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HYLER ENTERPRISES, INC.

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION
16

17 RUSSELL BRIMER,
18 Plaintiff,

19 v.

20 HYLER ENTERPRISES, INC.; THE WHARF'S
21 GENERAL STORE and DOES 1 through 150,
22 Defendants.

No. CGC-06-449000

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer And Hyler Enterprises, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer
4 (hereinafter “Brimer” or “Plaintiff”) and defendant Hyler Enterprises, Inc. (hereafter “Hyler” or
5 “Defendant”), with Brimer and Hyler collectively referred to as the “Parties.” Upon entry of this
6 Consent Judgment, Brimer shall be deemed to have voluntarily dismissed his complaint in the
7 above-entitled action without prejudice as to defendant The Wharf’s General Store.

8 **1.2 Plaintiff**

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

12 **1.3 Defendant**

13 Hyler has employed ten or more persons and has been a person in the course of doing
14 business for purposes of Proposition 65.

15 **1.4 General Allegations**

16 Brimer alleges that Hyler has manufactured, distributed and/or sold in the State of
17 California certain (1) wine glasses and other glassware intended for the consumption of food or
18 beverages with colored artwork or designs on the exterior, containing lead; and (2) mugs and
19 other ceramic containers intended for the consumption of food or beverages with colored artwork
20 or designs on the exterior, containing lead. Lead is listed pursuant to the Safe Drinking Water
21 and Toxic Enforcement Act of 1986, California Health & Safety Code §§25249.5 *et seq.*
22 (“Proposition 65”), as a chemical known to the State of California to cause birth defects and
23 other reproductive harm. Lead shall be referred to herein as the “Listed Chemical.”

24 **1.5 Product Description**

25 The products that are covered by this Consent Judgment are defined as follows: (1) wine
26 glasses and other glassware intended for the consumption of food or beverages with colored
27 artwork or designs on the exterior; and (2) mugs and other ceramic containers intended for the
28 consumption of food or beverages with colored artwork or designs on the exterior, including, but

1 not limited to, the products identified in Exhibit A to this Consent Judgment. All such (1) wine
2 glasses and other glassware intended for the consumption of food or beverages with colored
3 artwork or designs on the exterior; and (2) mugs and other ceramic containers intended for the
4 consumption of food or beverages with colored artwork or designs on the exterior, shall be
5 referred to herein as the “Products.”

6 **1.6 Notices of Violation**

7 On or about November 23, 2005, Brimer served Hyler and various public enforcement
8 agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided
9 Hyler and such public enforcers with notice that alleged that Hyler was in violation of California
10 Health & Safety Code §25249.6 for failing to warn consumers and customers that the Products
11 that Hyler sold exposed users in California to the Listed Chemical.

12 **1.7 Complaint**

13 On January 1, 2006, Brimer, who is acting in the interest of the general public in
14 California, filed a complaint (hereafter referred to as the “Complaint” or the “Action”) in the
15 Superior Court in and for the City and County of San Francisco against Hyler Enterprises, Inc.
16 and Does 1 through 150 (*Brimer v. Hyler Enterprises, Inc.*, CGC-06-449000) alleging violations
17 of Health & Safety Code §25249.6 based on the alleged exposures to the Listed Chemical
18 contained in Products sold by Hyler.

19 **1.8 No Admission**

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

27 However, this Section shall not diminish or otherwise affect the obligations,
28 responsibilities and duties of Hyler under this Consent Judgment.

1 **2.2.2 Exceptions**

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

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

6 **2.3 Reformulation Standards**

7 The following Products shall be deemed “Reformulated Products,” and to comply with
8 Proposition 65 and be exempt from any Proposition 65 warning requirements under Sections 2.2.
9 If the Product is decorated in the Lip and Rim Area, it must also satisfy subsection 2.3.2(d) to be
10 considered a Reformulated Product.

11 For purposes of this section, the following definitions apply:

12 “Exterior Decorations” is defined as all colored artwork, designs
13 and/or markings on the exterior surface of the Products.

14 “Lip and Rim Area” is defined as the exterior top 20 millimeters of
15 a hollowware Glassware or Ceramicware Food/Beverage Product, as
16 defined by American Society of Testing and Materials Standard Test
17 Method C927-99.

18 “No Detectable lead or cadmium” shall mean that neither lead nor
19 cadmium is detected at a level above two one-hundredths of one percent
20 (0.02%) of lead or eight one-hundredths of one percent (0.08%) of
21 cadmium by weight, respectively, using a sample size of the materials in
22 question measuring approximately 50-100 mg and a test method of
23 sufficient sensitivity to establish a limit of quantitation of less than
24 200 ppm.⁴

25 _____
26 ⁴ If the decoration is tested after it is affixed to the Covered Product, the percentage of the Listed
27 Chemicals by weight must relate only to the decorating material and must not include any
28 quantity attributable to non-decorating material (*e.g.*, the glass substrate).

1 (a) **Decorating Material Content-Based Standard.** The Exterior
2 Decorations, exclusive of the Lip and Rim Area, must only utilize decorating materials that
3 contain six one-hundredths of one percent (0.06%) of lead by weight or less and forty-eight one-
4 hundredths of one percent (0.48%) of cadmium by weight or less, as measured either before or
5 after the material is fired onto (or otherwise affixed to) the Product, using EPA Test Method
6 3050B.⁵

7 (b) **Lip and Rim Area Exterior Decoration.** If the Products
8 contain Exterior Decorations in the Lip and Rim Area, any Exterior Decorations that extend into
9 the Lip and Rim Area must only utilize decorating materials that contain No Detectable lead or
10 cadmium.

11 **2.4 Reformulation Goal**

12 Hyler hereby commits to ensure that all products that it offers for sale in California after
13 December 31, 2006, shall qualify as Reformulated Products.

14 **3. MONETARY PAYMENTS**

15 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

16 The total settlement amount shall be \$1,000, which shall be paid or credited to Hyler as
17 set forth herein. Hyler shall receive a credit of \$500 against the penalty amount in light of its
18 prompt cooperation with Brimer in resolving this matter. Pursuant to Health & Safety Code
19 §25249.7(b), Hyler shall pay \$500 on or before July 24, 2006. Said payment shall be made
20 payable to the “HIRST & CHANLER LLP in Trust For Russell Brimer” and shall be delivered to
21 plaintiff’s counsel at the following address:

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

26 ⁵ If the decoration is tested after it is affixed to the Covered Product, the percentage of the Listed
27 Chemicals by weight must relate only to the decorating material and must not include any
28 quantity attributable to non-decorating material (e.g., the ceramicware substrate).

1 **3.2 Apportionment of Penalties Received**

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

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

9 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
10 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
11 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
12 Hyler then expressed a desire to resolve the fee and cost issue shortly after the other settlement
13 terms had been finalized. The Parties then attempted to (and did) reach an accord on the
14 compensation due to Brimer and his counsel under the private attorney general doctrine codified
15 at California Code of Civil Procedure §1021.5 for all work performed through the Effective Date
16 of this Consent Judgment. Under the private attorney general doctrine, Hyler shall reimburse
17 Brimer and his counsel for fees and costs incurred as a result of investigating, bringing this
18 matter to Hyler’s attention, litigating and negotiating a settlement in the public interest and
19 seeking the Court’s approval of the settlement agreement. Hyler shall pay Brimer and his
20 counsel \$9,500 for all attorneys’ fees, expert and investigation fees, litigation and related costs.
21 The payment shall be made payable to HIRST & CHANLER LLP and shall be delivered on or
22 before July 24, 2006 at the following address:

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

26 **5. RELEASE OF ALL CLAIMS**

27 **5.1 Release of Hyler and Downstream Customers**

28 In further consideration of the promises and agreements herein contained, and for the

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

15 The Parties further understand and agree that this release shall not extend upstream to any
16 entities that manufactured the Products or any component parts thereof, or any distributors or
17 suppliers who sold the Products or any component parts thereof to Hyler.

18 **5.2 Hyler's Release of Brimer**

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

24 **6. COVENANT NOT TO SUE**

25 Plaintiff, on behalf of itself, its attorneys, agents, and its assigns, covenants not to sue nor
26 to institute or participate in, directly or indirectly, any form of legal action, against Hyler
27 concerning the Products. Provided however, Plaintiff shall remain free to institute any form of
28 legal action to enforce the provisions of this Agreement.

1 **7. COURT APPROVAL**

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

7 **8. SEVERABILITY**

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

11 **9. ATTORNEYS' FEES**

12 In the event that, after Court approval: (1) a dispute arises with respect to any provision
13 of this Consent Judgment; (2) any party or third party seeks modification of this Consent
14 Judgment pursuant to Section 15 below; or (3) Brimer takes reasonable and necessary steps to
15 enforce the terms of this Consent Judgment, Brimer shall be entitled to reasonable attorneys' fees
16 and costs pursuant to CCP §1021.5.

17 **10. GOVERNING LAW**

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

24 **11. NOTICES**

25 Unless specified herein, all correspondence and notices required to be provided pursuant
26 to this Consent Judgment 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
28 the other party at the following addresses:

1 To Hyler:

2 Sarah Esmaili
3 BINGHAM MCCUTCHEN LLP
4 Three Embarcadero Center
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 which
16 shall be deemed an original, and all of which, when taken together, shall constitute one and the
17 same document.

18 **13. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

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

21 **14. ADDITIONAL POST EXECUTION ACTIVITIES**

22 Brimer and Hyler agree to mutually employ their best efforts to support the entry of this
23 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in
24 a timely manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a
25 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly,
26 the Parties agree to file a Joint Motion to Approve the Agreement (“Joint Motion”), the first draft
27 of which Hyler’s counsel shall prepare, within a reasonable period of time after the Execution
28 Date (*i.e.*, not to exceed thirty (30) days unless otherwise agreed to by the Parties’ counsel based
on unanticipated circumstances). Hyler shall have no additional responsibility to Plaintiff’s
counsel pursuant to Code of Civil Procedure §1021.5 or otherwise with regard to reimbursement
of any fees and costs incurred with respect to the preparation and filing of the Joint Motion and
its supporting declaration or with regard to Plaintiff’s counsel appearing for a hearing thereon.

1 **15. MODIFICATION**

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

7 **16. AUTHORIZATION**

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

11 **AGREED TO:**

12 Date: _____

13
14 By: _____
15 Plaintiff RUSSELL BRIMER

11 **AGREED TO:**

12 Date: July 14, 2006

13
14 By: [Signature]
15 Defendant HYLER ENTERPRISES, INC.

17 **APPROVED AS TO FORM:**

18 Date: _____

19
20 HIRST & CHANLER LLP

21
22 By: _____
23 Keith G. Adams
24 Attorneys for Plaintiff
25 RUSSELL BRIMER

17 **APPROVED AS TO FORM:**

18 Date: _____

19
20 BINGHAM MCCUTCHEN LLP

21
22 By: _____
23 Sarah Esmaili
24 Attorneys for Defendant
25 HYLER ENTERPRISES, INC.

26 **IT IS SO ORDERED.**

27 Date: _____

28 _____
JUDGE OF THE SUPERIOR COURT

1 **15. MODIFICATION**

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

7 **16. AUTHORIZATION**

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

11 **AGREED TO:**

AGREED TO:

12 Date: 7.19.06

Date: _____

14 By: [Signature]
15 Plaintiff RUSSELL BRIMER

By: _____
Defendant HYLER ENTERPRISES, INC.

17 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

18 Date: 7.19.06

Date: July 17, 2006

20 HIRST & CHANLER LLP

BINGHAM MCCUTCHEN LLP

21 By: [Signature]
22 Keith G. Adams
23 Attorneys for Plaintiff
24 RUSSELL BRIMER

By: [Signature]
Sarah Esmaili
Attorneys for Defendant
HYLER ENTERPRISES, INC.

26 **IT IS SO ORDERED.**

27 Date: _____

JUDGE OF THE SUPERIOR COURT

Exhibit A

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- 1. Mug, Wharf's General Store, #55676
- 2. Wine Glass, Wharf's General Store Logo, #47214

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Exhibit B

The designated symbol that Hyler will use to identify Products containing the Listed Chemical which are sold through its catalogs or on its website is:

