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17 KONOCTI HARBOR RESORT & SPA

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 FOR THE CITY AND COUNTY OF SAN FRANCISCO
20 UNLIMITED CIVIL JURISDICTION

21 RUSSELL BRIMER

22 Plaintiff,
23 v.

24 KONOCTI HARBOR RESORT & SPA; and
25 DOES 1 through 150, inclusive,

26 Defendants.

Case No. CGC 06-450576

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer And Konocti Harbor Resort & Spa**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereinafter
4 "Brimer" or "Plaintiff") and defendant Konocti Harbor Resort & Spa, (hereafter "Konocti" or
5 "Defendant"), with Brimer and Konocti collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

13 **1.4 General Allegations**

14 Brimer alleges that Konocti has manufactured, distributed and/or sold in the State of
15 California certain shooters and other glassware intended for the consumption of food or beverages
16 with colored artwork or designs (containing lead) on the exterior. Lead is listed pursuant to the
17 Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code
18 §§25249.5 et seq. ("Proposition 65"), as a chemical known to the State of California to cause birth
19 defects and 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: shooters
22 and other glassware intended for the consumption of food or beverages with colored artwork or
23 designs (containing lead) on the exterior limited to the products identified in Exhibit A to this
24 Consent Judgment. All such shooters and other glassware intended for the consumption of food or
25 beverages with colored artwork or designs (containing lead) on the exterior shall be referred to
26 herein as the "Products."

27 **1.6 Notices of Violation**

28 On or about January 9, 2006, Brimer served Konocti and various public enforcement

1 agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that provided
2 Konocti and such public enforcers with notice that alleged that Konocti was in violation of
3 California Health & Safety Code §25249.6 for failing to warn consumers and customers that the
4 Products that Konocti sold exposed users in California to the Listed Chemical.

5 **1.7 Complaint**

6 On March 23, 2006, Brimer, who is acting in the interest of the general public in
7 California, filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the
8 Superior Court in and for the City and County of San Francisco against Konocti Harbor Resort &
9 Spa and Does 1 through 150, (Brimer v. Konocti Harbor Resort & Spa, San Francisco Superior
10 Court Case No. CGC 06-450576) alleging violations of Health & Safety Code §25249.6 based on
11 the alleged exposures to the Listed Chemical contained in the Products sold by Konocti.

12 **1.8 No Admission**

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

21 **1.9 Consent to Jurisdiction**

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

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term "Effective Date" shall mean January 1,
28 2007.

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

2 **2.1** After the Effective Date, Konocti shall not sell, ship or offer to be shipped for sale in
3 California Products containing the Listed Chemical unless such Products are sold or shipped with
4 the clear and reasonable warnings set out in Section 2.2 or comply with the Reformulation
5 Standards set forth in Section 2.3.

6 Any warning issued for Products pursuant to this Section 2.2 below shall be prominently
7 placed with such conspicuousness as compared with other words, statements, designs, or devices
8 as to render it likely to be read and understood by an ordinary individual under customary
9 conditions before purchase or, for Products shipped directly to an individual in California, before
10 use. Any warning issued pursuant to Section 2.2 shall be provided in a manner such that the
11 consumer or user understands to which specific product the warning applies, so as to minimize if
12 not eliminate the chance of an overwarning situation.

13 **2.2 Product Warnings**

14 **2.2.1** Clear and Reasonable Warnings. This Section describes Konocti's options
15 for satisfying the warning obligations required by Section 2.1, depending, in part, on the manner of
16 sale:

17 **(a) Retail Store Sales**

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

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

23 **(ii) Point-of-Sale Warnings.** Konocti may perform its warning
24 obligations by insuring to the greatest extent possible that signs are posted at retail outlets in the
25 State of California where the Products are sold. Konocti must receive a written commitment from
26 each retailer to whom Konocti sells Products directly that it will post the warning signs.

27 Point-of-sale warnings shall be provided through one or more signs posted in close proximity to
28 the point of display of the Products that state:

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

4 A point-of-sale warning shall be provided in a manner such that the consumer understands
5 to which specific Products the warning applies.

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

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

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

19 Where it is impracticable to provide the warning on the same page and in the same location
20 as the display and/or description of the Product, Konocti may utilize a designated symbol to cross
21 reference the applicable warning ("Designated Symbol") and shall define the term Designated
22 Symbol with the following language on the inside of the front cover of the catalog or on the same
23 page as any order form for the Product(s):

24 **WARNING:** The materials used as colored decorations on
25 the exterior of certain products identified with
26 this symbol [Designated Symbol] and offered
27 for sale in this catalog contain lead, a
28 chemical known to the State of California to
 cause birth defects and other reproductive
 harm.

1 The Designated Symbol (shown on Exhibit A attached hereto) must appear on the same
2 page and in close proximity to the display and/or description of the Product. On each page where
3 the Designated Symbol appears, Konocti must provide a header or footer directing the consumer to
4 the warning language and definition of the Designated Symbol.

5 If Defendant elects to provide warnings in the mail order catalog, then the warnings must
6 be included in all catalogs offering to sell one or more Products printed after January 1, 2007.

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

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

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

21 **WARNING:** Products identified on this page with the
22 following symbol use materials that contain
23 lead as colored decorations on their exterior, a
24 chemical known to the State of California to
cause birth defects and other reproductive
harm: [show Designated Symbol]

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

1 the shipping carton which contains the following warning language; or (c) by placing the
2 following warning statement on the packing slip or customer invoice on the line directly below the
3 description of the Product on the packing slip or customer invoice:

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

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

11 **WARNING:** The materials used as colored decorations on the exterior
12 of the following product(s) contain lead, a chemical known
13 to the State of California to cause birth defects or other
14 reproductive harm: [*list products for which warning is*
15 *given*].

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

20 **2.2.2 Exceptions**

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

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

24 **2.3 Reformulation Standards**

25 The following Products shall be deemed "Reformulated Products" and to comply with
26 Proposition 65 and be exempt from any Proposition 65 warning requirements under Sections 2.2:
27 The products must only utilize decorating materials that contain six one-hundredths of one percent
28 (0.06%) or less of lead by weight; and there must be no detectable lead in either the lip-and-rim
area.

29 **2.3 Reformulation Standards**

30 The following products shall be deemed "Reformulated Products" and to comply with
31 Proposition 65 and be exempt from any Proposition 65 warning requirements under Sections 2.2:

1 The products must only utilize decorating materials that contain six one-hundredths of one percent
2 (0.06%) or less of lead by weight; and there must be no detectable lead in either the lip-and-rim
3 area.

4 **2.4 Reformulation Commitment**

5 Konocti hereby commits that all Products that it offers for sale in California after April 27,
6 2007 shall qualify as Reformulated Products.

7 **3. MONETARY PAYMENTS**

8 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

9 The total settlement amount shall be \$1,000, which shall be paid by Konocti as set forth
10 herein. Pursuant to Health & Safety Code §25249.7(b), Konocti shall pay the \$1,000 in civil
11 penalties on or before December 29, 2006. Said payments shall be made payable to the "HIRST &
12 CHANLER LLP in Trust For Russell Brimer" and shall be delivered to plaintiff's counsel at the
13 following address:

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

19 **3.2 Apportionment of Penalties Received**

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

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

27 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
28 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
this fee issue to be resolved after the material terms of the agreement had been settled. Konocti
then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had

1 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
2 to Brimer and his counsel under the private attorney general doctrine codified at California Code
3 of Civil Procedure §1021.5 for all work performed through the Court's approval of this agreement.
4 Under the private attorney general doctrine, Konocti shall reimburse Brimer and his counsel for
5 fees and costs incurred as a result of investigating, bringing this matter to Konocti's attention,
6 litigating and negotiating a settlement in the public interest and seeking the Court's approval of the
7 settlement agreement. Konocti shall pay Brimer and his counsel \$19,000 for all attorneys' fees,
8 expert and investigation fees, litigation and related costs. The first payment, of \$6,000, shall be
9 made payable to HIRST & CHANLER LLP and shall be delivered on or before December 29,
10 2006. The second payment, of \$7,000, shall be made payable to HIRST & CHANLER LLP and
11 shall be delivered on or before January 26, 2007. The third payment, of \$6,000, shall be made
12 payable to HIRST & CHANLER LLP and shall be delivered on or before February 23, 2006. All
13 payments shall be sent to the following address:

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

17 **5. RELEASE OF ALL CLAIMS**

18 **5.1 Release of Konocti and Downstream Customers**

19 In further consideration of the promises and agreements herein contained, and for the
20 payments to be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and
21 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
22 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form
23 of legal action and releases all claims, including, without limitation, all actions, and causes of
24 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
25 losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees)
26 of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"),
27 against Konocti and each of its downstream distributors, wholesalers, licensors, licensees,
28 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies,

1 corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
2 shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This
3 release is limited to those claims that arise under Proposition 65, as such claims relate to Konocti's
4 alleged failure to warn about exposures to or identification of the Listed Chemical contained in the
5 Products.

6 The Parties further understand and agree that this release shall not extend upstream to any
7 entities that manufactured the Products or any component parts thereof, or any distributors or
8 suppliers who sold the Products or any component parts thereof to Konocti.

9 **5.2 Konocti's Release of Brimer**

10 Konocti waives any and all claims against Brimer, his attorneys and other representatives,
11 for any and all actions taken or statements made (or those that could have been taken or made) by
12 Brimer and his attorneys and other representatives, whether in the course of investigating claims or
13 otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to
14 the Products.

15 **6. COURT APPROVAL**

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

22 **7. SEVERABILITY**

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

26 **8. ATTORNEYS' FEES**

27 In the event that, after Court approval: (1) a dispute arises with respect to any provision of
28 this Consent Judgment; (2) Konocti or any third party seeks modification of this Consent

1 Judgment pursuant to Section 14 below; or (3) Brimer takes reasonable and necessary steps to
2 enforce the terms of this Consent Judgment, Brimer shall be entitled to his reasonable attorneys'
3 fees and costs pursuant to CCP §1021.5.

4 **9. GOVERNING LAW**

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

11 **10. NOTICES**

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

16 To Konocti:

17 Konocti Harbor Resort & Spa
18 c/o Peter P. Machi, Attorney at Law
19 335 West Portal Avenue
20 San Francisco, CA 94127-1411

21 To Brimer:

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

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

11. COUNTERPARTS; FACSIMILE SIGNATURES

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

1 same document.

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

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

5 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

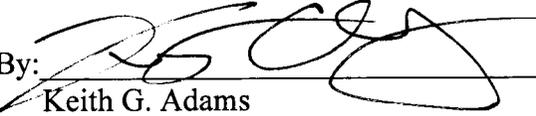
6 Brimer and Konocti agree to mutually employ their best efforts to support the entry of this
7 Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
8 timely manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a
9 noticed motion is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

15 **14. MODIFICATION**

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

1 **15. AUTHORIZATION**

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

<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>12-14-06</u></p> <p>By: <u></u> Plaintiff, Russell Brimer</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Konocti Harbor Resort & Spa</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: <u>12/14/06</u></p> <p>HIRST & CHANLER LLP</p> <p>By: <u></u> Keith G. Adams Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>PETER P. MACHI, ATTORNEY AT LAW</p> <p>By: _____ Peter P. Machi Attorneys for Defendant KONOCTI HARBOR RESORT & SPA</p>

20 **IT IS SO ORDERED.**

21 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 align="center">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Plaintiff, Russell Brimer</p>	<p align="center">AGREED TO:</p> <p>Date: <u>12/15/06</u></p> <p>By: <u>Richard L. Menee</u> Defendant Konocti Harbor Resort & Spa</p>
<p align="center">APPROVED AS TO FORM:</p> <p>Date: <u>12/14/06</u></p> <p>HIRST & CHANLER LLP</p> <p>By: <u>[Signature]</u> Keith G. Adams Attorneys for Plaintiff RUSSELL BRIMER</p>	<p align="center">APPROVED AS TO FORM:</p> <p>Date: <u>12/15/06</u></p> <p>PETER P. MACHI, ATTORNEY AT LAW</p> <p>By: <u>[Signature]</u> Peter P. Machi Attorneys for Defendant KONOCTI HARBOR RESORT & SPA</p>

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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Exhibit A

1. Konocti Harbor Resort & Spa “Classic Rock Café” Shooter

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Exhibit B

The Designated Symbol that Konocti will use to identify Products containing the Listed Chemical which are sold through its catalogs or on its website is:

