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WING HOP FUNG GINSENG, INC.

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF LOS ANGELES
15 UNLIMITED CIVIL JURISDICTION
16

17
18 RUSSELL BRIMER

19 Plaintiff,

20 v.

21 WING HOP FUNG GINSENG, INC.; and
DOES 1 through 150, inclusive,

22 Defendants.

Case No. BC358277

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

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Wing Hop Fung Ginseng, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer
4 (hereinafter "Brimer" or "Plaintiff") and defendant Wing Hop Fung Ginseng, Inc., (hereafter
5 "Wing Hop" or "Defendant"), with Brimer and Wing Hop collectively referred to as the
6 "Parties."

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

14 **1.4 General Allegations**

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

22 **1.5 Product Description**

23 The products that are covered by this Consent Judgment are defined as follows: certain
24 bowls, plates and other ceramic containers intended for the consumption of food or beverages
25 with colored artwork or designs on the exterior (containing lead) including, but not limited to,
26 the products identified in Exhibit A to this Consent Judgment. All such ceramicware shall be
27 referred to herein as the "Products."

28

1 **1.6 Notice of Violation**

2 On or about June 27, 2006, Brimer served Wing Hop and various public enforcement
3 agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that provided
4 Wing Hop and such public enforcers with notice that alleged that Wing Hop was in violation of
5 California Health & Safety Code §25249.6 for failing to warn consumers and customers that the
6 Products that Wing Hop sold exposed users in California to the Listed Chemical.

7 **1.7 Complaint**

8 On September 8, 2006, Brimer, who is acting in the interest of the general public in
9 California, filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the
10 Superior Court in and for the County of Los Angeles against Wing Hop and Does 1 through
11 150, (*Brimer v. Wing Hop Fung Ginseng, Inc.*, Case No. BC358277) alleging violations of
12 Health & Safety Code §25249.6 based on the alleged exposures to the Listed Chemical
13 contained in the Products sold by Wing Hop.

14 **1.8 No Admission**

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

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Wing Hop as to the allegations contained in the Complaint, that venue is
27 proper in the County of Los Angeles and that this Court has jurisdiction to enter and enforce the
28 provisions of this Consent Judgment.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term "Effective Date" shall mean August 31,
3 2007.

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

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

9 Any warning issued for Products pursuant to this Section 2.2 below shall be prominently
10 placed with such conspicuousness as compared with other words, statements, designs, or
11 devices as to render it likely to be read and understood by an ordinary individual under
12 customary conditions before purchase or, for Products shipped directly to an individual in
13 California, before use.

14 **2.2 Product Warnings**

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

18 **(a) Retail Store Sales**

19 **(i) Point-of-Sale Warnings.** Wing Hop may perform its
20 warning obligations, by insuring to the greatest extent possible that signs are posted at retail
21 outlets in the State of California where the Products are sold. Wing Hop must receive a written
22 commitment from each retailer to whom Wing Hop sells Products directly that it will post the
23 warning signs. Point-of-sale warnings shall be provided through one or more signs posted in
24 close proximity to the point of display of the Products that state:

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

 A point-of-sale warning shall be provided in a manner such that the consumer

1 understands to which specific Products the warning applies.

2 **(b) Internet Sales**

3 **(i) 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
6 for the Product; (c) on the same page as the price for any Product; or (d) on one or more web
7 pages displayed to a purchaser during the checkout process. The following warning statement
8 shall be used and shall appear in any of the above instances adjacent to or immediately
9 following the display, description, or price of the Product for which it is given in the same type
10 size or larger as the product description text:

11 **WARNING:** The materials used as colored decorations
12 on the exterior of this product contains
13 lead, a chemical known to the State of
14 California to cause birth defects and other
reproductive harm.

15 **2.2.2 Concurrent Warnings**

16 **(a) Additional Languages On Warnings** In addition to the warnings
17 listed pursuant to section 2.2.1, Wing Hop shall also include at the bottom of each warning the
18 term:

19 **“CALIFORNIA PROPOSITION 65 WARNING”**

20 which shall be translated into languages that correlate to any and all non-English languages used
21 in advertisements on the store premises, or used in print and/or broadcast advertisement for
22 Wing Hop stores. An example of such a warning is provided as Exhibit B.

23 **(b) Availability of Translated Warnings** For all retail stores where the
24 Products are made for sale, fully translated warnings shall be available upon request by a
25 consumer. The warnings, posted pursuant to section 2.2.1(a), shall be translated into languages
26 that correlate to any and all non-English languages used in advertisements on the store premises,
27 or used in print or broadcast advertisement for Wing Hop stores. Said translation can be posted
28 at the public entrance/exit for review by the public, provided such warnings are prominently

1 displayed so as to stand apart from other items posted in close proximity thereto.

2 **2.2.3 Exceptions**

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

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

6 **2.3 Reformulation Standards**

7 Products satisfying the conditions of Sections 2.3.1 and 2.3.2 are referred to as
8 “Reformulated Products”.

9 **2.3.1** Products with decorations that contain six one-hundredths of one percent
10 (.06%) of lead as measured either before or after the material is fired onto (or otherwise affixed
11 to) the Product using a test method of sufficient sensitivity to establish a limit of quantification
12 of less than 600 parts per million (“ppm”).¹

13 **2.3.2** Products with decorations within the "Lip and Rim Area"² or on any food
14 contact surface that contain two one-hundredths of one percent (0.02%) of lead by weight or less
15 using a sample size of the material in question measuring approximately 50-100 mg and a test
16 method of sufficient sensitivity to establish a limit of quantitation of less than 200 ppm.

17 **2.4 Reformulation Commitment**

18 Wing Hop commits to use its best efforts to only sell reformulated products after or
19 before March 1, 2008. On or before February 15, 2008, Wing Hop shall provide Brimer with a
20 declaration stating whether or not it is, or will be, selling Reformulated Products after March 1,
21 2008. If Wing Hop is unable to sell Reformulated Products, the declaration will detail its efforts
22 to identify a distributor and/or manufacturer of Reformulated Products. The declaration shall
23 set forth the person seeking Reformulated Products, the date of contact to the distributors and/or
24 manufacturers, the name, address, and person contacted at the distributors and/or manufacturers,

25 _____
26 ¹ If the decoration is tested after it is affixed to the Product, the percentage of the Listed Chemical by
27 weight must relate only to the decorating material and must not only include any quantity attributable to non-
decorating material (e.g., the ceramic substrate).

28 ² “Lip and Rim Area” is defined as the exterior top 20 millimeters of a hollowware food or beverage
Product.

1 and the date that a response was received from the distributors and/ or manufacturers stating that
2 Reformulated Products were unavailable, which shall be attached to the declaration as an
3 exhibit. The parties agree that if Wing Hop seeks Reformulated Products from at least three (3)
4 different suppliers and/or manufacturers, it will be deemed to have used its best efforts to
5 comply with the terms of this Section.

6 **3. MONETARY PAYMENTS**

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

8 The total civil penalty amount shall be \$10,000. The first half, amounting to \$5,000,
9 which shall be paid by Wing Hop pursuant to Health & Safety Code §25249.7(b), shall be made
10 on or before September 14, 2007. Should Wing Hop provide Brimer with a declaration
11 pursuant to Section 2.4, verifying that it employed its best efforts to sell only Reformulated
12 Products, the second half of the penalty, amounting to \$5,000, shall be waived. Otherwise,
13 \$5,000 shall be paid on or before February 28, 2008. Said payments shall be made payable to
14 the "HIRST & CHANLER LLP" in Trust for Russell Brimer" and shall be delivered to
15 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
24 Office of Environmental Health Hazard Assessment and the remaining 25% of these penalty
25 monies retained by Brimer as provided by Health & Safety Code §25249.12(d). Brimer shall
26 bear all responsibility for apportioning and paying to the State of California the appropriate civil
27 penalties paid in accordance with this Section.

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

The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
without reaching terms on the amount of fees and costs to be reimbursed to them, thereby

1 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
2 Wing Hop then expressed a desire to resolve the fee and cost issue shortly after the other
3 settlement terms had been finalized. The Parties then attempted to (but did not) reach an accord
4 on the compensation due to Plaintiffs and their counsel under the private attorney general
5 doctrine codified at Code of Civil Procedure §1021.5 for all work performed through the
6 Effective Date of the Agreement and reasonably to be performed in connection with the terms
7 set forth in this Agreement after the Effective Date. The parties do agree, however, that Plaintiff
8 and his counsel are entitled to their reasonable attorneys fees and costs under the prerequisites
9 set forth by CCP §1021.5.

10 In an effort to save resources, the Parties have agreed to have the outstanding fee and
11 cost issue adjudicated by mediation. If the mediation is unsuccessful, the Parties have further
12 agreed to convey the necessary authority to the neutral conducting the mediation to determine a
13 sum that it deems to be the reasonable attorneys' fees and costs recoverable by Plaintiff.
14 Plaintiff and Wing Hop agree that if the mediator is required to make a determination of
15 Plaintiff's reasonable fees and costs, that determination shall be final and binding upon the
16 parties.

17 The mediation shall take place in Los Angeles County within 30 days of the entry of this
18 Consent Judgment, with payment to occur within 30 days of the date the mediator awards
19 attorney's fees and costs or the date that the parties negotiate a fixed sum entry of this court's
20 order approving the judgment or November 30, 2007, whichever is sooner. The payment shall
21 be made payable to HIRST & CHANLER LLP at the following address:

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

25 **5. RELEASE OF ALL CLAIMS**

26 **5.1 Release of Wing Hop and Downstream Customers**

27 In further consideration of the promises and agreements herein contained, and for the
28 payments to be made pursuant to Sections 3 and 4, Brimer, on behalf of himself, his past and

1 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
2 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
3 form of legal action and releases all claims, including, without limitation, all actions, and causes
4 of action, in law or in equity, suits, liabilities, demands, obligations, damages, fines or penalties
5 of any nature whatsoever, whether known or unknown, fixed or contingent (collectively
6 "Claims"), against Wing Hop and each of its downstream retailers, franchisees, dealers,
7 customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and
8 their respective officers, directors, attorneys, representatives, shareholders, agents, and
9 employees, and sister and parent entities (collectively "Releasees"). This release is limited to
10 those claims that arise under Proposition 65, as such claims relate to Wing Hop's alleged failure
11 to warn about exposures to or identification of the Listed Chemical contained in the Products.

12 The Parties further understand and agree that this release shall not extend upstream to
13 any entities that manufactured the Products or any component parts thereof, or any distributors
14 or suppliers who sold the Products or any component parts thereof to Wing Hop. The parties
15 also understand and agree that this section does not release defendant from payment plaintiff's
16 reasonable fee's and costs associated with the mediation set forth in Section 4.

17 **5.2 Wing Hop's Release of Brimer**

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

23 **6. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and
25 shall be null and void if, for any reason, it is not approved and entered by the Court within one
26 year after it has been fully executed by all Parties.

27 **7. SEVERABILITY**

28 If, subsequent to court approval of this Consent Judgment, any of the provisions of this

1 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
2 provisions remaining shall not be adversely affected.

3 **8. ATTORNEYS' FEES**

4 In the event that, after Court approval: (1) a dispute arises with respect to any provision
5 of this Consent Judgment; (2) Wing Hop or any third party seeks modification of this Consent
6 Judgment pursuant to Section 14 below; or (3) Brimer takes reasonable and necessary steps to
7 enforce the terms of this Consent Judgment, Brimer, should he prevail, shall be entitled to his
8 reasonable attorneys' fees and costs pursuant to CCP §1021.5.

9 **9. GOVERNING LAW**

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

16 **10. NOTICES**

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

21 To Wing Hop:

22 Richard Salcido, Esq.
23 HUNTER MOLLOY & SALCIDO LLP
24 225 S. Lake Ave. #600
Pasadena, CA 91101

25 Wing Hop Fung Ginseng, Inc.
26 Attn: Dai Ong, President
727 N. Broadway, Ste. 102
Los Angeles, CA 90012

To Brimer:

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

27 Any Party, from time to time, may specify in writing to the other Party a change of
28 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
4 same document.

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

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

8 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

9 Brimer and Wing Hop agree to mutually employ their best efforts to support the entry of
10 this Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the
11 Court in a timely manner. The Parties acknowledge that, pursuant to Health & Safety Code §
12 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
13 Accordingly, the Plaintiff agrees to file a Motion to Approve the Agreement ("Motion").

14 **14. MODIFICATION**

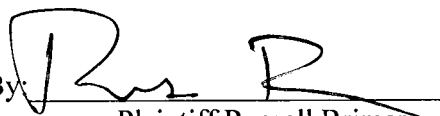
15 This Consent Judgment may be modified within twenty (20) days only: (1) by written
16 agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon;
17 or (2) upon a successful motion of any Party and entry of a modified Consent Judgment by the
18 Court. The Attorney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

20 **15. AUTHORIZATION**

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

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<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>9-4-07</u></p> <p>By:  Plaintiff Russell Brimer</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>8/29/07</u></p> <p>By:  Defendant Wing Hop Fung Ginseng, Inc.</p>
<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p style="text-align: center;">HIRST & CHANLER LLP</p> <p>By: _____ George W. Dowell, Esq. Attorneys for Plaintiff RUSSELL BRIMER</p>	<p style="text-align: center;">APPROVED AS TO FORM:</p> <p>Date: _____</p> <p style="text-align: center;">HUNTER MOLLOY & SALCIDO LLP</p> <p>By: _____ Richard Salcido, Esq. Attorneys for Defendant WING HOP FUNG GINSENG, INC.</p>

IT IS SO ORDERED.

Date: _____ JUDGE OF THE SUPERIOR COURT

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AGREED TO:	AGREED TO:
Date: _____	Date: _____
By: _____ Plaintiff Russell Brimer	By: _____ Defendant Wing Hop Fung Ginseng, Inc.
APPROVED AS TO FORM:	APPROVED AS TO FORM:
Date: <u>9-6-07</u>	Date: <u>8/29/07</u>
HIRST & CHANLER LLP	HUNTER MOLLOY & SALCIDO LLP
By: <u>George W. Dowell</u> George W. Dowell, Esq. Attorneys for Plaintiff RUSSELL BRIMER	By: <u>Richard Salcido</u> Richard Salcido, Esq. Attorneys for Defendant WING HOP FUNG GINSENG, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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EXHIBIT A

The Products that are covered by this Consent Judgment include, but are not limited to:

1. *5" Bowl, #542712 (#0 000100 086539)*
2. *4" Plate, #84207 (#0 000100 086539)*

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EXHIBIT B

PROPOSITION 65 WARNING
The materials used as colored decorations on the exterior
of this product contains lead, a chemical known to the
State of California to cause birth defects and other
reproductive harm.
[California Proposition 65 Warning (Chinese)]