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Attorneys for Plaintiff
RUSSELL BRIMER

Attorneys for Defendants
SOUTHWEST SPECIALTY FOODS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

RUSSELL BRIMER, Plaintiff, v. SOUTHWEST SPECIALTY FOODS, INC.; and DOES 1 through 150, Defendants.	Case No. CGC-08-474309 **STIPULATION AND [PROPOSED] ORDER RE: CONSENT JUDGMENT**

1. INTRODUCTION

1.1 Plaintiff and Settling Defendant. This Consent Judgment is entered into by and between plaintiff Russell Brimer (hereafter "Brimer" or "Plaintiff") and defendant Southwest Specialty Foods, Inc. (hereinafter "Southwest" or "Defendant"), with Plaintiff and Defendant collectively referred to as the "Parties" and Brimer and Defendant each being a "Party."

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

1.3 General Allegations. Plaintiff alleges that Defendant has manufactured, distributed and/or sold in the State of California mugs and other ceramic containers, intended for the consumption of food or beverages, with colored artwork or designs on the exterior surface containing lead, which is listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§25249.5 et seq., also known as Proposition 65, to cause cancer and birth defects (and other reproductive harm). Lead (and/or lead compounds) shall be referred to herein as the "Listed Chemical."

1.4 Product Description. The products that are covered by this Consent Judgment are defined as follows: the 14 oz. El Grande mug MUG2 *(#0 89382 11299 0)*, intended for the consumption of food or beverages, with colored artwork or designs on the exterior surface containing lead, manufactured, sold and/or distributed by Defendant in California. Such products collectively are referred to herein as the "Products."

1.5 Notices of Violation. Beginning on March 21, 2007, Brimer served Defendant and various public enforcement agencies with a document entitled "60-Day Notice of Violation" ("Notice"), that provided Defendant and such public enforcers with notice that alleged that Defendant was in violation of Health & Safety Code §25249.6 for failing to warn purchasers that certain Products that they sold expose users in California to the Listed Chemical.

1.6 Complaint. On April 10, 2008, Brimer, in the interest of the general public in California, filed a complaint (hereafter referred to as the "Complaint" or the "Action") in the Superior Court for the City and County of San Francisco against Defendant and Does 1 through 150, alleging violations of Health & Safety Code §25249.6 based on the alleged exposures to the Listed Chemical contained in certain Products sold by Defendant.

1.7 No Admission. Defendant has filed its answer and denies the material factual and legal allegations contained in Plaintiff's Notices and Complaint and maintains that all products that it has sold and distributed in California including the Products have been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Defendant of any fact, finding, conclusion, issue of law or violation of law. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties of Defendant under this Consent Judgment.

1.8 Consent to Jurisdiction. For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the Parties and concerning the alleged violations at issue and personal jurisdiction over Defendant as to the acts alleged, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment and to enforce the provisions thereof.

1.9 Effective Date. For purposes of this Consent Judgment, "Effective Date" shall be May 29, 2009.

2. INJUNCTIVE RELIEF: PROPOSITION 65 WARNINGS AND REFORMULATION

2.1 WARNING OBLIGATIONS FOR NON-REFORMULATED PRODUCTS

(a) **Required Warnings.** After May 30, 2009, Southwest shall not ship or cause to be shipped or sell any Products containing any of the Listed Chemical to any person or entity in California, unless warnings are given in accordance with one or more provisions in

(b) Subsection 2.2 below.

(c) **Exceptions.** The obligation set forth in subsections 2.1(a) and 2.2 below shall not apply to:

i. any Products manufactured on or before April 30, 2009; or

ii. Reformulated Products

2.2 CLEAR AND REASONABLE WARNINGS

(a) **Product Labeling.** A warning shall be affixed to the packaging, labeling or directly to or on the Products which states:

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

or,

WARNING: The materials used as colored decorations on the exterior of the following products contain lead a chemical known to the State of California to cause birth defects or other reproductive harm.

Warnings issued for the Products pursuant to this subsection shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of use or purchase. Any changes to the language or format of the warning required by this subsection shall only be made following: (1) approval of Plaintiff; (2) approval from the California Attorney General's Office, provided that written notice of at least fifteen (15) days is

given to Plaintiff for the opportunity to comment; or (3) Court approval.

(b) **Point-of-Sale Warnings.** The Defendant may execute its warning obligations, where applicable, through arranging for the posting of signs at retail outlets in the State of California at which the Products are sold, in accordance with the terms specified in subsections 2.2(b)(i), 2.2(b)(ii) and 2.2(b)(iii).

i. If point-of-sale warnings are to be provided through one or more signs posted at or near the point of sale or display of the Products, the warning must state:

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

or

WARNING: **The materials used as colored decorations on the exterior of the following mug products sold in this store contain lead a chemical known to the State of California to cause birth defects or other reproductive harm.**

ii. Warnings issued for the Products pursuant to this subsection shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of use or purchase and shall be placed or written in a manner such that the consumer understands to which *specific* Products the warnings apply so as to minimize if not eliminate the chances that an overwarning situation will arise. Any changes to the language or format of the warning required for the Products by this subsection shall only be made following: (1) approval of Plaintiff; (2) approval from the California Attorney General's Office, provided that written notice of at least fifteen (15) days is given to Plaintiff for the opportunity to comment; or, (3) Court approval.

iii. If Southwest intends to utilize point-of-sale warnings for sales made to retail outlets to comply with this Consent Judgment, it must provide notice as required by this Consent Judgment to each retailer to whom the Products are shipped for sale in California and obtain the written consent of such retailer before shipping the Products. Such notice shall include a copy of this Consent Judgment and any required warning materials (including, as appropriate, signs and/or stickers). If Southwest has obtained the written consent of a retailer and transmitted the requisite warnings as provided herein, Boston shall not be found to have violated this Consent Judgment if it has complied with the terms of this Consent Judgment.

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

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

or

> **WARNING: This product contains lead, a chemical known to the state of California to cause birth defects or other reproductive harm**

Alternatively, the designated symbol may appear adjacent to or immediately following the

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display, description, or price of the Product for which a warning is being given, provided that the following warning statement also appears elsewhere on the same web page, as follows:

> **WARNING: Products identified on this page with this symbol – contain Lead, a chemical known to the State of California to cause birth defects and other reproductive harm.**

2.3 Reformulation Commitment

Beginning October 31, 2009, Defendant shall not ship, offer to ship for sale or sale in California any Products containing the Listed Chemical, unless such Products meet the applicable reformulation standards set forth in section 2.3 (b) below.

(a) **Reformulation Definitions**. For purposes of this section, the following definitions apply:

"Exterior Decorations" is defined as all colored artwork, designs and/or markings on the exterior surface of the Product.

"Lip and Rim Area" is defined as the interior and exterior top 20 millimeters of a hollowware food/beverage Product, as defined by American Society of Testing and Materials Standard Test Method C927-99.

"No Detectable Lead" shall mean that no lead is detected at a level above two one-hundredths of one percent (0.02%) by weight using a sample size of the materials in question measuring approximately 50-100 mg and a test method of sufficient sensitivity to establish a limit of quantitation of less than 200 ppm.[1]

"Product" shall mean ceramic mugs intended for the consumption of food or beverages, with colored artwork or designs on the exterior surface.

"Reformulated Product" refers to any Product that meets the Reformulation Standard set forth below, as applicable.

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

(b) **Reformulation Standard.** A Product is a Reformulated Product if it satisfies the standards outlined in subsections 2.3(b)(i), (ii) or (iii), subject to the following qualifications:

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

ii. Wipe Test-Based Standard. The Product must produce a test result no higher than 1.0 micrograms (ug) of lead as applied to the Exterior Decorations and performed as outlined in NIOSH method no. 9100.

iii. Total Acetic-Acid Immersion Test Based Standard. The Product must achieve a result of 0.99 ppm or less for lead after correction for internal volume when tested under the protocol attached hereto as Exhibit A (the ASTM C927-99 test method, modified for total immersion with results corrected for internal volume).[3]

iv. Lip and Rim Area Decoration. If the Product contains Exterior Decorations in the Lip and Rim Area:

(A) Any Exterior Decorations that extend into the Lip and Rim Area must only utilize decorating materials that contain No Detectable Lead, or

(B) The Product must yield a test result showing a concentration level of 0.5 ug/ml or less of lead using ASTM method C 927-99.[4]

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

[3] Because this method requires correction for internal volume, this method is only appropriate for ceramic hollowware.

[4] The result must be evaluated without correction for internal volume; this method is only appropriate for ceramic hollowware.

3. MONETARY PAYMENTS.

3.1 In settlement of all the claims referred to in this Consent Judgment against Southwest, Southwest shall pay $1,000.00 in civil penalties to be apportioned in accordance with California Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment and the remaining 25% of these penalty monies remitted to Brimer as provided by California Health & Safety Code §25249.12(d). Southwest shall issue two separate checks for the penalty payment: (a) one check made payable to Hirst & Chanler LLP in Trust for the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount of $750.00, representing 75% of the total penalty and (b) one check to Hirst & Chanler LLP in Trust for Brimer in the amount of $250.00, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of $750.00. The second 1099 shall be issued to Brimer in the amount of $250.00, whose address and tax identification number shall be furnished, upon request, five calendar days before payment is due. The penalty payment shall be due no later than April 30, 2009, and shall be sent to:

Hirst & Chanler LLP
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

4. REIMBURSEMENT OF FEES AND COSTS

4.1 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 leaving this fee issue to be resolved after the material terms of the agreement had been settled. Defendant then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on

the compensation due to Plaintiff and his counsel under the private attorney general doctrine codified at Code of Civil Procedure §1021.5 for all work performed through the Court's approval of the Agreement. Under the private attorney general doctrine codified at Code of Civil Procedure §1021.5, Defendant shall reimburse Plaintiff and his counsel for fees and costs, incurred as a result of investigating, bringing this matter to Defendant's attention, litigating and negotiating a settlement in the public interest, and seeking the Court's approval of this Consent Judgment. Specifically, Defendant shall pay Plaintiff and his counsel $12,500.00 for all attorneys' fees, expert and investigation fees, and litigation costs. The payment shall be made payable to Hirst & Chanler LLP and shall be delivered to Plaintiff's counsel on or before April 30, 2009, at the following address:

HIRST & CHANLER LLP
Attn: Prop 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565.

Except as specifically provided in this Consent Judgment, Defendant shall have no further obligation with regard to reimbursement of Plaintiff's attorney's fees and costs with regard to the Products covered in this Action.

5. RELEASE OF ALL CLAIMS

5.1 Plaintiff's Release of Defendant. In further consideration of the representations, warranties and commitments herein contained, and for the payments to be made pursuant to sections 3 and 4, Plaintiff, on behalf of himself, his past and current agents, representatives, attorneys, successors assignees, or any person or entity who may now or in the future claim through him in a derivative manner, and in the interest of the general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and release all claims, including, without limitation, all actions, causes of action, in law or in equity, suits,

liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Defendant and each of its distributors, wholesalers, licensors, licensees, auctioneers, retailers, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, divisions, subsidiaries and their respective officers, directors, attorneys, representatives, shareholders, agents, representatives, insurers and employees and any other persons or entities to whom Defendant may be liable (collectively, "Defendant's Releasees") arising under Proposition 65 related to Defendant's or Defendant's Releasees' alleged failure to warn about exposures to or identification of the Listed Chemical contained in the Products. It is specifically understood and agreed that the Parties and the Court intend that Defendant's compliance with the terms of this Consent Judgment resolves all issues and liability, now and in the future (so long as Defendant complies with the terms of the Consent Judgment) concerning Defendant and the Defendant's Releasees' compliance with the requirements of Proposition 65 as to the Listed Chemical in exterior decorations on the Products.

5.2 Defendant's Release of Plaintiff. Defendant waives all rights to institute any form of legal action against Plaintiff, or their attorneys or representatives, for all actions taken or statements made by Plaintiff or his attorneys or representatives, in the course of seeking enforcement of Proposition 65 in association with this Action.

6. COURT APPROVAL

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

7. SEVERABILITY

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

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

8. ATTORNEYS' FEES

In the event that, after Court approval: (1) Southwest seeks modification of this Consent Judgment pursuant to Section 14 below; or (2) Brimer takes reasonable and necessary steps to successfully enforce the terms of this Consent Judgment, Brimer shall be entitled to his reasonable attorneys' fees and costs pursuant to CCP §1021.5.

9. GOVERNING LAW

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products specifically, then Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, those Products are so affected.

10. NOTICES

All correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail, return receipt requested or (ii) overnight courier on either Party by the other at the addresses listed below. Either Party, from time to time, may specify a change of address to which all notices and other communications shall be sent.

For Plaintiff:	For Defendant:
Russell Brimer c/o Hirst & Chanler LLP 2560 Ninth Street Parker Plaza, Suite 214 Berkeley, CA 94710-2565	Donald R. Wild WILD, CAREY & FIFE 120 Montgomery Street, Suite 1000 San Francisco, CA 94104

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

same document.

12. COMPLIANCE WITH HEALTH & SAFETY CODE §25249.7(F)

Plaintiff agrees to comply with the reporting form requirements referenced in Health & Safety Code §25249.7(f). Pursuant to regulations promulgated under that section, Plaintiff shall present this Consent Judgment to the California Attorney General's Office within two (2) days after receiving all of the necessary signatures. A noticed motion to enter the Consent Judgment will then be served on the Attorney General's Office at least forty-five (45) days prior to the date a hearing is scheduled on such motion in the Superior Court for the City and County of San Francisco unless the Court allows a shorter period of time.

13. ADDITIONAL POST EXECUTION ACTIVITIES

The Parties shall mutually employ their best efforts to support the entry of this Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the Plaintiff agrees to file a Motion to Approve the Agreement ("Motion"), within a reasonable period of time after the Execution Date (*i.e.*, not to exceed sixty (60) days unless otherwise agreed to by the Parties' counsel based on unanticipated circumstances). Plaintiff's counsel shall prepare a declaration in support of the Motion which shall, *inter alia*, set forth support for the fees and costs to be reimbursed pursuant to Section 4.

14. MODIFICATION

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

15. ENTIRE AGREEMENT

This Consent Judgment sets forth the entire agreement between Plaintiff and Defendant relating to the subject mater hereof and hereby supersedes any and all prior oral or written agreements or understandings.

16. 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.

AGREED TO:

Date: 4.30.09

By: _____
Plaintiff Russell Brimer

AGREED TO:

Date: _____

By: _____
Jeff Jacobs, President
Defendant Southwest Specialty Foods, Inc.

APPROVED AS TO FORM:

Date: _____

HIRST & CHANLER LLP

By: _____
Daniel Bornstein
Attorneys for Plaintiff
RUSSELL BRIMER

APPROVED AS TO FORM:

Date: _____

WILD, CAREY & FIFE

By: _____
Donald R. Wild
Attorneys for Defendant
SOUTHWEST SPECIALTY FOODS, INC

IT IS SO ORDERED.

Date: _____

_____
JUDGE OF THE SUPERIOR COURT

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Plaintiff Russell Brimer

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Date: _____

By: _____
Jeff Jacobs, President
Defendant Southwest Specialty Foods, Inc.

APPROVED AS TO FORM:

Date: 4/30/08

HIRST & CHANLER LLP

By: Daniel Bornstein
Daniel Bornstein
Attorneys for Plaintiff
RUSSELL BRIMER

APPROVED AS TO FORM:

Date: _____

WILD, CAREY & FIFE

By: _____
Donald R. Wild
Attorneys for Defendant
SOUTHWEST SPECIALTY FOODS, INC

IT IS SO ORDERED.

Date: _____

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Date: 4-30-09

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APPROVED AS TO FORM:

Date: _____

HIRST & CHANLER LLP

By: _____
Daniel Bornstein
Attorneys for Plaintiff
RUSSELL BRIMER

APPROVED AS TO FORM:

Date: 4/30/09

WILD, CAREY & FIFE

By: Robert Lindquist
for Donald R. Wild
Attorneys for Defendant
SOUTHWEST SPECIALTY FOODS, INC

IT IS SO ORDERED.

Date: _____

_____
JUDGE OF THE SUPERIOR COURT