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RUSSELL BRIMER

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11 Attorneys for Defendant
FUDDRUCKERS, INC.

12

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION
16

17 RUSSELL BRIMER

18 Plaintiff,

19 v.

20 FUDDRUCKERS, INC.; and DOES 1 through
21 150, inclusive,

22 Defendants.

Case No. RG-06250344

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

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1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Fuddruckers, Inc.**

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

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 FUDDRUCKERS employs ten or more persons and is a person in the course of doing
13 business for purposes of Proposition 65. As set forth in this Consent Judgment FUDDRUCKERS
14 shall collectively refer to Fuddruckers Inc., and its California franchises.

15 **1.4 Product Description**

16 The products that are covered by this Consent Judgment are glass soda bottles with
17 colored artwork or designs (containing lead) printed, fired, or otherwise directly placed onto the
18 exterior glass surface and intended for sale or use in the consumption of food (including
19 condiments) and beverages by customers at FUDDRUCKERS in California, including, but not
20 limited to, *Faygo Original Rock & Rye (# 0 78300 00520 9)*. All such products shall hereinafter
21 be referred to as "Products."

22 **1.5 General Allegations**

23 BRIMER alleges that FUDDRUCKERS has distributed, used and/or sold in the State of
24 California Glassware Food/Beverage Products with colored artwork or designs on the exterior
25 surface that contain (or cause exposure to) lead. Lead is listed pursuant to the Safe Drinking
26 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.*
27 ("Proposition 65"), as a chemical known to the State of California to cause birth defects and other
28 reproductive harm. Lead shall be referred to herein as the "Listed Chemical."

1 **1.6 Notices of Violation**

2 On or about September 27, 2005, BRIMER served FUDDRUCKERS and various public
3 enforcement agencies with a document entitled “60-Day Notice of Violation” that provided
4 FUDDRUCKERS and such public enforcers with notice that alleged that FUDDRUCKERS was
5 in violation of California Health & Safety Code § 25249.6 for failing to warn consumers and
6 customers that the Products that FUDDRUCKERS sold and/or utilized exposed users in
7 California to the Listed Chemical. On or about October 16, 2006, BRIMER served Daratel, Ltd.,
8 Union Six Corporation, and FUDDRUCKERS and various public enforcement agencies with two
9 more 60-Day Notices of Violation that provided the recipients and such public enforcers with
10 additional notice that alleged that FUDDRUCKERS was in violation of California Health &
11 Safety Code § 25249.6 for failing to warn consumers and customers that the Products that
12 FUDDRUCKERS sold and/or utilized exposed users in California to the Listed Chemical.
13 (Collectively, the 60-Day Notices of Violation described in this subsection are referred to herein
14 as the “Notices”.)

15 **1.7 Complaint**

16 On January 12, 2006, BRIMER, who is acting in the interest of the general public in
17 California, filed a complaint (hereafter referred to as the “Complaint” or the “Action”) in the
18 Superior Court in and for the County of Alameda against FUDDRUCKERS, INC. and Does 1
19 through 150, (*Brimer v. Fuddruckers, Inc., RG 06 250344*) alleging violations of Health & Safety
20 Code §25249.6 based on the alleged exposures to the Listed Chemical contained in the Products
21 sold by FUDDRUCKERS.

22 **1.8 No Admission**

23 FUDDRUCKERS denies the material factual and legal allegations contained in
24 BRIMER’s Notice and Complaint and maintains that all products that it has sold and distributed
25 in California, including the Products, have been and are in compliance with all laws. Nothing in
26 this Consent Judgment shall be construed as an admission by FUDDRUCKERS of any fact,
27 finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment
28 constitute or be construed as an admission by FUDDRUCKERS of any fact, finding, conclusion,

1 issue of law or violation of law, such being specifically denied by FUDDRUCKERS. However,
2 this Section shall not diminish or otherwise affect the obligations, responsibilities and duties of
3 FUDDRUCKERS under this Consent Judgment.

4 **1.9 Consent to Jurisdiction**

5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
6 jurisdiction over FUDDRUCKERS as to the allegations contained in the Complaint, that venue is
7 proper in the County of Alameda and that this Court has jurisdiction to enter and enforce the
8 provisions of this Consent Judgment.

9 **1.10 Effective Date**

10 For purposes of this Consent Judgment, the term "Effective Date" shall mean March 16,
11 2007.

12 **2. INJUNCTIVE RELIEF: REFORMULATION**

13 **2.1** After the Effective Date, FUDDRUCKERS shall not utilize or sell Products unless
14 such Products comply with standards set forth in Section 2.2.

15 **2.2 Reformulation Standards**

16 The following Products shall be deemed to comply with Proposition 65 and be exempt
17 from any Proposition 65 warning requirements:

18 Products with exterior decorations that contain six one-hundredths
19 of one percent (0.06%), or less, lead by weight as measured either
20 before or after the material is fired onto (or otherwise affixed to)
21 the Products using a test method of sufficient sensitivity to
22 establish a limit of quantitation of less than 600 parts per million
23 ("ppm"); and two one-hundredths of one percent (0.02%), or less,
24 lead by weight in decorations which extend into the top
25 20 millimeters of a Product using a sample size of the materials in
26 question measuring approximately 50-100 mg and a test method of
27 sufficient sensitivity to establish a limit of quantitation of less than
28 200 ppm.¹ (Hereinafter such Products shall be referred to as
"Reformulated" Products.)

¹If the decoration is tested after it is affixed to the Glassware Food/Beverage Products, the percentage of the Listed Chemical by weight must relate only to the decorating material and must not include any quantity attributable to non-decorating material (e.g., the glass substrate).

1 **2.3 Reformulation Certification**

2 FUDDRUCKERS can show that its Products are Reformulated by undertaking to contact
3 each of its distributors of the Products by certified mail quarterly for the next three (3) years
4 seeking confirmation that the Products that FUDDRUCKERS is utilizing or selling in its
5 restaurants comply with the standards set forth in subsection 2.2 above. The letter shall require
6 the distributor to specifically identify each Product sold as being Reformulated, and request
7 supporting documentation for each such claim. In the event that the distributor cannot certify that
8 a Product is Reformulated, or fails to respond within 30 days of FUDDRUCKERS sending of the
9 request, FUDDRUCKERS will not sell such Products in its restaurants until certification is
10 provided or unless it otherwise has obtained test results from an independent laboratory in the
11 United States confirming that the Products are Reformulated.

12 FUDDRUCKERS will provide a copy of each letter sent to its distributors to Russell
13 Brimer at the address required pursuant to section 10 below, within seven (7) calendar days of it
14 being sent. FUDDRUCKERS shall also provide plaintiff with a copy of each distributor response
15 (or, if a distributor fails to respond and FUDDRUCKERS otherwise intends to continue to sell or
16 offer for use the Product(s) in question, laboratory test results), quarterly within forty (40) days of
17 the date the aforementioned copies of the letter to distributors is sent to Russell Brimer.²

18 **2.4 Reformulation Commitment**

19 FUDDRUCKERS hereby commits that all Products that it offers for sale, or that it utilizes
20 in its restaurants, in California after March 30, 2007 shall qualify as Reformulated Products.³

21 **3. SETTLEMENT FUNDS/CONSIDERATION**

22 **3.1 Payments Pursuant to Health & Safety Code §25249.7(b)**

23 Pursuant to Health & Safety Code Section 25249.7(b), FUDDRUCKERS shall pay a total
24 of \$800,000 in civil penalties. A total of \$320,000 of the foregoing amount will be waived if, on
25 or before the date the first installment of the civil penalty is due (as set forth below),

26 ² The requirements set forth in this subsection shall apply and be enforceable severally with respect to Fuddruckers,
27 Inc. and each of its California franchisees.

28 ³ Fuddruckers, Inc. may address the obligations of this subsection with respect to its California franchisees by means
of contract, either through separate written agreements with them or through newly originated or renewals of its
franchising agreements.

1 FUDDRUCKERS notifies the Plaintiff in writing that it will extend the Reformulation
2 Commitment it is making under subsection 2.4 above to all FUDDRUCKERS locations owned
3 and operated by Fuddruckers, Inc. throughout the United States, to be effectuated within ninety
4 (90) days. An additional \$320,000 will be waived if, on or before the date the first installment of
5 the civil penalty is due (as set forth below), FUDDRUCKERS notifies the Plaintiff in writing that
6 it will extend the Reformulation Commitment it is making under subsection 2.4 above to all
7 FUDDRUCKERS locations owned and operated by its franchisees throughout the United States,
8 to be effectuated upon origination (for new franchises) or renewal (for existing franchises) of its
9 franchising agreements. The penalty payment, excluding any waived portions, shall be made
10 payable to "Hirst & Chanler LLP in Trust For Russell Brimer" and shall be delivered to
11 Plaintiff's counsel, following the approval and entry of this agreement as a Consent Judgment by
12 the Court, in monthly installments of \$10,000 beginning on the last business day of August 2007
13 and continuing on the last business day of every month thereafter until the total penalty payment
14 obligation as set forth in this subsection (i.e., net amount, if applicable) has been satisfied. These
15 installment payments shall be sent to the following address:

16 HIRST & CHANLER LLP
17 Attn: Proposition 65 Controller
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710-2565

21 **3.2 Apportionment of Payments Pursuant to Health & Safety Code §25249.7(b)**

22 All funds received pursuant to subsection 3.1, above, shall be apportioned by BRIMER in
23 accordance with Health & Safety Code § 25192, with 75% of these funds remitted by BRIMER
24 to the State of California's Office of Environmental Health Hazard Assessment and the remaining
25 25% of these penalty monies retained by BRIMER as provided by Health & Safety Code
26 § 25249.12(d). BRIMER shall bear all responsibility for apportioning and paying to the State of
27 California the appropriate civil penalties paid in accordance with this Section.
28

1 **4. ATTORNEYS' FEES AND COSTS**

2 **4.1 Reimbursement of Fees and Costs**

3 The Parties acknowledge that BRIMER and his counsel offered to resolve this dispute
4 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
5 this fee issue to be resolved after the material terms of the agreement had been settled.
6 FUDDRUCKERS then expressed a desire to resolve the fee and cost issue shortly after the other
7 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord and
8 satisfaction on the compensation to be paid to BRIMER and his counsel pursuant to the private
9 attorney general doctrine codified at California Code of Civil Procedure § 1021.5 for all work
10 performed through the Court's approval of this agreement, including all fees and costs incurred
11 by BRIMER and his counsel as a result of investigating, bringing this matter to FUDDRUCKERS
12 attention, litigating and negotiating a settlement in the public interest and seeking the Court's
13 approval of the settlement agreement. Specifically, under the accord and satisfaction reached,
14 FUDDRUCKERS shall pay BRIMER and his counsel a total of \$890,000 for all attorneys' fees,
15 expert and investigation fees, litigation and related costs. The payment shall be made payable to
16 HIRST & CHANLER LLP and shall be delivered to the following address pursuant to the
17 schedule set forth in subsection 4.2 below:

18 HIRST & CHANLER LLP
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710-2565

21 **4.2 Fee/Cost Reimbursement Payment Schedule:**

22 \$250,000 of the total amount set forth in subsection 4.1 above shall be paid on or
23 before March 30, 2007;

24 \$40,000 per month towards the total amount set forth in subsection 4.1 above shall
25 be paid on the last business day of each month running from April through July of 2007;

26 \$30,000 per month towards the total amount set forth in subsection 4.1 above shall
27 be paid on the last business day of each month running from August 2007 through
28 November 2008, at which point the total payment obligation set forth in subsection 4.1

1 above will be fully satisfied.

2 **5. RELEASE OF ALL CLAIMS**

3 **5.1 Release of FUDDRUCKERS and Downstream Customers**

4 In further consideration of the promises and agreements herein contained, and for the
5 payments to be made pursuant to Sections 3 and 4, BRIMER, on behalf of himself, his past and
6 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
7 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
8 form of legal action and releases all claims, including, without limitation, all actions, and causes
9 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
10 penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and
11 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
12 (collectively "Claims"), against FUDDRUCKERS and each of its licensees, retailers, franchisees,
13 customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and
14 their respective officers, directors, attorneys, representatives, shareholders, agents, and
15 employees, and sister and parent entities (collectively "Releasees"). This release is limited to
16 those claims that arise under Proposition 65, as such claims relate to the Notices and/or are pled
17 or could have been pled in *Brimer v. Fuddruckers, Inc.* (Case No. RG06250344).

18 The Parties further understand and agree that this release shall not extend upstream to any
19 entities that manufactured the Products or any component parts thereof, or any distributors or
20 suppliers who sold the Products or any component parts thereof to FUDDRUCKERS.

21 **5.2 Fuddruckers Release of Brimer**

22 FUDDRUCKERS waives any and all claims against BRIMER, his attorneys and other
23 representatives, for any and all actions taken or statements made (or those that could have been
24 taken or made) by BRIMER and his attorneys and other representatives, whether in the course of
25 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
26 and/or with respect to the Products.

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1 **6. COURT APPROVAL**

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

8 **7. SEVERABILITY**

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

12 **8. ATTORNEYS' FEES**

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

16 **9. GOVERNING LAW**

17 The terms of this Consent Judgment shall be governed by the laws of the State of
18 California and apply, unless otherwise specified, within the State of California. In the event that
19 Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as
20 to the Products, then FUDDRUCKERS shall provide written notice to BRIMER of any asserted
21 change in the law, and shall have no further obligations pursuant to this Consent Judgment with
22 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
25 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
26 (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by the
27 other party at the following addresses:
28

1 To FUDDRUCKERS:

2 Esther P. Holm, Esq.
3 LEWIS BRISBOIS BISGAARD & SMITH LLP
4 650 Town Center Drive, Suite 1400
5 Costa Mesa, CA 92626
6 and
7 Matt Pannek, CEO
8 Fuddruckers, Inc.
9 5700 Mopac Expressway South
10 Suite C300
11 Austin, Texas 78749

12 To BRIMER:

13 Proposition 65 Controller
14 HIRST & CHANLER LLP
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710-2565

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

20 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

25 BRIMER agrees to comply with the reporting form requirements referenced in Health &
26 Safety Code § 25249.7(f).

27 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

28 BRIMER and FUDDRUCKERS agree to mutually employ their best efforts to support the
entry of this Agreement as a Consent Judgment and obtain approval of the Consent Judgment by
the Court in a timely manner. The Parties acknowledge that, pursuant to Health & Safety Code
§ 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
Accordingly, Plaintiff agrees to file a Motion to Approve the Agreement (“Motion to Approve”)
within a reasonable period of time after the Execution Date (*i.e.*, not to exceed thirty (30) days
unless otherwise agreed to by the Parties’ counsel based on unanticipated circumstances).

1 FUDDRUCKERS shall have no additional responsibility to Plaintiff's counsel pursuant to Code
2 of Civil Procedure § 1021.5 or otherwise with regard to reimbursement of any fees and costs
3 incurred with respect to the preparation and filing of the Motion to Approve and its supporting
4 declaration or with regard to Plaintiff's counsel appearing for a hearing thereon.

5 **14. MODIFICATION**

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

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1 **15. 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 **AGREED TO:**

AGREED TO:

6 Date: 3-15-07

Date: _____

7
8 By: 
9 Plaintiff RUSSELL BRIMER

By: _____
Defendant FUDDRUCKERS, INC.

10 **APPROVED AS TO FORM:**

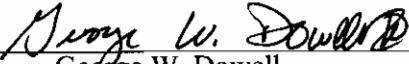
APPROVED AS TO FORM:

11
12 Date: March 15, 2007

Date: _____

13 HIRST & CHANLER LLP

LEWIS BRISBOIS BISGAARD & SMITH LLP

14
15 By: 
16 George W. Dowell
17 Attorneys for Plaintiff
RUSSELL BRIMER

By: _____
Esther P. Holm
Attorneys for Defendant
FUDDRUCKERS, INC.

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19 **IT IS SO ORDERED.**

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21 Date: _____

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.

AGREED TO:

AGREED TO:

Date: 3-15-07

Date: MARCH 15 2007

By: [Signature]
Plaintiff RUSSELL BRIMER

By: [Signature]
Defendant FUDDRUCKERS, INC.
MATT FANNER
PRESIDENT & CEO

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: March 15, 2007

Date: _____

HIRST & CHANLER LLP

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: [Signature]
George W. Dowell
Attorneys for Plaintiff
RUSSELL BRIMER

By: _____
Esther P. Holm
Attorneys for Defendant
FUDDRUCKERS, INC.

IT IS SO ORDERED.

Date: _____

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.

AGREED TO:

AGREED TO:

Date: _____

Date: _____

By: _____
Plaintiff RUSSELL BRIMER

By: _____
Defendant FUDDRUCKERS, INC.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

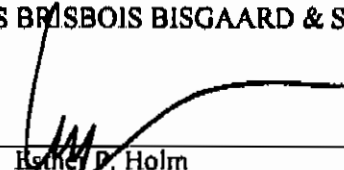
Date: _____

Date: 3/16/07

HIRST & CHANLER LLP

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
George W. Dowell
Attorneys for Plaintiff
RUSSELL BRIMER

By: _____

Retha P. Holm
Attorneys for Defendant
FUDDRUCKERS, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT