displayed to a purchaser during the checkout process. The following warning statement shall be
11 used and shall appear in any of the above instances adjacent to or immediately following the
12 display, description, or price of the Product for which it is given in the same type size or larger as
13 the product description text:
14

15 **WARNING:** The materials used as colored decorations on
16 the exterior of this product contain lead, a
17 chemical known to the State of California to
18 cause birth defects and other reproductive
19 harm.

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

23 **WARNING:** Products identified on this page with the
24 following symbol use materials that contain
25 lead as colored decorations on their exterior, a
26 chemical known to the State of California to
27 cause birth defects and other reproductive
28 harm: ▼.

(iii) **Package Insert or Label.** For all Products sold by catalog

1 or via the Internet, a warning may be provided with the Product when it is shipped directly to an
2 individual in California, by either: (a) affixing the following warning language to the packaging,
3 labeling or directly to a specific Product; (b) inserting a warning card measuring at least 4" x 6" in
4 the shipping carton which contains the following warning language; or (c) by placing the following
5 warning statement on the packing slip or customer invoice on the line directly below the
6 description of the Product on the packing slip or customer invoice:
7

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

12 Alternatively, AtHome may place the following language on the packing slip or invoice
13 and specifically identifying the Product in lettering of the same size or larger as the description of
14 the Product:

15 **WARNING:** The materials used as colored decorations on
16 the exterior of the following product(s)
17 contain lead, a chemical known to the State of
18 California to cause birth defects or other
19 reproductive harm: [*list products for which*
20 *warning is given*].

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

25 **2.2.2 Exceptions**

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

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

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2.3 Reformulation Standards

The following Products shall be deemed "Reformulated Products" and to comply with Proposition 65 and be exempt from any Proposition 65 warning requirements under Sections 2.2. The products must only utilize decorating materials that contain six one-hundredths of one percent (0.06%) or less of lead by weight; and there must be no detectable lead in the Lip-and-Rim Area¹.

2.4 Reformulation Commitment

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

3. MONETARY PAYMENTS

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

The total settlement amount shall be \$4,000, which shall be paid by AtHome as set forth herein. AtHome shall receive a credit of \$2,000 against the penalty amount in light of its prompt cooperation with Brimer in resolving this matter. Pursuant to Health & Safety Code §25249.7(b), AtHome shall pay the remaining \$2,000 in civil penalties in two installments. The first payment of \$1,000 shall be made on or before September 30, 2006. The second payment of \$1,000 shall be payable February 1, 2007. The second payment shall be waived in the event that AtHome certifies in writing under penalty of perjury with supporting facts and documentation, not later than January 15, 2007, that it has complied with the Reformulation Commitment set forth in Section 2.4. Said payments shall be made payable to the "HIRST & CHANLER LLP in Trust For Russell Brimer" and shall be delivered to plaintiff's counsel at the following address:

¹"Lip-and-Rim Area" is defined as the exterior top 20 millimeters of a hollowware food or beverage product.

1 HIRST & CHANLER LLP
2 Attn: Proposition 65 Controller
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710-2565

6 **3.2 Apportionment of Penalties Received**

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

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

14 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
16 this fee issue to be resolved after the material terms of the agreement had been settled. AtHome
17 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
18 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
19 to Brimer and his counsel under the private attorney general doctrine codified at California Code
20 of Civil Procedure §1021.5 for all work performed through the Court's approval of this agreement.
21 Under the private attorney general doctrine, AtHome shall reimburse Brimer and his counsel for
22 fees and costs incurred as a result of investigating, bringing this matter to AtHome's attention,
23 litigating and negotiating a settlement in the public interest and seeking the Court's approval of the
24 settlement agreement. AtHome shall pay Brimer and his counsel \$21,500 for all attorneys' fees,
25 expert and investigation fees, litigation and related costs. The payment shall be made payable to
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1 HIRST & CHANLER, LLP and shall be delivered on or before September 30, 2006, at the
2 following address:

3 HIRST & CHANLER LLP

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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 AtHome and Downstream Customers**

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

3 The Parties further understand and agree that this release shall not extend upstream to any
4 entities that manufactured the Products or any component parts thereof, or any distributors or
5 suppliers who sold the Products or any component parts thereof to AtHome.
6

7 **5.2 AtHome's Release of Brimer**

8 AtHome waives any and all claims against Brimer, his attorneys and other representatives,
9 for any and all actions taken or statements made (or those that could have been taken or made) by
10 Brimer and his attorneys and other representatives, whether in the course of investigating claims or
11 otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to
12 the Products.
13

14 **6. COURT APPROVAL**

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

23 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
24 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
25 provisions remaining shall not be adversely affected.
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8. ATTORNEYS' FEES

In the event that, after Court approval: (1) a dispute arises with respect to any provision of this Consent Judgment; (2) AtHome or any third party seeks modification of this Consent Judgment pursuant to Section 14 below; or (3) Brimer takes reasonable and necessary steps to enforce the terms of this Consent Judgment, Brimer shall be entitled to his reasonable attorneys' fees and costs pursuant to CCP §1021.5.

9. GOVERNING LAW

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

10. NOTICES

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

To AtHome :

Richard Hart, Esq,
HANDLER, THAYER, & DUGGAN
191 North Wacker Drive, 23rd Floor
Chicago, Illinois 60606-1633

1 To Brimer:

2 Proposition 65 Controller
3 HIRST & CHANLER LLP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565

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

9 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

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18 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

19 Brimer and AtHome agree to mutually employ their best efforts to support the entry of this
20 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
21 timely manner. The Parties acknowledge that, pursuant to Health & Safety Code §25249.7, a
22 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the
23 Plaintiff agrees to file a Motion to Approve the Agreement ("Motion"). AtHome shall have no
24 additional responsibility to Plaintiff's counsel pursuant to Code of Civil Procedure §1021.5 or
25 otherwise with regard to reimbursement of any fees and costs incurred with respect to the
26 preparation and filing of the Motion or with regard to Plaintiff's counsel appearing for a hearing
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1 thereon.

2 **14. MODIFICATION**

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

The Products that are covered by this Consent Judgment are wine glasses and other glassware intended for the consumption of food or beverages with colored artwork or designs containing lead on the exterior, including, but not limited to:

1. *Pepperberry Wine Glasses S/4, #32501723*
2. *Gerbera Daisy Wine Glasses*
3. *Bordeaux Wine Glasses*
4. *Welcome Wine Glasses*
5. *Snowflake Wine Glasses*

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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.

<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>9-27-06</u></p> <p>By: <u></u> Plaintiff, RUSSELL BRIMER</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant, ATHOME</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HIRST & CHANLER LLP</p> <p>By: _____ Christopher M. Martin, Esq. Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HANDLER, THAYER, & DUGGAN</p> <p>By: _____ Richard Hart, Esq. Attorneys for Defendant ATHOME</p>

IT IS SO ORDERED.

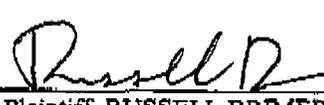
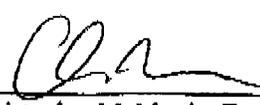
Date: _____

Hon.
JUDGE OF THE SUPERIOR COURT

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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.

<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>9-27-06</u></p> <p>By: <u></u> Plaintiff, RUSSELL BRIMER</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant, ATHOME</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: <u>9/28/06</u></p> <p>HIRST & CHANLER LLP</p> <p>By: <u></u> Christopher M. Martin, Esq. Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HANDLER, THAYER, & DUGGAN</p> <p>By: _____ Richard Hart, Esq. Attorneys for Defendant ATHOME</p>

IT IS SO ORDERED.

Date: _____

Hon. _____
JUDGE OF THE SUPERIOR COURT

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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.

<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Plaintiff, RUSSELL BRIMER</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>9/29/06</u></p> <p>By: <u>M. Colcagna, VP-FINANCE</u> Defendant, ATHOME</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HIRST & CHANLER LLP</p> <p>By: _____ Christopher M. Martin, Esq. Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: <u>9/29/06</u></p> <p>HANDLER, THAYER, & DUGGAN</p> <p>By: <u>[Signature]</u> Richard Hart, Esq. Attorneys for Defendant ATHOME</p>

IT IS SO ORDERED.

Date: _____

Hon.
JUDGE OF THE SUPERIOR COURT

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Exhibit B

The Designated Symbol that AtHome will use to identify Products containing the Listed Chemical which are sold through its catalogs or on its website is:

