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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE CITY AND COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION

12
13 RUSSELL BRIMER)
14 Plaintiff,)
15 v.)
16 HEARTLAND AMERICA; IMPORT)
17 SPECIALTIES, INC.; and DOES 1 through)
18 150,)
19 Defendants.)

Case No. CGC 06-449005

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer And Heartland America**

3 This Stipulation and [Proposed] Order Re: Consent Judgment (“Consent Judgment”) is
4 entered into by and between plaintiff Russell Brimer (hereinafter “Brimer” or “Plaintiff”) and
5 defendants, Heartland America and Import Specialties, Inc., (hereafter “Heartland” or
6 “Defendants”), with Brimer and Heartland collectively referred to as the “Parties.”

7 **1.2 Plaintiff**

8 Brimer is an individual residing in 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 products.

11 **1.3 Defendants**

12 Defendants both employ ten or more persons and are persons in the course of doing business
13 for purposes of Proposition 65.

14 **1.4 General Allegations**

15 Brimer alleges that Heartland has manufactured, distributed and/or sold in the State of
16 California certain glass and metal lamps containing lead. Lead is listed pursuant to the Safe
17 Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§25249.5 *et*
18 *seq.* (“Proposition 65”), as a chemical known to the State of California to cause birth defects and
19 other reproductive harm. Lead shall be referred to herein as the “Listed Chemical.”

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: glass and
22 metal lamps including, but not limited to, the products identified in Exhibit A to this Consent
23 Judgment. All such glass and metal lamps shall be referred to herein as the “Products.”

24 **1.6 Notices of Violation**

25 On or about November 23, 2005, Brimer served Heartland and various public enforcement
26 agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided
27 Heartland and such public enforcers with notice that alleged that Heartland was in violation of
28 California Health & Safety Code §25249.6 for failing to warn consumers and customers that the

1 Products that Heartland sold exposed users in California to the Listed Chemical.

2 **1.7 Complaint**

3 On January 31, 2006, Brimer, who is acting in the interest of the general public in California,
4 filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the Superior Court in
5 and for the City and County of San Francisco against Heartland America, Import Specialties, Inc.,
6 and Does 1 through 150, (*Brimer v. Heartland America*, CGC 06-449005) alleging violations of
7 Health & Safety Code §25249.6 based on the alleged exposures to the Listed Chemical contained in
8 Products sold by Heartland.

9 **1.8 No Admission**

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

18 **1.9 Consent to Jurisdiction**

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

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" shall mean December 6,
25 2006.

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

27 **2.1** After the Effective Date, Heartland shall not sell, ship or offer to be shipped for sale
28 in California Products containing the Listed Chemical unless such Products are sold or shipped with

1 the clear and reasonable warnings set out in Section 2.2 or comply with the Reformulation
2 Standards set forth in Section 2.3.

3 **2.2 Product Warnings**

4 **2.2.1 Clear and Reasonable Warnings.** This Section describes Heartland's
5 options for satisfying the warning obligations required by Section 2.1, depending, in part, on the
6 manner of sale:

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

9 **WARNING:** The materials used in the metal portions of this product
10 contain lead, a chemical known to the State of
11 California to cause birth defects and other reproductive
harm

12 A warning issued for Products pursuant to this Section shall be prominently placed with
13 such conspicuousness as compared with other words, statements, designs, or devices as to render it
14 likely to be read and understood by an ordinary individual under customary conditions before use or
15 purchase.

16 **OR**

17 (b) **Point-of-Sale Warnings.** Heartland may perform its warning
18 obligations by posting signs at its retail outlets in the State of California where the Products are sold.
19 Heartland must receive a written commitment from each retailer to whom Heartland sells Products
20 directly that it will post the warning signs. From the Effective Date, point-of-sale warnings shall be
21 provided through one or more signs posted in close proximity to the point of display of the Products
22 that state:

23 **WARNING:** The materials used in the metal portions of this
24 product contain lead, a chemical known to the State
25 of California to cause birth defects and other
reproductive harm.

26 A point-of-sale warning shall be prominently placed with such conspicuousness as compared
27 with other words, statements, designs, or devices as to render it likely to be read and understood by
28 an ordinary individual under customary conditions of use or purchase and shall be placed or written

1 in a manner such that the consumer understands to which *specific* Products the warning applies.

2 **OR**

3 **(c) Mail Order Catalog and Internet Sales.** Defendants shall satisfy
4 their warning obligations for Products that are sold by mail order catalog or from the internet to
5 California residents, by providing a warning: (a) in the mail order catalog and/or on the website; or
6 (b) with the Product when it is shipped to an address in California. Warnings given in the mail
7 order catalog or on the website shall identify the *specific* Product¹ to which the warning applies as
8 further specified in Sections 2.2.1(c)(i), (ii) and/or (iii) as applicable:

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

13 **WARNING:** The materials used in the metal portions of this product
14 contain lead, a chemical known to the State of
15 California to cause birth defects and other reproductive
harm.

16 Where it is impracticable to provide the warning on the same page and in the same location as the
17 display and/or description of the Product, Heartland shall provide the following language on the
18 inside of the front cover of the catalog or on the same page as any order form for the Product(s):

19 **WARNING:** The materials used in the metal portions of certain
20 products identified with this symbol [Designated
21 Symbol] and offered for sale in this catalog contain
lead, a chemical known to the State of California to
cause birth defects and other reproductive harm.

22 The Designated Symbol (shown on Exhibit A) must appear on the same page and in close
23 proximity to the display and/or description of the product. On each page where the Designated
24 Symbol appears, Heartland must provide a header or footer directing the consumer to the warning
25 language and definition of the Designated Symbol.

26 If Defendants elect to provide warnings in the mail order catalog, then the warnings must be
27

28 ¹ The *specific* identification must provide the common description most likely to identify the
Product to the consumer by product name, model number or UPC identification.

1 included in all catalogs sent to the printer after December 15, 2006, for all first, subsequent or
2 additional printings.

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

11 **WARNING:** The materials used in the metal portions of this product
12 contain lead, a chemical known to the State of
13 California to cause birth defects and other reproductive
14 harm.

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

18 **WARNING:** Products identified on this page with the following
19 symbol use materials in the metal portions that contain
20 lead, a chemical known to the State of California to
21 cause birth defects and other reproductive harm:
22 [show Designated Symbol]

23 (iii) **Package Insert or Label.** For all Products sold by catalog or
24 via the internet, a warning may be provided with the Product when it is shipped directly to an
25 individual in California, by either: (a) affixing the following warning language to the packaging,
26 labeling or directly to a specific Product;² (b) inserting a warning card measuring at least 4" x 6" in
27 the shipping carton which contains the following warning language;³ or (c) by placing the following

28 ² A warning statement or sticker placed on the bottom of the product packaging is deemed an
inadequate warning for purposes of this Consent Judgment.

³ If more than one product is in the shipping carton and the warning does not apply to all products in
that carton, then the warning card or slip shall be supplied in a manner which distinguishes between
the Products for which it is being given and any items to which it does not apply.

1 warning statement on the packing slip or customer invoice on the line directly below the description
2 of the Product on the packing slip or customer invoice:

3 **WARNING:** The materials used in the metal portions of this product
4 contain lead, a chemical known to the State of
5 California to cause birth defects and other reproductive
6 harm.

7 Alternatively, Heartland may place the following language on the packing slip or invoice and
8 specifically identifying the Product in lettering of the same size or larger as the description of the
9 Product:

10 **WARNING:** The materials used in the following product(s) contains
11 lead, a chemical known to the State of California to
12 cause birth defects or other reproductive harm: *[list*
13 *products for which warning is given].*

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

18 If a warning is given pursuant to this Section, it must be given in a conspicuous matter as to
19 render it likely to be read and understood by an ordinary individual.

20 **2.2.2 Exceptions**

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

- 22 (i) Any Products manufactured and shipped to a third party before the Effective
23 Date; or
- 24 (ii) Reformulated Products (as defined in Section 2.3 below).

25 **2.3 Reformulation Standards**

26 The following Products shall be deemed “Reformulated Products” and to comply with
27 Proposition 65 and be exempt from any Proposition 65 warning requirements under Sections 2.2:

28 Any product containing one tenth of one percent (0.1%) lead or less by weight in each material used
in the Products, *e.g.*, solder or came.

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1 **2.4 Reformulation Goal**

2 Heartland hereby commits to ensure that as many of its Products as is commercially
3 reasonable shall qualify as Reformulated Products, with the commitment that at least 50% of the
4 Products that it sells in California after June 30, 2007, and 80% of the products that it sells in
5 California after July 1, 2007, will be Reformulated Products as defined in Section 2.3.⁴

6 **3. MONETARY PAYMENTS**

7 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

8 The total amount of civil penalties shall be \$5,000, which shall be paid by or credited to
9 Heartland as set forth herein. Pursuant to Health & Safety Code §25249.7(b), Heartland shall pay
10 \$1,000 in civil penalties on or before December 15, 2006. The second payment of \$4,000 shall be
11 payable on or before July 31, 2007. The second payment shall be waived in the event that Heartland
12 certifies in writing under penalty of perjury with supporting facts or documentation, not later than
13 July 15, 2007, that it has complied with the Reformulation Commitment set forth in Section 2.4.⁵
14 Said payments shall be made payable to the “HIRST & CHANLER LLP in Trust for Russell Brimer”
15 and shall be delivered to plaintiff’s counsel at 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 Penalties Received**

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

27 _____

28 ⁴ The commitment provided for in this Section shall exclusively be enforced through Section 3.1 below.

⁵ Failure to submit such a timely certification shall be addressed through the second penalty payment provided for in this Section 3.1 and not be the basis for additional remedies or enforcement actions.

1 paid in accordance with this Section.

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

3 **4.1** 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. Heartland
6 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
7 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
8 Brimer and his counsel under the private attorney general doctrine codified at California Code of
9 Civil Procedure §1021.5 for all work performed through the Effective Date of this Consent
10 Judgment. Under the private attorney general doctrine, Heartland shall reimburse Brimer and his
11 counsel for fees and costs incurred as a result of investigating, bringing this matter to Heartland's
12 attention, litigating and negotiating a settlement in the public interest and seeking the Court's
13 approval of the settlement agreement. Heartland shall pay Brimer and his counsel \$23,000 for all
14 attorneys' fees, expert and investigation fees, litigation and related costs. The payment shall be
15 made payable to HIRST & CHANLER LLP and shall be delivered on or before December 15, 2006
16 at the following address:

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

22 **5. RELEASE OF ALL CLAIMS**

23 **5.1 Release of Heartland and Downstream Customers**

24 In further consideration of the promises and agreements herein contained, and for the
25 payments to be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and current
26 agents, representatives, attorneys, successors and/or assignees, and in the interest of the general
27 public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
28 action and releases all claims, including, without limitation, all actions, and causes of action, in law
or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any

1 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against
2 Heartland, Strokin LLC and each of Heartland's downstream distributors, wholesalers, licensors,
3 licensees, auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent
4 companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys,
5 representatives, shareholders, agents, and employees, and sister and parent entities (collectively
6 "Releasees"). This release is limited to those claims that arise under Proposition 65, as they relate
7 to Heartland's alleged failure to warn about exposures to or identification of the Listed Chemical
8 contained in the Products.

9 The Parties further understand and agree that this release shall not extend upstream to any
10 entities that manufactured the Products or any component parts thereof, or any distributors or
11 suppliers who sold the Products or any component parts thereof to Heartland.

12 **5.2 Heartland's Release of Brimer**

13 Heartland waives any and all claims against Brimer, his attorneys and other representatives,
14 for any and all actions taken or statements made by Brimer and his attorneys and other
15 representatives, whether in the course of investigating claims or otherwise seeking enforcement of
16 Proposition 65 against it in this matter, and/or with respect to the Products.

17 **6. COURT APPROVAL**

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

23 **7. SEVERABILITY**

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

27 **8. ATTORNEYS' FEES**

28 In the event that, after Court approval: (1) a dispute arises with respect to any provision of

1 this Consent Judgment; (2) any party or third party seeks modification of this Consent Judgment
2 pursuant to Section 14 below; or (3) Brimer takes reasonable and necessary steps to enforce the
3 terms of this Consent Judgment, Brimer shall be entitled to reasonable attorneys' fees and costs
4 pursuant to CCP §1021.5. If Brimer brings an unsuccessful action to enforce the terms of this
5 Consent Judgment in any court, Heartland shall be entitled to reasonable attorneys' fees and costs.

6 **9. GOVERNING LAW**

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

13 **10. NOTICES**

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

18 To Defendants:

19 Heartland America (or Import Specialties, Inc.)
20 c/o Lora E. Mitchell
21 FREDRIKSON & BYRON, P.A.
22 200 South Sixth Street, Suite 4000
23 Minneapolis, MN 55402

24 To Brimer:

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

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

1 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

8 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

9 Brimer and Heartland agree to mutually employ their best efforts to support the entry of this
10 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
11 timely manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a
12 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the
13 Plaintiff agrees to file a Motion to Approve the Agreement (“Motion). Heartland shall have no
14 additional responsibility to Plaintiff’s counsel pursuant to Code of Civil Procedure §1021.5 or
15 otherwise with regard to reimbursement of any fees and costs incurred with respect to the
16 preparation and filing of Motion or with regard to Plaintiff’s counsel appearing for a hearing
17 thereon.

18 **14. MODIFICATION**

19 This Consent Judgment may be modified only by: (1) written agreement of the Parties and
20 upon entry of a modified Consent Judgment by the Court thereon; or (2) motion of any Party as
21 provided by law and upon entry of a modified Consent Judgment by the Court. The Attorney
22 General shall be served with notice of any proposed modification to this Consent Judgment at least
23 fifteen (15) days in advance of its consideration by the Court.

24 \\\n25 \\\n26 \\\n27 \\\n28 \\\n

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.

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>6 AGREED TO:</p> <p>7 Date: <u>12-12-06</u></p> <p>8</p> <p>9 By:  10 Plaintiff Russell Brimer</p> | <p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Heartland America</p> |
| | <p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Import Specialties, Inc.</p> |
| <p>17 APPROVED AS TO FORM:</p> <p>18 Date: <u>12-12-2006</u></p> <p>19</p> <p>20 HIRST & CHANLER LLP</p> <p>21</p> <p>22 By:  23 Laralee S. Paras Attorneys for Plaintiff 24 RUSSELL BRIMER</p> | <p>APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>FREDRIKSON & BYRON, P.A.</p> <p>By: _____ Laura J. Miller Attorneys for Defendants, HEARTLAND AMERICA and IMPORT SPECIALTIES, INC.</p> |

25 **IT IS SO ORDERED.**

26 Date: _____

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JUDGE OF THE SUPERIOR COURT

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15. AUTHORIZATION

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

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Plaintiff Russell Brimer</p> | <p>AGREED TO:</p> <p>Date: <u>12/13/06</u></p> <p>By: <u>Sharon Huggatt</u> Defendant Heartland America</p> |
| <p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Plaintiff Russell Brimer</p> | <p>AGREED TO:</p> <p>Date: <u>12/13/06</u></p> <p>By: <u>Sharon Huggatt</u> Defendant Import Specialties, Inc.</p> |
| <p>APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HIRST & CHANLER LLP</p> <p>By: _____ Laralei S. Paras Attorneys for Plaintiff RUSSELL BRIMER</p> | <p>APPROVED AS TO FORM:</p> <p>Date: <u>12-13-06</u></p> <p>FREDRIKSON & BYRON, P.A.</p> <p>By: <u>Laurie J. Miller</u> Attorneys for Defendants, HEARTLAND AMERICA and IMPORT SPECIALTIES, INC.</p> |

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

Exhibit A

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1. Butter Fly Lamp, #WW22-29252