

1 Christopher M. Martin, State Bar No. 186021
 D. Joshua Voorhees, State Bar No. 241436
 2 Aparna L. Reddy, State Bar No. 242895
 HIRST & CHANLER LLP
 3 Hinsdale Square
 23 N. Lincoln, Suite 204
 4 Chicago, IL 60521
 Telephone: (630) 789-6998
 5 Facsimile: (630) 214-0979

6 Attorneys for Plaintiff
 RUSSELL BRIMER

7 James Cai, State Bar No. 200189
 8 SCHEIN & CAI LLP
 100 Century Center Court, Suite 315
 9 San Jose, CA 95112
 Telephone: (408) 436-0789
 10 Facsimile: (408) 436-0758

11 Attorneys for Defendants
 MCLAUGHLIN SUPERMARKET; STORY SUPERMARKET

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 14 **FOR THE COUNTY OF SANTA CLARA**
 15 **UNLIMITED CIVIL JURISDICTION**

18 RUSSELL BRIMER
 Plaintiff,
 19 v.
 20 MCLAUGHLIN SUPERMARKET; STORY
 SUPERMARKET; and DOES 1 through 150,
 21 Defendants.

Case No. 1-06-CV-071138
**STIPULATION AND [PROPOSED]
 ORDER RE: SETTLEMENT
 AGREEMENT**

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer, McLaughlin Supermarket and Story Supermarket**

3 This Settlement Agreement is entered into by and between plaintiff Russell Brimer
4 (hereinafter Brimer or plaintiff) and defendants McLaughlin Supermarket and Story Supermarket
5 (hereinafter McLaughlin or defendant), with Brimer and McLaughlin collectively referred to as the
6 "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 McLaughlin employs ten or more persons and is a person in the course of doing business
13 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
14 Safety Code §§25249.5 et seq. (Proposition 65).

15 **1.4 General Allegations**

16 Brimer alleges that McLaughlin has distributed and/or sold in the State of California
17 certain shot glasses and other glassware and mugs and other ceramic ware intended for the
18 consumption of food or beverages with colored artwork or designs containing lead on the exterior.
19 Lead is listed pursuant to Proposition 65 as a chemical known to the State of California to cause
20 birth defects and other reproductive harm. Lead shall be referred to herein as the "listed
21 chemical."

22 **1.5 Product Description**

23 The products that are covered by this Settlement Agreement are defined as follows: certain
24 glass container sets and other glassware intended for the consumption of food or beverages with
25 colored artwork or designs (containing lead) on the exterior, that include but are not limited to the
26 products identified in Exhibit A to this Settlement Agreement. All such glass container sets and
27 other glassware shall be referred to herein as the "products."

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1.6 Notices of Violation

On November 23, 2005, Brimer served McLaughlin and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (Notice) that provided McLaughlin and such public enforcers with notice that alleged that McLaughlin was in violation of California Health & Safety Code §25249.6 for failing to warn consumers and customers that the products that McLaughlin sold exposed users in California to the listed chemical.

1.7 Complaint

On February 1, 2006, Brimer, who is acting in the interest of the general public in California, filed a complaint (Complaint or Action) in the Superior Court in and for the City and County of San Francisco against McLaughlin Supermarket; Story Supermarket; and Does 1 through 150, (*Brimer v. McLaughlin Supermarket; Story Supermarket; and Does 1 through 150*, San Francisco Court Case No. CGC-06-449054) alleging violations of Health & Safety Code §25249.6 based on the alleged exposures to the listed chemical contained in the products McLaughlin sold. On September 6, 2006, Judge Ronald Evans Quidachay of the Superior Court for the City and County of San Francisco ordered that the case be transferred to the Superior Court for the County of Santa Clara, where it was received as Santa Clara Court Case No. 1-06-CV-071138 on September 14, 2006.

1.8 No Admission

McLaughlin denies the material, factual and legal allegations contained in Brimer's Notice and Complaint and maintains that all products that it has sold and distributed in California, including the products defined in Section 1.5 above, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by McLaughlin of any fact, finding, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by McLaughlin of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by McLaughlin.

1 However, this Section shall not diminish or otherwise affect the obligations, responsibilities and
2 duties of McLaughlin under this Settlement Agreement.

3 **1.9 Consent to Jurisdiction**

4 For purposes of this Settlement Agreement only, the parties stipulate that this Court has
5 jurisdiction over McLaughlin as to the allegations contained in the Complaint, that venue is proper
6 in the County of Santa Clara and that this Court has jurisdiction to enter and enforce the provisions
7 of this Settlement Agreement.

8 **1.10 Effective Date**

9 For purposes of this Settlement Agreement, the term "effective date" shall mean July 16,
10 2007.

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

12 **2.1 Product Warnings**

13 After the effective date, McLaughlin shall not sell, ship, or offer to be shipped for sale in
14 California products containing the listed chemical unless such products are sold or shipped with
15 the clear and reasonable warning set out in this Section 2.1, comply with the reformulation
16 standards set forth in Section 2.3 or are otherwise exempt pursuant to Section 2.2.

17 Any warning issued for products pursuant to this Section 2.1 shall be prominently placed
18 with such conspicuousness as compared with other words, statements, designs, or devices as to
19 render it likely to be read and understood by an ordinary individual under customary conditions
20 before purchase or, for products shipped directly to an individual in California or used in the
21 workplace, before use. Any warning issued pursuant to this Section 2.1 shall be provided in a
22 manner such that the consumer or user understands to which *specific* product the warning applies,
23 so as to minimize if not eliminate the chance that an overwarning situation will arise.

24 Sections 2.1(a)-(b) describe McLaughlin's options for satisfying its warning obligations
25 depending, in part, on the manner of sale. The following warnings will be applicable when the
26 product is sold either to consumers or in a business-to-business transaction:

27 **(a) Retail Store Sales**

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1 (i) **Product Labeling.** From the effective date, a warning will
2 be affixed to the packaging, labeling or directly on the product by McLaughlin or its agent, that
3 states:

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

9 (ii) **Point-of-Sale Warnings.** McLaughlin may perform its
10 warning obligations by ensuring that signs are posted at retail outlets in the State of California
11 where the products are sold. In order to avail itself of the point-of-sale option, McLaughlin shall
12 provide a written notice (via certified mail in the first quarter of each calendar year) to each retailer
13 or distributor to whom McLaughlin sells or transfers the products directly, which informs such
14 retailers or distributors that point-of-sale warnings are required at each retail location in the State
15 of California. McLaughlin shall include a copy of the warning signs and posting instructions with
16 such notice. Further, McLaughlin must receive and make available for Brimer's inspection, upon
17 request, a written commitment: (a) from each retailer to whom McLaughlin sells products directly
18 that said retailer will post the warning signs; and (b) from each distributor to whom McLaughlin
19 sells products directly that the distributor will transmit the point-of-sale warning notice and
20 instructions to its direct customers. Point-of-sale warnings shall be provided through one or more
21 signs posted in close proximity to the point of display of the products that states:

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

27 (b) **Mail Order Catalog and Internet Sales.** Defendant shall satisfy its
28 warning obligations for products that are sold by mail order catalog or from the Internet to
California residents, by providing a warning: (i) in the mail order catalog; (ii) on the website;
and/or (iii) with the product when it is shipped to an address in California. Warnings given in the
mail order catalog or on the website shall identify the specific product to which the warning

1 applies as further specified in Sections 2.1(b)(i), (ii) and/or (iii) as applicable:

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

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

9 Where it is impracticable to provide the warning on the same page and in the same location
10 as the display and/or description of the product, McLaughlin may utilize a designated symbol to
11 cross reference the applicable warning (designated symbol) and shall define the term "designated
12 symbol" with the following language on the inside of the front cover of the catalog or on the same
13 page as any order form for the product(s):

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

18 The designated symbol (shown on Exhibit B attached hereto) must appear on the same
19 page and in close proximity to the display and/or description of the product. On each page where
20 the designated symbol appears, McLaughlin must provide a header or footer directing the
21 consumer to the warning language and definition of the designated symbol.

22 If defendant elects to provide warnings in the mail order catalog, then the warnings must be
23 included in all catalogs offering to sell one or more products printed after July 16, 2007.

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

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

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

15 **WARNING:** Products identified on this page with the
16 following symbol use materials that contain
17 lead as colored decorations on their exterior, a
18 chemical known to the State of California to
19 cause birth defects and other reproductive
20 harm: ▼.

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

28 **WARNING:** The materials used on this product as exterior
decorations contain lead, a chemical known to

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the State of California to cause birth defects and other reproductive harm.

Alternatively, McLaughlin may place the following language on the packing slip or invoice and specifically identifying the product in lettering of the same size or larger as the description of the product:

WARNING: The materials used as colored decorations on the exterior of the following product(s) contain lead, a chemical known to the State of California to cause birth defects or other reproductive harm:

[list products for which warning is given].

The defendant 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.

2.2 Exceptions

The warning requirements set forth in Section 2.1 shall not apply to:

- (i) Any products shipped to a third party before the effective date; or
- (ii) Reformulated products (as defined in Section 2.3 below).

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 2.1: 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.

¹"Lip-and-Rim Area" is defined as the exterior top 20 millimeters of a hollowware food or beverage product.
STIPULATION AND [PROPOSED] ORDER RE: SETTLEMENT AGREEMENT CASE NO. 1-06-CV-071138

1 **2.4 Reformulation Commitment**

2 McLaughlin hereby commits that all products that it offers for sale in California after
3 September 1, 2007, shall qualify as reformulated products.

4 **3. MONETARY PAYMENTS**

5 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

6 The total settlement amount shall be \$1,000, which shall be paid by McLaughlin as set
7 forth herein. Pursuant to Health & Safety Code §25249.7(b), McLaughlin shall pay the \$1,000 in
8 civil penalties on or before July 16, 2007. Said payment shall be made payable to the "HIRST &
9 CHANLER LLP in Trust For Russell Brimer" and shall be delivered to plaintiff's counsel at the
10 following address:
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12 HIRST & CHANLER LLP
13 Attn: Proposition 65 Controller
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710-2565

17 **3.2 Apportionment of Penalties Received**

18 All penalty monies received shall be apportioned by Brimer in accordance with Health &
19 Safety Code §25192, with 75% of these funds remitted by Brimer to the State of California's
20 Office of Environmental Health Hazard Assessment and the remaining 25% of these penalty
21 monies retained by Brimer as provided by Health & Safety Code §25249.12(d). Brimer shall bear
22 all responsibility for apportioning and paying to the State of California the appropriate civil
23 penalties paid in accordance with this Section.
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25 **4. REIMBURSEMENT OF FEES AND COSTS**

26 The parties acknowledge that Brimer and his counsel offered to resolve this dispute
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STIPULATION AND [PROPOSED] ORDER RE: SETTLEMENT AGREEMENT CASE NO. 1-06-CV-071138

1 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
2 this fee issue to be resolved after the material terms of the agreement had been settled.
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4 McLaughlin then expressed a desire to resolve the fee and cost issue shortly after the other
5 settlement terms had been finalized. The parties then attempted to (and did) reach an accord on
6 the compensation due to Brimer and his counsel under the private attorney general doctrine
7 codified at California Code of Civil Procedure §1021.5 for all work performed through the Court's
8 approval of this agreement. Under the private attorney general doctrine, McLaughlin shall
9 reimburse Brimer and his counsel for fees and costs incurred as a result of investigating, bringing
10 this matter to McLaughlin's attention, litigating and negotiating a settlement in the public interest
11 and seeking the Court's approval of the settlement agreement. McLaughlin shall pay Brimer and
12 his counsel \$9,000 for all attorneys' fees, expert and investigation fees, litigation and related costs.
13
14 The payment shall be made payable to HIRST & CHANLER, LLP and shall be delivered on or
15 before July 16, 2007, at the following address:

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

22
23 **5. RELEASE OF ALL CLAIMS**

24 **5.1 Release of McLaughlin and Downstream Customers**

25 In further consideration of the promises and agreements herein contained, and for the
26 payments to be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and
27 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
28 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form
of legal action and releases all claims, including, without limitation, all actions, and causes of

1 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
2 losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees)
3 of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),
4 against McLaughlin and each of its downstream distributors, wholesalers, licensors, licensees,
5 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies,
6 corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
7 shareholders, agents, and employees, and sister and parent entities (collectively "releasees"). This
8 release is limited to those claims that arise under Proposition 65, as such claims relate to
9 McLaughlin's alleged failure to warn about exposures to or identification of the listed chemical
10 contained in the products.
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13 The parties further understand and agree that this release shall not extend upstream to any
14 entities that manufactured the products or any component parts thereof, or any distributors or
15 suppliers who sold the products or any component parts thereof to McLaughlin.
16

17 **5.2 McLaughlin's Release of Brimer**

18 McLaughlin waives any and all claims against Brimer, his attorneys and other
19 representatives, for any and all actions taken or statements made (or those that could have been
20 taken or made) by Brimer and his attorneys and other representatives, whether in the course of
21 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
22 and/or with respect to the products.
23

24 **6. COURT APPROVAL**

25 This Settlement Agreement is not effective until it is approved and entered by the Court
26 and shall be null and void if, for any reason, it is not approved and entered by the Court within one
27 year after it has been fully executed by all parties, in which event any monies that have been
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1 provided to plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, shall be
2 refunded within fifteen (15) days after receiving written notice from McLaughlin that the one-year
3 period has expired.

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5 **7. SEVERABILITY**

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

9
10 **8. ATTORNEYS' FEES**

11 In the event that, after Court approval: (1) McLaughlin or any third party seeks
12 modification of this Settlement Agreement pursuant to Section 14 below; or (2) Brimer takes
13 reasonable and necessary steps to enforce the terms of this Settlement Agreement, Brimer shall be
14 entitled to his reasonable attorneys' fees and costs pursuant to CCP §1021.5.

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16 **9. GOVERNING LAW**

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

23
24 **10. NOTICES**

25 Unless specified herein, all correspondence and notices required to be provided pursuant to
26 this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class,
27 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
28

1 other party at the following addresses:

2 To McLaughlin:

3 James Cai
4 SCHEIN & CAI LLP
5 100 Century Center Court, Suite 315
6 San Jose, CA 95112

7 To Brimer:

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

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

15 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

22 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

23 Brimer and McLaughlin agree to mutually employ their best efforts to support the entry of
24 this Agreement as a Settlement Agreement and obtain approval of the Settlement Agreement by
25 the Court in a timely manner. The parties acknowledge that, pursuant to Health & Safety Code
26 §25249.7, a noticed motion is required to obtain judicial approval of this Settlement Agreement.
27

1 Accordingly, the plaintiff agrees to file a Motion to Approve the Agreement (Motion).
 2 McLaughlin shall have no additional responsibility to plaintiff's counsel pursuant to Code of Civil
 3 Procedure §1021.5 or otherwise with regard to reimbursement of any fees and costs incurred with
 4 respect to the preparation and filing of the Motion or with regard to plaintiff's counsel appearing
 5 for a hearing thereon.
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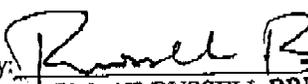
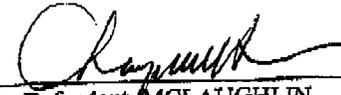
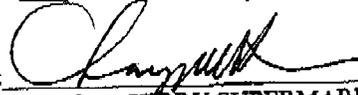
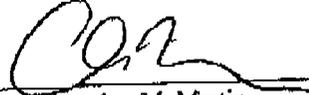
7 **14. MODIFICATION**

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

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

<p align="center">AGREED TO:</p> <p>Date: <u>7.3.07</u></p> <p>By: <u></u> Plaintiff, RUSSELL BRIMER</p>	<p align="center">AGREED TO:</p> <p>Date: <u>7-20/07</u></p> <p>By: <u></u> Defendant, MCLAUGHLIN SUPERMARKET</p>
	<p>Date: <u>7-20/07</u></p> <p>By: <u></u> Defendant, STORY SUPERMARKET</p>
<p align="center">APPROVED AS TO FORM:</p> <p>Date: <u>7-5-07</u> HIRST & CHANLER LLP</p> <p>By: <u></u> Christopher M. Martin Attorneys for Plaintiff RUSSELL BRIMER.</p>	<p align="center">APPROVED AS TO FORM:</p> <p>Date: <u>7/19/07</u> SCHEIN & CAI LLP</p> <p>By: <u></u> James Cai Attorneys for Defendants MCLAUGHLIN SUPERMARKET; STORY SUPERMARKET</p>

IT IS SO ORDERED.

Date: _____

Hon. _____
JUDGE OF THE SUPERIOR COURT

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Exhibit A

The products that are covered by this Settlement Agreement include, but are not limited to:

1. *Parka Glass 3 Pc. Container Set*
2. *Sport Drink, 8 850228 000403*
3. *Kimlan Soy Sauce, 0 79985 11055 4*
4. *Chinese Honey, 6 59924 00139 8*
5. *Master Soy Sauce, 4 710678 150230*
6. *Glass Container with Lid*
7. *Glass Container with Lid, Large, Crab, Green Lid*
8. *Glass Container with Lid, Small, Crab, Green Lid*
9. *Glass Container with Lid, Small, Crab, Orange Lid*
10. *Glass Bowl with Lid*

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Exhibit B

The designated symbol that McLaughlin will use to identify products containing the listed chemical which are sold through its catalogs or on its website is:

