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18 Attorneys for Defendant
19 OVERSTOCK.COM, INC.

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 CITY AND COUNTY OF SAN FRANCISCO
22 UNLIMITED JURISDICTION

23 HOWARD
24 RICE
25 NEMEROVSKI
26 CANADY
27 FALK
28 & RABKIN
Attorneys for Plaintiff

16 RUSSELL BRIMER,
17
18 Plaintiff,

19 v.

20 OVERSTOCK.COM, INC.; and DOES 1
21 through 150, inclusive,
22 Defendants.

No. CGC 05-447603

STIPULATION FOR ENTRY OF
CONSENT JUDGMENT

1 1. INTRODUCTION.

2 1.1 Russell Brimer And Overstock.com, Inc.

3 This stipulation for entry of a Consent Judgment is entered into by and between
4 plaintiff Russell Brimer (hereinafter "Brimer" or "Plaintiff") and defendant Overstock.com,
5 Inc., (hereafter "Overstock.com" or "Defendant"), with Brimer and Overstock.com
6 collectively referred to as the "Parties." The Parties hereby stipulate that the Court may and
7 should enter judgment as expressed herein.

8 1.2 Plaintiff.

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

12 1.3 Defendant.

13 Overstock.com employs ten or more persons and is a person in the course of doing
14 business for purposes of Proposition 65.

15 1.4 General Allegations.

16 Brimer alleges that Overstock.com has manufactured, distributed and/or sold in the
17 State of California certain tea glasses and other glassware intended for food or beverages
18 with colored artwork or designs on the exterior that contain lead. Lead is listed pursuant to
19 the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
20 Code Sections 25249.5 *et seq.* ("Proposition 65"), as a chemical known to the State of
21 California to cause birth defects and other reproductive harm. Lead shall be referred to
22 herein as the "Listed Chemical."

23 1.5 Product Description.

24 The products that are covered by this Consent Judgment are defined as follows: tea
25 glasses and other glassware intended for food or beverages with colored artwork or designs
26 (containing lead) on the exterior including, but not limited to, the glassware products
27 identified in Exhibit A to this Consent Judgment. All such tea glasses and other glassware
28 intended for food or beverages with colored artwork or designs on the exterior made for sale

1 by Overstock.com shall be referred to herein as the "Products."

2 1.6 Notices of Violation.

3 On or about September 27, 2005, Brimer served Overstock.com and various public
4 enforcement agencies with a document entitled "60 Day Notice of Violation" (the "Notice")
5 that provided Overstock.com and such public enforcers with notice that alleged that
6 Overstock.com was in violation of California Health & Safety Code Section 25249.6 for
7 failing to warn consumers and customers that the Products that Overstock.com sold exposed
8 users in California to the Listed Chemical.

9 1.7 Complaint.

10 On December 13, 2005, Brimer, representing that he was acting in the interest of the
11 general public in California, filed a complaint (hereafter referred to as the "Complaint" or
12 the "Action") in the Superior Court for the County of San Francisco against Overstock.com,
13 Inc. and Does 1 through 150, (Brimer v. Overstock.com, Inc., Case No. CGC 05-447603)
14 alleging violations of Health & Safety Code Section 25249.6 based on the alleged exposures
15 to the Listed Chemical contained in the Products sold by Overstock.com.

16 1.8 No Admission.

17 Overstock.com denies the material factual and legal allegations contained in Brimer's
18 Notice and Complaint and maintains that all products that it has sold and distributed in
19 California, including the Products, have been and are in compliance with all laws. Nothing
20 in this Consent Judgment shall be construed as an admission by Overstock.com of any fact,
21 finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment
22 constitute or be construed as an admission by Overstock.com of any fact, finding,
23 conclusion, issue of law or violation of law, such being specifically denied by
24 Overstock.com. This Consent Judgment is a settlement of disputed claims, allegations and
25 defenses, and is entered into by the Parties to avoid the time, expense and uncertainty of
26 litigation, with no admission of liability, or the validity of any claim, allegation or defense,
27 by any Party. However, this Section shall not diminish or otherwise affect the obligations,
28 responsibilities and duties of Overstock.com under this Consent Judgment.

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1 1.9 Consent to Jurisdiction.

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Overstock.com over the allegations of violations contained in the
4 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint,
5 that venue is proper in the County of San Francisco and that this Court has jurisdiction to
6 enter this Consent Judgment as a full and final settlement and resolution of the allegations
7 contained in the Complaint and of all claims which were or could have been raised based on
8 the facts alleged therein or arising therefrom, and to enforce the provisions of this Consent
9 Judgment.

10 1.10 Effective Date.

11 For purposes of this Consent Judgment, the term "Effective Date" shall mean
12 September 31, 2006.

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

14 2.1 After the Effective Date, Overstock.com shall not sell, ship or offer to be
15 shipped for sale in California Products containing the Listed Chemical unless such Products
16 are sold or shipped with the clear and reasonable warnings set out in Section 2.2 or comply
17 with the Reformulation Standards set forth in Section 2.3.

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

23 2.2 Product Warnings.

24 2.2.1 Clear and Reasonable Warnings. This Section describes
25 Overstock.com's options for satisfying the warning obligations required by Section 2.1,
26 depending, in part, on the manner of sale:

27 (i) Internet Sales. Defendant shall satisfy its warning
28 obligations for Products that are sold from the Internet to California residents, by providing a

1 warning: (a) on the website; or (b) with the Product when it is shipped to an address in
2 California. Warnings given on the website shall identify the specific Product to which the
3 warning applies, and must be provided either: (1) on the same web page on which the
4 Product is displayed; (2) on the same web page as the order form for the Product; (3) on the
5 same page as the price for any Product; or (4) on one or more webs pages displayed to a
6 purchaser during the checkout process.

7 For each such instance:

8 **WARNING:** Attention California Residents: This product contains lead,
9 a chemical known to the State of California to cause birth
10 defects and other reproductive harm.

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

19 **WARNING:** Attention California Residents: This product contains lead,
20 a chemical known to the State of California to cause birth
21 defects and other reproductive harm.

22 Alternatively, Overstock.com may place the following warning on the packing slip or
23 invoice and specifically identifying the Product in lettering of the same size or larger as the
24 description of the Product:

25 **WARNING:** Attention California Residents: This product contains lead,
26 a chemical known to the State of California to cause birth
27 defects and other reproductive harm.

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

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1 2.2.2 Exceptions.

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

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

5 2.3 Reformulation Standards.

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

8 2.3.1 Products with decorations that contain six one-hundredths of one
9 percent (.06%) or less of lead as measured either before or after the material is fired onto (or
10 otherwise affixed to) the Product using a test method of sufficient sensitivity to establish a
11 limit of quantification of less than 600 parts per million ("ppm").¹

12 2.3.2 Products with decorations within the "Lip and Rim Area"² that contain
13 two one-hundredths of one percent (0.02%) or less of lead by weight or less using a sample
14 size of the material in question measuring approximately 50-100 mg and a test method of
15 sufficient sensitivity to establish a limit of quantitation of less than 200 ppm.³

16 2.4 Product Reformulation.

17 Overstock.com commits, no later than December 31, 2006, to use its commercially
18 reasonable efforts to ensure that all designs applied to the exterior surface of the Products
19 offered for sale to consumers residing in the State of California comply with the
20 reformulation standards specified in Section 2.3 above. Any such Products shall be deemed
21 to comply with Proposition 65 as "Reformulated," and shall be exempt from any Proposition
22 65 warning requirements pursuant to Section 2.2. This section shall not apply to items

23 _____
24 ¹If the decoration is tested after it is affixed to the Product, the percentage of the Listed
25 Chemical by weight must relate only to the decorating material and must not only include
26 any quantity attributable to non-decorating material (e.g., the glass substrate).

26 ²"Lip and Rim Area" is defined as the exterior top 20 millimeters of a hollowware
27 glassware food or beverage Product.

27 ³If the decoration is tested after it is affixed to the Product, the percentage of the Listed
28 Chemical by weight must relate only to the decorating material and must not only include
28 any quantity attributable to non-decorating material (e.g., the glass substrate).

1 offered to consumers residing in the State of California through the Worldstock program of
2 Overstock.com.

3 **3. MONETARY PAYMENTS.**

4 3.1 Payment In Lieu Of Penalties Pursuant to Health & Safety Code Section
5 25249.7(b).

6 The total settlement amount shall be \$2,500, which shall be paid by Overstock.com as
7 set forth herein. In lieu of any civil penalties pursuant to Health & Safety Code Section
8 25249.7(b), Overstock.com shall pay the \$2,500 as a charitable contribution on or before
9 September 31, 2006, to Worldwatch Institute, a 501(c)(3) charitable organization that is
10 dedicated to the development of environmentally sustainable technologies, the reduction of
11 threats to the well-being of existing and future generations, and a socially just society. Each
12 of these goals is shared by Plaintiff and Overstock.com and its Worldstock program.

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
16 leaving this fee issue to be resolved after the material terms of the agreement had been
17 settled. Overstock.com then expressed a desire to resolve the fee and cost issue shortly after
18 the other settlement terms had been finalized. The Parties then attempted to (and did) reach
19 an accord on the compensation due to Brimer and his counsel under the private attorney
20 general doctrine codified at California Code of Civil Procedure Section 1021.5 for all work
21 performed through the Court's approval of this agreement. Under the private attorney
22 general doctrine, Overstock.com shall reimburse Brimer and his counsel for fees and costs
23 incurred as a result of investigating, bringing this matter to Overstock.com's attention,
24 litigating and negotiating a settlement in the public interest and seeking the Court's approval
25 of the settlement agreement. Overstock.com shall pay Brimer and his counsel \$27,000 for
26 all attorneys' fees, expert and investigation fees, litigation and related costs, including but
27 not limited to all attorneys' fees and costs (including those incurred and to be incurred to
28 obtain Court approval and the entry of this consent Judgment), expert and investigative fees

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1 and costs and other litigation expenses relating to this Action. Except as so specified,
2 Overstock .com shall have no responsibility to reimburse Brimer and his counsel for any
3 other costs or fees. The payment shall be made payable to HIRST & CHANLER LLP and
4 shall be delivered on or before September 31, 2006 at 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 **5. RELEASE OF ALL CLAIMS.**

9 5.1 Release of Overstock.com and Downstream Customers.

10 As to the Products, this Consent Judgment is a full, final and binding resolution
11 between the Plaintiff, acting on behalf of the public interest pursuant to Health and Safety
12 Code Section 25249.7(d), on the one hand, and Defendant, on the other hand, of any
13 violation of Proposition 65, of all claims made or which could have been made in the Notice
14 and/or the Complaint related to the Products, and of any other statutory, regulatory or
15 common law claim that could have been asserted against Defendant or any of its successors
16 or assigns, for failure to provide clear, reasonable, and lawful warnings of exposure to the
17 Listed Chemical contained in or otherwise associated with the Products, sold or distributed
18 by, for, or on behalf of Defendant. As to the Products, compliance with the terms of this
19 Consent Judgment resolves any issue, now and in the future, concerning compliance by
20 Defendant, and its successors and assigns, with the requirements of Proposition 65 with
21 respect to the Products.

22 As of the date of this Consent Judgment, Plaintiff represents to Overstock.com that
23 Plaintiff is not in possession of information pertaining to any other alleged violations by
24 Overstock.com of Proposition 65 covered by his notice and Complaint and presently intends
25 no further lawsuit or action against Overstock.com based upon a violation of Proposition 65
26 covered by his notice and Complaint. As a result, if any such future action is instituted, it
27 may not be based upon any offering or sale of any Product prior to the date of this Consent
28 Judgment, and Plaintiff hereby waives any right to bring any such action.

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

18 The Parties further understand and agree that this release shall not extend upstream to
19 any entities that manufactured the Products or any component parts thereof, or any
20 distributors or suppliers who sold the Products or any component parts thereof to
21 Overstock.com. Finally, the Parties understand and agree that this release does not extend to
22 such Releasees for Products sold to California citizens by means other than through or by
23 Overstock.com.

24 5.2 Overstock.com's Release of Brimer.

25 Overstock.com waives any and all claims against Brimer, his attorneys and other
26 representatives, for any and all actions taken or statements made (or those that could have
27 been taken or made) by Brimer and his attorneys and other representatives, whether in the
28 course of investigating claims or otherwise seeking enforcement of Proposition 65 against it

1 in this matter, and/or with respect to the Products.

2 **6. COURT APPROVAL.**

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

10 **7. ENFORCEMENT OF CONSENT JUDGMENT.**

11 Before moving to enforce the terms and conditions of Section 2 of this Consent
12 Judgment against Overstock.com with respect to an alleged violation of said terms and
13 conditions, Plaintiff and others must follow the procedures set forth in subsections 7.2 and
14 7.3.

15 In the event that Plaintiff and/or their attorneys, agents, assigns, or any other person
16 acting in the public interest under Health & Safety Code Section 25249.7(d) (hereinafter
17 "Notifying Person") identifies one or more Products sold by Overstock.com for which the
18 warnings for those Products required under Section 2 of this Consent Judgment have not
19 been and are not being given, such Notifying Person shall notify, in writing, Overstock.com
20 of such alleged failure to warn (the "Notice of Breach"). The Notice of Breach shall be sent
21 by first class mail, with proof of service, to the persons identified in Section 11 of this
22 Consent Judgment, and must be served within sixty (60) days of the date the alleged
23 violation was observed. The Notice of Breach shall identify the date the alleged violation
24 was observed, and reasonably describe the nature of the alleged violation with sufficient
25 detail to allow Overstock.com to determine the basis of the claim being asserted and the
26 identities of the Products to which those assertions apply.

27 The Notifying Person shall take no further action against Overstock.com pursuant to
28 this Consent Judgment or otherwise unless the Notifying Person discovers, at least thirty

1 (30) days after service of the Notices of Breach served pursuant to subsection 7.2, that the
2 failure to warn with regard to the Products specified has not been cured by application of
3 appropriate warning to website listed Products, as specified in Section 2 herein.

4 **8. SEVERABILITY.**

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

8 **9. ATTORNEYS' FEES.**

9 In the event that, after Court approval: (1) a dispute arises with respect to any
10 provision of this Consent Judgment; or (2) Brimer takes reasonable and necessary steps to
11 enforce the terms of this Consent Judgment, the prevailing party shall be entitled to recover
12 reasonable attorneys' fees and costs.

13 **10. GOVERNING LAW.**

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

20 **11. NOTICES.**

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

25 To Overstock.com:

26 General Counsel
27 Overstock.com, Inc.
28 6350 South 3000 East
Salt Lake City, UT 84121

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1 With a copy to:

2 Richard C. Jacobs
3 Howard Rice Nemerovski Canady Falk & Rabkin
4 3 Embarcadero Center, 7th Floor
5 San Francisco, CA 94111

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
13 address to which all notices and other communications shall be sent.

14 **12. COUNTERPARTS; FACSIMILE SIGNATURES.**

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

18 **13. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f).**

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

26 **14. ADDITIONAL POST EXECUTION ACTIVITIES.**

27 Brimer and Overstock.com agree to mutually employ their best efforts to support the
28 entry of this Agreement as a Consent Judgment and obtain approval of the Consent
Judgment by the Court in a timely manner; however, the motion and supporting documents
necessary to obtain such approval shall be prepared by Plaintiff. The Parties acknowledge
that, pursuant to Health & Safety Code Section 25249.7, a noticed motion is required to

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1 obtain judicial approval of this Consent Judgment. Accordingly, the Parties agree to file a
2 Joint Motion to Approve the Agreement ("Joint Motion"), within a reasonable period of time
3 after the Execution. Overstock.com shall have no additional responsibility to Plaintiff's
4 counsel pursuant to Code of Civil Procedure Section 1021.5 or otherwise with regard to
5 reimbursement of any fees and costs incurred with respect to the preparation and filing of the
6 Joint Motion and its supporting declaration or with regard to Plaintiff's counsel appearing
7 for a hearing thereon.

8 **15. MODIFICATION.**


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

14 **16. AUTHORIZATION.**

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

18 DATED: September 22, 2006.


RUSSELL BRIMER



Russell Brimer

19
20
21
22 DATED: September 22nd, 2006.

OVERSTOCK.COM, INC.

23
24 By: 
25 Defendant Overstock.com, Inc.
26
27
28

1 AGREED AND APPROVED AS TO FORM:

2 DATED: September 22, 2006.

3 GEORGE W. DOWELL
4 D. JOSHUA VOORHEES
5 HIRST & CHANLER LLP

6 By: George W. Dowell
7 GEORGE W. DOWELL

8 Attorneys for Plaintiff RUSSELL BRIMER

9 DATED: September 22nd, 2006.

10 RICHARD C. JACOBS
11 HOWARD RICE NEMEROVSKI CANADY
12 FALK & RABKIN
13 A Professional Corporation

14 By: Richard C. Jacobs
15 RICHARD C. JACOBS

16 Attorneys for Defendant OVERSTOCK.COM,
17 INC.

18 HOWARD
19 RICE
20 NEMEROVSKI
21 CANADY
22 FALK
23 & RABKIN
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Exhibit A

Product Name

Moroccan Tea Glass Set (Morocco) (Blue) (#1009500; Model No. KIT-1073)

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