

1 George W. Dowell, IV, State Bar No. 234759
2 D. Joshua Voorhees, State Bar No. 241436
3 HIRST & CHANLER LLP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 RUSSELL BRIMER

11 William R. Warhurst, State Bar No. 95551
12 HANNIG LAW FIRM LLP
13 2991 El Camino Real
14 Redwood City, CA 94061
15 Telephone: (650) 482-3040
16 Facsimile: (650) 482-2820

17 Attorneys for Defendant
18 ARTE ÍTLAICA, LTD.

19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER

Plaintiff,

v.

ARTE ITALICA, LTD.; and DOES 1 through
150, inclusive,

Defendants.

Case No. CGC 06-453879

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer And Arte Italica, Ltd.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereinafter
4 "Brimer" or "Plaintiff") and defendant Arte Italica, Ltd., (hereafter "Arte Italica" or "Defendant"),
5 with Brimer and Arte Italica 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 Arte Italica employs ten or more persons and is a person in the course of doing business
12 for purposes of Proposition 65.

13 **1.4 General Allegations**

14 Brimer alleges that Arte Italica has manufactured, distributed and/or sold in the State of
15 California certain cereal bowls and other ceramic containers intended for the consumption of food
16 or beverages with pewter that contains lead. Lead is listed pursuant to the Safe Drinking Water
17 and Toxic Enforcement Act of 1986, California Health & Safety Code §§25249.5 et seq.
18 ("Proposition 65"), as a chemical known to the State of California to cause birth defects and other
19 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: cereal
22 bowls and other ceramic containers intended for the consumption of food or beverages with
23 pewter containing lead including, but not limited to, the Pewter and Ceramic Bowl identified in
24 Exhibit A to this Consent Judgment. All such cereal bowls and other ceramic containers intended
25 for the consumption of food or beverages with pewter containing lead shall be referred to herein as
26 the "Products."

27 **1.6 Notices of Violation**

28 On or about January 13, 2006, Brimer served Arte Italica and various public enforcement

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

5 **1.7 Complaint**

6 On July 6, 2006, Brimer, who is acting in the interest of the general public in California,
7 filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the Superior Court
8 in and for the County of San Francisco against Arte Italica and Does 1 through 150, (Brimer v.
9 Arte Italica, Case No. CGC 06-453879) alleging violations of Health & Safety Code §25249.6
10 based on the alleged exposures to the Listed Chemical contained in the Products sold by Arte
11 Italica.

12 **1.8 No Admission**

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

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term "Effective Date" shall mean September 30, 2006.

28 ///

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

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

11 **2.2 Product Warnings**

12 **2.2.1** Clear and Reasonable Warnings. This Section describes Arte Italica’s
13 options for satisfying the warning obligations required by Section 2.1, depending, in part, on the
14 manner of sale:

15 **(a) Retail Store Sales**

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

19 **WARNING:** The pewter used on this product contains lead, a
20 chemical known to the State of California to
cause birth defects and other reproductive harm.

21 **(ii) Point-of-Sale Warnings.** Arte Italica may perform its

22 warning obligations by insuring to the greatest extent possible that signs are posted at retail outlets
23 in the State of California where the Products are sold. Arte Italica must receive a written
24 commitment from each retailer to whom Arte Italica sells Products directly that it will post the
25 warning signs. Point-of-sale warnings shall be provided through one or more signs posted in close
26 proximity to the point of display of the Products that state:

27 ///

28 ///

1 **WARNING:** The pewter used on this product contains lead, a
2 chemical known to the State of California to
 cause birth defects and other reproductive harm.

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

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

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

15 **WARNING:** The pewter used on this product contains lead, a
16 chemical known to the State of California to
 cause birth defects and other reproductive harm.

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

22 **WARNING:** Products identified with this symbol ▼ and
23 offered for sale in this catalog contain lead, a
24 chemical known to the State of California to
 cause birth defects and other reproductive
 harm.

25 The Designated Symbol (shown on Exhibit B attached hereto) must appear on the same
26 page and in close proximity to the display and/or description of the Product. On each page where
27 the Designated Symbol appears, Arte Italica must provide a header or footer directing the
28 consumer to the warning language and definition of the Designated Symbol.

1 If Defendant elects to provide warnings in the mail order catalog, then the warnings must
2 be included in all catalogs offering to sell one or more Products printed after August 15, 2006.

3 (ii) **Internet Web Sites and Pages.** A warning may be given
4 in conjunction with the sale of the Product via the internet, provided it appears either: (a) on the
5 same web page on which the Product is displayed; (b) on the same web page as the order form for
6 the 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
9 display, description, or price of the Product for which it is given in the same type size or larger as
10 the product description text:

11 **WARNING:** The pewter used on this product contains lead, a
12 chemical known to the State of California to
cause birth defects and other reproductive harm.

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

16 **WARNING:** Products identified on this page with the
17 following symbol use pewter that contains
18 lead, a chemical known to the State of
California to cause birth defects and other
reproductive harm: ▼

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

26 **WARNING:** The pewter used on this product contains
27 lead, a chemical known to the State of
28 California to cause birth defects and other
reproductive harm.

1 Alternatively, Arte Italica may place the following language on the packing slip or
2 invoice and specifically identifying the Product in lettering of the same size or larger as the
3 description of the Product:

4 **WARNING:** The pewter used on the following product(s)
5 contains lead, a chemical known to the State
6 of California to cause birth defects or other
 reproductive harm: [*list products for which*
 warning is given].

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

11 **2.2.2 Exceptions**

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

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

15 **2.3 Reformulation Standards**

16 The following Reformulated Products shall be deemed to comply with Proposition 65 and
17 be exempt from any Proposition 65 warning requirements under Sections 2.2:

18 **2.3.1 Leach Test Based Standard.** A Ceramicware Food/Beverage Product that
19 produces a test result no higher than 0.1 ppm of lead as outlined in ASTM method C738 is a
20 "Reformulated Product."

21 **2.3.2 Products with only pewter shall be made with pewter that has No**
22 **Detectable Lead.**

23 "No Detectable Lead" shall mean that lead is not detected at a level above two one-
24 hundredths of one percent (0.02%) of lead by weight, using a test method of sufficient sensitivity
25 to establish a limit of quantization of less than 200 ppm.

26 **2.4 Reformulation Commitment**

27 Arte Italica hereby commits that all Products that it offers for sale in California after
28 February 1, 2007, shall qualify as Reformulated Products.

1 **3. MONETARY PAYMENTS**

2 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

3 Pursuant to Health & Safety Code §25249.7(b), Arte Italice shall pay \$20,000 in civil
4 penalties in two installments. The first payment of \$10,000 shall be made on or before September
5 8, 2006. The second payment of \$10,000 shall be payable February 1, 2007. The second payment
6 shall be waived in the event that Arte Italice certifies in writing under penalty of perjury with
7 supporting facts and documentation, not later than January 15, 2007, that it has complied with the
8 Reformulation Commitment set forth in Section 2.4. Said payment shall be made payable to the
9 "HIRST & CHANLER LLP in Trust For Russell Brimer" and shall be delivered to plaintiff's
10 counsel at the following address:

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

14 **3.2 Apportionment of Penalties Received**

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

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

22 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
23 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
24 this fee issue to be resolved after the material terms of the agreement had been settled. Arte Italice
25 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
26 had been finalized. The Parties then attempted to (and did) reach an accord on the compensation
27 due to Brimer and his counsel under the private attorney general doctrine codified at California
28 Code of Civil Procedure §1021.5 for all work performed through the Court's approval of this

1 agreement. Under the private attorney general doctrine, Arte Italica shall reimburse Brimer and
2 his counsel for fees and costs incurred as a result of investigating, bringing this matter to Arte
3 Italica's attention, litigating and negotiating a settlement in the public interest and seeking the
4 Court's approval of the settlement agreement. Arte Italica shall pay Brimer and his counsel
5 \$34,500 for all attorneys' fees, expert and investigation fees, litigation and related costs. The
6 payment shall be made payable to HIRST & CHANLER LLP and shall be delivered on or before
7 September 15, 2006, at the following address:

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

11 **5. RELEASE OF ALL CLAIMS**

12 **5.1 Release of Arte Italica and Downstream Customers**

13 In further consideration of the promises and agreements herein contained, and for the payments to
14 be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and current agents,
15 representatives, attorneys, successors and/or assignees, and in the interest of the general public,
16 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
17 and releases all claims, including, without limitation, all actions, and causes of action, in law or in
18 equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses
19 (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature
20 whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Arte
21 Italica and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers,
22 retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate
23 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
24 shareholders, agents, and employees, and sister and parent entities (collectively "Releasees").
25 This release is limited to those claims that arise under Proposition 65, as such claims relate to Arte
26 Italica's alleged failure to warn about exposures to or identification of the Listed Chemical
27 contained in the Products.

28 The Parties further understand and agree that this release shall not extend upstream to any entities

1 that manufactured the Products or any component parts thereof, or any distributors or suppliers
2 who sold the Products or any component parts thereof to Arte Italica.

3 **5.2 Arte Italica's Release of Brimer**

4 Arte Italica waives any and all claims against Brimer, his attorneys and other
5 representatives, for any and all actions taken or statements made (or those that could have been
6 taken or made) by Brimer and his attorneys and other representatives, whether in the course of
7 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
8 and/or with respect to the Products.

9 **6. COURT APPROVAL**

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

16 **7. SEVERABILITY**

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

20 **8. ATTORNEYS' FEES**

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

26 **9. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of
28 California and apply within the State of California. In the event that Proposition 65 is repealed or

1 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Arte
2 Italica shall provide written notice to Brimer of any asserted change in the law, and shall have no
3 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
4 Products are so affected.

5 **10. NOTICES**

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

10 To Arte Italica:

11 Earl Skidmore
12 Arte Italica
13 362 5th Avenue, Suite 601
14 New York, NY 10001

15 To Brimer:

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

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

23 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

13. ADDITIONAL POST EXECUTION ACTIVITIES

Brimer and Arte Italica agree to mutually employ their best efforts to support the entry of

1 this Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court
2 in a timely manner. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a
3 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the
4 Parties agree to file a Joint Motion to Approve the Agreement ("Joint Motion"), the first draft of
5 which Arte Italica's counsel shall prepare, within a reasonable period of time after the Execution
6 Date (i.e., not to exceed thirty (30) days unless otherwise agreed to by the Parties' counsel based
7 on unanticipated circumstances). Arte Italica shall have no additional responsibility to Plaintiff's
8 counsel pursuant to Code of Civil Procedure §1021.5 or otherwise with regard to reimbursement
9 of any fees and costs incurred with respect to the preparation and filing of the Joint Motion and its
10 supporting declaration or with regard to Plaintiff's counsel appearing for a hearing thereon.

11 **14. MODIFICATION**

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

17 ///

18 ///

19 ///

20

21

22

23

24

25

26

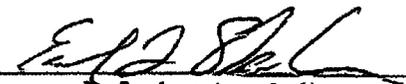
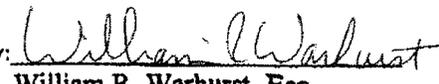
27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Plaintiff Russell Brimer</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>9/7/06</u></p> <p>By:  Defendant Arte Italica</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HIRST & CHANLER LLP</p> <p>By: _____ George W. Dowell, IV, Esq. Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: <u>9/12/06</u></p> <p>HANNIG LAW FIRM LLP</p> <p>By:  William R. Warhurst, Esq. Attorneys for Defendant ARTE ITALICA, INC.</p>

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 style="text-align: center;">AGREED TO:</p> <p>Date: <u>9-15-06</u></p> <p>By: <u></u> Plaintiff Russell Brimer</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Arte Italica</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: <u>September 12, 2006</u></p> <p>HIRST & CHANLER LLP</p> <p>By: <u></u> George W. Dowell, IV, Esq. Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p>HANNIG LAW FIRM LLP</p> <p>By: _____ William R. Warhurst, Esq. Attorneys for Defendant ARTE ITALICA, INC.</p>

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit A

<u>Exemplar Product</u>
Pewter and Ceramic Bowl, 7" (P5115.25; #Arti-P5115)