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12 Attorneys for Defendant
13 PEPSI-COLA BOTTLING COMPANY OF NEW BERN, INC.

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

19 RUSSELL BRIMER,

20 Plaintiff,

21 v.

22 PEPSI-COLA BOTTLING COMPANY OF NEW
23 BERN, INC.; and DOES 1 through 150,

24 Defendants.

Case No. CGC-05-447641

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

1 **1. INTRODUCTION**

2 **1.1 Parties to the Settlement Agreement**

3 This Settlement Agreement is entered into by and between Russell Brimer (hereafter
4 “Brimer”) and PEPSI-COLA BOTTLING COMPANY OF NEW BERN, INC. (“New Bern”), with
5 Brimer and New Bern collectively referred to as the “Parties” and individually referred to as a
6 “Party,” where appropriate.

7 **1.2 Brimer**

8 Brimer is a citizen of the State of California, who seeks to promote awareness of exposures
9 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
10 contained in consumer and industrial products.

11 **1.3 New Bern**

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

14 **1.4 General Contentions**

15 Brimer has contended that New Bern has distributed and/or sold in the State of California
16 certain glass containers and other glass items with colored artwork or designs (allegedly containing
17 lead) on the exterior. Lead is listed pursuant to the Safe Drinking Water and Toxic Enforcement
18 Act of 1986, California Health & Safety Code §§25249.5 *et seq.* (“Proposition 65”), to cause birth
19 defects and other reproductive harm. Lead shall be referred to herein as the “Listed Chemical.”

20 **1.5 Products Descriptions**

21 The specific products that are covered by this Settlement and Release are old fashioned
22 syrup glasses and other glassware intended for the consumption of food and beverages with colored
23 artwork or designs (containing lead) on their exterior that are listed on Exhibit A. Said products
24 listed on Exhibit A are referred to herein as the “Products”.

25 **1.6 Notices of Violations**

26 On or about September 27, 2005, Brimer served New Bern and various public enforcement
27

1 agencies with a document entitled "60-Day Notice of Violation" (the "Notice") regarding the sale by
2 New Bern of certain items of glassware described herein.

3 **1.7 No Admission**

4 New Bern denies all allegations contained in the Notice and maintains that the Products that
5 it previously sold or distributed to consumers in California were in compliance with all laws.
6 Nothing in this Settlement Agreement shall be construed as an admission by New Bern of any fact
7 finding, conclusion of law, or violation of law, nor shall compliance with this Settlement Agreement
8 constitute or be construed as an admission by New Bern of any fact, finding, conclusion, issue of
9 law or violation of law, such being specifically denied by New Bern. Nothing in this Settlement
10 Agreement shall apply to, or be used as evidence regarding compliance for, any other product sold,
11 or offered for sale, by New Bern with Proposition 65 or any other statute or regulation. However,
12 this Section shall not diminish or otherwise affect the obligations, responsibilities and duties of New
13 Bern under this Settlement Agreement.

14 **1.8 Jurisdiction and Venue**

15 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over New Bern as to the allegations contained in the Complaint, that venue is proper in
17 the City and County of San Francisco and that this Court has jurisdiction to enter and enforce the
18 provisions of this Consent Judgment.

19 **1.9 Effective Date**

20 For purposes of this Settlement Agreement, the term "Effective Date" shall mean July 15,
21 2006.

22 **2. INJUNCTIVE RELIEF**

23 **2.1** After July 15, 2006, New Bern shall not sell or offer for sale in California the
24 Products containing the Listed Chemical in their exterior decoration unless such Products comply
25 with Section 2.2, 2.3, or 2.4 below. Any Products still in New Bern's care, custody, or control, as of
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1 July 15, 2006, shall not be sold in California, directly or indirectly, unless such Products comply
2 with Sections 2.2, 2.3, or 2.4 below.

3 **2.2 Product Warnings**

4 Subject to Section 2.4 and Section 2.1, New Bern shall not ship to or otherwise cause the
5 Products to be sold in California stores after July 15, 2006, unless warnings are provided in one or
6 more of the following ways at New Bern's discretion.

7 **2.2.1 Warning on the Products or Product Packaging**

8 A warning is affixed to the packaging, labeling or directly onto the Products by the
9 manufacturer, importer, or distributor of the Product, unless New Bern consents, in writing,
10 to provide the warning itself, that states:

11
12 **WARNING: The materials used as colored decorations on the**
13 **exterior of this product contain lead, a chemical**
14 **known to the State of California to cause birth**
15 **defects or other reproductive harm.**

16 Warnings issued for the Products pursuant to this subsection shall be prominently
17 placed with such conspicuousness as compared with other words, statements, designs, or
18 devices so as to render it likely to be read and understood by an ordinary individual under
19 customary conditions of purchase. Any material changes to the language of the warning
20 required by this subsection shall only be made with the written approval of Brimer.

21 **2.2.2 Point of Sale**

22 At its discretion, New Bern may satisfy its warning obligations under this Settlement
23 Agreement by arranging for the placement of sign(s), the wording of which shall be in
24 accordance with the wording of subsection 2.2.1 above, to be posted in its retail outlets at
25 which the Products are sold directly to consumers. The signs shall be placed in reasonable
26 locations such that they are likely to be read and understood at the point of display for the
27 Products by the ordinary consumer exercising reasonable purchasing behavior.
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1 **2.3 Mail Order and Internet Sales**

2 Subject to subsection 2.3.3 and Section 2.4, after July 15, 2006, New Bern shall not sell or
3 distribute the Products by mail order catalog or the Internet to California residents, unless warnings
4 are provided as set forth below.

5 For the Products that require a warning pursuant to this Settlement Agreement that are sold
6 by New Bern by mail order or from the Internet to California residents, a warning containing the
7 language in Section 2.2 shall be included, at New Bern’s sole option, either: (a) in the mail order
8 catalog (if any) or on the website (if any) pursuant to subsection 2.3.1 or 2.3.2; or (b) with the
9 Products when any of them are shipped to an address in California pursuant to subsection 2.3.3.
10 Any warnings given in the mail order catalogs or on the website shall identify the *specific* Products
11 to which the warning applies so as to significantly minimize, if not eliminate, the chances that an
12 overwarning situation will arise. Nothing in this Section 2.3 shall require New Bern to provide
13 warnings for the Products ordered from a mail order catalog printed prior to July 15, 2006.

14 **2.3.1 Mail Order Catalog**

15 The warning message shall be stated within the catalog on the inside front cover and
16 either: (i) on the same page as any order form; or (ii) on the same page as the price, in the
17 same size as the surrounding, non-heading text, with the same language as that appearing in
18 Section 2.2.

19 **2.3.2 Internet Web Sites**

20 The warning text, or a link to a page containing the warning text, shall be displayed
21 either: (a) on the same page on which the Products are displayed; (b) on the same page as
22 any order form for the Products; (c) on the same page as the price for the Products; (d) on
23 one or more pages displayed to a purchaser over the internet or via electronic mail during the
24 checkout and order confirmation process for sale of the Products; or (e) in any manner such
25 that is likely to be read and understood by an ordinary individual under customary conditions
26 of purchase of the Products. This warning shall including the same language as that
27 appearing in Section 2.2. If a link is used, it shall state “Health Hazard Warning Information
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1 for California Residents,” and shall be of a size equal to the size of other links on the page.

2 **2.3.3 Package Insert or Label**

3 Alternatively, a warning may be provided with the Products when shipped directly to
4 a consumer in California, by: (a) Product labeling pursuant to Section 2.2, above; (b)
5 inserting a card or slip of paper measuring at least 4” x 6” in the shipping carton; or (c)
6 including the warning on the packing slip or customer invoice identifying the Products in
7 lettering of the same size as the description of the Products. The warning shall include the
8 language appearing in Section 2.2 and shall clearly inform the consumer that he or she may
9 return the Product(s) for a full refund (including all shipping costs) within thirty (30) days of
10 receipt.

11 **2.4 Reformulated Commitment**

12 New Bern commits that all designs applied to the exterior surface of the Products
13 manufactured after the Effective Date, that are available for purchase by consumers residing and
14 located in the State of California shall contain less than 0.06% lead by weight in the decoration as
15 measured either before or after the decoration is applied to the Product, using a test method of
16 sufficient sensitivity to establish a limit of quantification of less than 600 parts per million (“ppm”).¹
17 These Products shall be deemed to comply with Proposition 65, as “Reformulated”, and be exempt
18 from any Proposition 65 warning requirements under Sections 2.2 and 2.3.

19 **3. MONETARY PAYMENTS**

20 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

21 Pursuant to Health & Safety Code section 25249.7(b), New Bern shall pay \$2,000 in civil
22 penalties on or before July 31, 2006, to be sent by overnight delivery, with the penalty payment
23 made payable to “Hirst & Chanler LLP in Trust for Russell Brimer” and shall be delivered to
24 plaintiff’s counsel at the following address:
25 _____

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

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 Office
9 of Environment Health Hazard Assessment and the remaining 25% of these penalty monies retained
10 by Brimer as provided by Health & Safety Code §25249.12(d). Brimer shall bear all responsibility
11 of apportioning and paying to the State of California the appropriate civil penalties in accordance
12 with this Section.

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

14 The Parties have reached an accord on the compensation due to Brimer and his counsel
15 under the Private Attorney General doctrine codified at California Code of Civil Procedure §1021.5
16 for all work performed through the Effective Date of the Settlement Agreement. Under the Private
17 Attorney Doctrine, New Bern shall reimburse Brimer and his counsel for fees and costs incurred as
18 a result of investigating, bringing this matter to New Bern's attention, and negotiating a settlement
19 in the public interest. On or before July 31, 2006, New Bern shall pay Brimer and his counsel
20 \$20,000 for all attorneys' fees, expert and investigation fees, and related costs. The check made
21 payable to "Hirst & Chanler LLP" and shall be delivered to plaintiff's counsel at the following
22 address:

23 HIRST & CHANLER LLP
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710-2565
28

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Release of New Bern and Downstream Customers**

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and current
5 agents, representatives, attorneys, successors and/or assignees, and in the interest of the general
6 public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
7 action and releases all claims, including, without limitations, all actions, causes of action, in law or
8 in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses
9 (including, but not limited to, investigation fees, experts fees and attorneys' fees) of any nature
10 whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against New
11 Bern and each of its downstream vendors, suppliers, distributors, wholesalers, licensors, licensees,
12 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, patent companies,
13 corporate affiliates, subsidiaries, related companies and their respective officers, directors, attorneys,
14 representatives, shareholders, agents, and employees (collectively "Releasees") arising under
15 Proposition 65, Business & Professions Code §17200 *et seq.*, Business & Professions Code §17500
16 *et seq.*, and Civil Code §1750 *et seq.* (the Consumer Legal Remedies Acts ("CLRA")) related to
17 New Bern's alleged failures to warn about exposures to or identification of the Listed Chemical
18 contained in the specific Products subject to this Settlement Agreement.

19 The Parties further agree and acknowledge that this Settlement Agreement is a full, final and
20 binding resolution of any violation of Proposition 65, Business & Professions Code §§ 17200 *et*
21 *seq.*, Business & Professions Code §§ 17500 *et seq.*, and Civil Code §1750 *et seq.* (the Consumer
22 Legal Remedies Acts ("CLRA")) that have been or could have been asserted against New Bern for
23 its alleged failure to provide clear and reasonable warnings of exposure to or identification of the
24 Listed Chemical in the Products which are the subject of this Settlement Agreement.

25 It is specifically understood and agreed that the Parties intend that New Bern's compliance
26 with the terms of this Settlement Agreement resolves all issues and liability, now and in the future
27 (so long as New Bern complies with the terms of the Settlement Agreement) concerning New
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1 Bern's compliance with the requirements of Proposition 65, Business & Professions Code §§17200
2 *et seq.*, Business & Professions Code §§17500 *et seq.*, and Civil Code §1750 *et seq.* (the Consumer
3 Legal Remedies Acts ("CLRA")) as to the Listed Chemical in the specific Products which are the
4 subject of this Settlement Agreement.

5 **5.2 New Bern's Release of Brimer**

6 New Bern waives all rights to institute any form of legal action against Brimer, his attorneys
7 or representatives, for all actions taken or statements made by Brimer or his attorneys or
8 representatives, in the course of seeking enforcement herein of Proposition 65, Business &
9 Professions Code §§17200 *et seq.*, or Business & Professions Code §§17500 *et seq.* against New
10 Bern and its affiliates.

11 **6. COURT APPROVAL**

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

17 **7. SEVERABILITY**

18 If any of the provisions of this Settlement Agreement are held by a court to be
19 unenforceable, the ability of the enforceable provisions shall not be adversely affected.

20 **8. ATTORNEYS' FEES**

21 In the event that a dispute arises, with respect to any provision(s) of this Settlement
22 Agreement, the prevailing party shall, except as otherwise provided herein, be entitled to recover
23 reasonable and necessary costs and reasonable attorneys' fees incurred from the resolution of such
24 dispute except in situations in which CCP §1021.5 would apply.

25 **9. GOVERNING LAW**

26 The terms of this Settlement Agreement shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or is
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1 otherwise rendered inapplicable by reason of law generally, or as to the Products subject to this
2 Settlement Agreement, then New Bern shall have no further obligations pursuant to this Settlement
3 Agreement.

4 **10. NOTICES**

5 Unless specified herein, all correspondence and notices required to be provided pursuant to
6 this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class,
7 registered or certified mail, return receipt requested or (ii) overnight courier to any Party by the
8 others at the following addresses:

9
10 **To Russell Brimer:**

11 HIRST & CHANLER LLP
12 Attn: Proposition 65 Controller
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710-2565

16
17 **To Pepsi-Cola Bottling Company of New Bern, Inc.:**

18 Michael A.J. Nangano, Esq.
19 STREETER & NANGANO
20 445 S. Figueroa Street, 27th Floor
21 Los Angeles, CA 90071
22 Telephone: (213) 612_7716
23 Fax: (213) 612-7717

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

26 **11. COUNTERPARTS: FACSIMILE SIGNATURES**

27 This Settlement Agreement may be executed in counterparts and by facsimile, each of which
28 shall be deemed an original, and all of which, when taken together, shall constitute one and the same
documents.

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

Brimer agrees to comply with the reporting form requirements referenced in Health & Safety
Code §25249.7(f). Pursuant to regulations promulgated under that section, Brimer shall present this

1 Settlement Agreement to the California Attorney General's Office within two (2) days after
2 receiving all of the necessary signatures. A noticed motion to enter the Consent Judgment will then
3 be served on the Attorney General's Office at least forty-five (45) days prior to the date a hearing is
4 scheduled on such motion in the Superior Court for the City and County of San Francisco unless the
5 Court allows a shorter period of time.

6 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

7 The Parties shall mutually employ their best efforts to support the entry of this Settlement
8 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
9 timely manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a
10 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the
11 Parties agree to file a Motion to Approve the Settlement Agreement ("Motion"), the first draft of
12 which Defendant shall prepare, within a reasonable period of time after the Effective Date.
13 Plaintiff's counsel shall finalize the Motion to Approve and prepare a declaration in support of the
14 Joint Motion which shall, inter alia, set forth support for the fees and costs to be reimbursed
15 pursuant to Section 4. New Bern shall have no additional responsibility to Plaintiff's counsel
16 pursuant to Code of Civil Procedure § 1021.5 or otherwise with regard to reimbursement of any fees
17 and costs incurred with respect to the preparation and filing of the Joint Motion and its supporting
18 declaration or with regard to Plaintiff's counsel appearing for a hearing or related proceedings
19 thereon.

20
21 **14. MODIFICATION**

22 This Settlement Agreement may be modified only by written agreement of the Parties. The
23 Attorney General shall be served with notice of any proposed modification to this Settlement
24 Agreement.

25 **15. AUTHORIZATION**

26 The undersigned are authorized to execute this Settlement Agreement on behalf of their
27 respective Parties and have read and agree to all of the terms and conditions of this Settlement
28 Agreement.

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AGREED TO:

AGREED TO:

Date: 7-24-06

Date: _____

RUSSELL BRIMER

PEPSI-COLA BOTTLING COMPANY OF
NEW BERN, INC.

By: 
Plaintiff Russell Brimer

By: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: 7/24/2006

Date: _____

HIRST & CHANLER LLP

STREETER & NANGANO

By: 
D. Joshua Voorhees, Esq.
Attorneys for Plaintiff
RUSSELL BRIMER

By: _____
Michael A.J. Nangano, Esq.
Attorneys for Defendant
PEPSI-COLA BOTTLING COMPANY OF
NEW BERN, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

EXHIBIT A

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<u>Product Name</u>
Pepsi-Cola Old Fashion Syrup Glass

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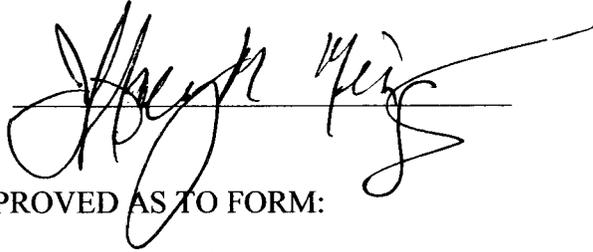
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Date: 7-31-2006

RUSSELL BRIMER

PEPSI-COLA BOTTLING COMPANY OF
NEW BERN, INC.

By: _____
Plaintiff Russell Brimer

By:  _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

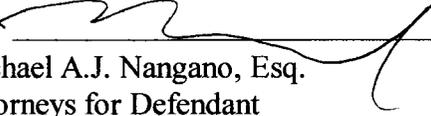
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Date: 3 AUG 06

HIRST & CHANLER LLP

STREETER & NANGANO

By: _____
D. Joshua Voorhees, Esq.
Attorneys for Plaintiff
RUSSELL BRIMER

By:  _____
Michael A.J. Nangano, Esq.
Attorneys for Defendant
PEPSI-COLA BOTTLING COMPANY OF
NEW BERN, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT