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8 Attorneys for Plaintiff
9 RUSSELL BRIMER

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16 Attorneys for Defendants
17 WILTON INDUSTRIES, INC. and WILTON BRANDS, INC.

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

21 RUSSELL BRIMER,

22 Plaintiff,

23 v.

24 WILTON INDUSTRIES, INC.; WILTON
25 BRANDS, INC.; and DOES 1 through 150,
26 inclusive,

27 Defendants.

28 Case No. R410549553

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

Health & Safety Code § 25249.6, *et seq.*

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Wilton Industries, Inc. and Wilton Brands, Inc.**

3 This Stipulation and [Proposed] Order Re: Consent Judgment (“Consent Judgment”) is
4 entered into by and between Russell Brimer (“Brimer”) and Wilton Industries, Inc. and Wilton
5 Brands, Inc. (collectively, “Wilton”), with Brimer and Wilton 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 Wilton employs ten or more persons and is a person in the course of doing business for
13 purposes of Proposition 65.

14 **1.4 General Allegations**

15 Brimer alleges that Wilton has manufactured, distributed and/or sold in the State of
16 California coated decorative staple bars containing lead including, but not limited to, *EK Success*
17 *Fastenator Decorative Staple Bars*, EKFSVP34 (#0 15586 65919 1). Lead is listed pursuant to the
18 Safe 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 birth
20 defects and other reproductive harm. Lead shall be referred to herein as “Lead” or the “Listed
21 Chemical.”

22 **1.5 Product Description**

23 The products that are covered by this Consent Judgment are defined as follows: coated
24 decorative staple bars which contain the Listed Chemical in or on the product and which Wilton:
25 (a) manufactured, distributed and/or sold for sale in California or to California consumers; or (b)
26 will manufacture, distribute or sell for sale in California or to California consumers. All such items
27 shall be referred to herein as the “Products.”

28 ///

1 **1.6 Notice of Violation**

2 On or about December 15, 2009, Brimer served Wilton and various public enforcement
3 agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided
4 Wilton and such public enforcers with notice that alleged that Wilton was in violation of California
5 Health & Safety Code §25249.6 for failing to warn consumers and customers that the Products
6 exposed users in California to lead. No public enforcer has diligently prosecuted the allegations set
7 forth in the Notice.

8 **1.7 Complaint**

9 On or about December 3, 2010, Brimer, who was and is acting in the interest of the general
10 public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court for the
11 City and County of Alameda against Wilton, alleging violations of California Health & Safety
12 Code § 25249.6 based on the alleged exposures to lead contained in coated decorative staple bars
13 manufactured, distributed and/or sold by Wilton.

14 **1.8 No Admission**

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

23 **1.9 Consent to Jurisdiction**

24 For purposes of this Consent Judgment only, the parties stipulate that this Court has
25 jurisdiction over Wilton as to the allegations contained in the Complaint, that venue is proper in
26 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
27 this Consent Judgment.

28 ///

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
3 this Consent Judgment is entered by the Court.

4 **1.10 Execution Date**

5 For purposes of this Consent Judgment, the term “Execution Date” means the date on
6 which this Consent Judgment is signed by the Parties.

7 **2. INJUNCTIVE RELIEF: REFORMULATION**

8 **2.1 Reformulation Commitment**

9 As of the Effective Date, Wilton shall only distribute and/or sell Products in California that
10 are Lead Free, as set forth below. For purposes of this Consent Judgment, “Lead Free” shall mean
11 Products which produce a test result no higher than: (a) 90 ppm of Lead for Paint or other Surface
12 Coatings¹ on the Products; and (b) 100 parts per million (“ppm”) of Lead in all component parts of
13 the Products other than Paint or other Surface Coatings. In the case of both (a) and (b), the test
14 methods shall be Environmental Protection Agency (“EPA”) testing methodologies 3050B and
15 6010B as utilized for the purpose of determining lead content in a solid substance. Compliance
16 with these standards shall constitute compliance with Proposition 65 for the Products with regard
17 to Lead.

18 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE §25249.7(B)**

19 In settlement of all the claims referred to in this Consent Judgment against it, Wilton shall
20 pay \$30,000 in civil penalties to be apportioned in accordance with California Health & Safety
21 Code § 25192, with 75% of these funds remitted to the State of California’s Office of
22 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of these penalty
23 monies remitted to Brimer as provided by California Health & Safety Code § 25249.12(d). In
24

25 ¹ Pursuant to 16 C.F.R. § 1303.2(b), as amended from time to time, for purposes of this Consent Judgment the
26 term “Paint or other Surface Coatings” means a fluid, semi-fluid, or other material, with or without a suspension of
27 finely divided coloring matter, which changes to a solid film when a thin layer is applied to a metal, wood, stone,
28 paper, leather, cloth, plastic, or other surface. This term does not include printing inks or those materials which
actually become a part of the substrate, such as the pigment in a plastic article, or those materials which are actually
bonded to the substrate, such as by electroplating or ceramic glazing.

1 consideration of the stringent "Lead Free" standards Wilton has agreed to in Section 2.1, Brimer
2 has agreed to waive \$10,000 of the civil penalty. Further, Brimer has agreed that \$18,000 of the
3 civil penalty will be waived, provided that an officer of Wilton certifies in writing, that, as a result
4 of the receipt of Brimer's Notice, approximately 25,000 units of Products in its inventory have
5 been removed ("Quarantined Products") and that it shall not distribute or offer for sale in
6 California or to California consumers any Quarantined Products. Such certification shall be
7 delivered to Brimer's counsel, at the address below, on or before December 3, 2010. Such
8 payment shall be made to counsel for Wilton within five (5) days of the Execution Date. Counsel
9 for Wilton will provide to The Chanler Group, in writing, confirmation that such payment has been
10 received and will be held pending entry of an order approving this Consent Judgment. No later
11 than within three (3) days of the Effective Date, counsel for Wilton shall issue separate checks for
12 the penalty payment: (a) one check made payable to "The Chanler Group in Trust for OEHHA"
13 representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for
14 Russell Brimer" representing 25% of the total penalty and send the payment, via an overnight
15 delivery service with a tracking system, to The Chanler Group, at the following address:

16 The Chanler Group
17 Attn: Proposition 65 Controller
2560 Ninth Street, Suite 214
Berkeley, CA 94710-2565.

18 Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010,
19 Sacramento, CA 95814 (EIN: 68-0284486); and (b) Russell Brimer, whose address and tax
20 identification number shall be provided within five calendar days of payment delivery.

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

22 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
24 issue to be resolved after the material terms of the agreement had been settled. After the other
25 settlement terms had been finalized, the Parties attempted to (and did) reach an accord on the
26 compensation due to Brimer and his counsel under the private attorney general doctrine codified at
27 Code of Civil Procedure ("CCP") §1021.5 and principles of contract law, for all work performed
28 through the mutual execution of this agreement. Under these legal principles, Wilton shall

1 reimburse Brimer's counsel for fees and costs, incurred as a result of investigating, bringing this
2 matter to Wilton's attention, and negotiating a settlement in the public interest. Wilton shall pay
3 Brimer and his counsel \$42,000 for all attorneys' fees, expert and investigation fees, and related
4 costs. Such payment shall be made to counsel for Wilton within five (5) days of the Execution
5 Date. Counsel for Wilton will provide to The Chanler Group, in writing, confirmation that such
6 payment has been received and will be held pending entry of an order approving this Consent
7 Judgment. No later than within three (3) days of the Effective Date, counsel for Wilton shall then
8 send the payment, via an overnight delivery service with a tracking system, to The Chanler Group,
9 at the following address:

10 The Chanler Group
11 Attn: Proposition 65 Controller
12 2560 Ninth Street, Suite 214
13 Berkeley, CA 94710-2565.

14 Wilton shall issue a separate 1099 for fees and cost paid in the amount of \$42,000 to The
15 Chanler Group, 2560 Ninth Street, Suite 214, Berkeley, CA 94710-2565 (EIN: 94-3171522).

16 **5. RELEASE OF ALL CLAIMS**

17 **5.1 Release of Wilton**

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

1 employees, and sister and parent entities including, but not limited to, EK Success Ltd.
2 (collectively "Releasees"). This release is limited to those Claims that arise under Proposition 65,
3 as such Claims relate to Wilton's alleged failure to warn about exposures to, or identification of,
4 Lead contained in or on the Products whether sold prior to or after the Effective Date.

5 In addition to the foregoing, Brimer, on behalf of himself, his past and current agents,
6 representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity
7 on behalf of the People of the State of California, hereby waives all rights to institute or participate
8 in, directly or indirectly, any form of legal action and releases all Claims against Wilton and each
9 of its Releasees as such Claims relate to Wilton's alleged failure to warn about exposures to or
10 identification of Lead contained in the Products.

11 **5.2- Wilton's Release of Brimer**

12 Wilton waives any and all claims against Brimer, his attorneys and other representatives,
13 for any and all actions taken or statements made by Brimer and his attorneys and other
14 representatives, whether in the course of investigating claims or otherwise seeking enforcement of
15 Proposition 65 against it in this matter, and/or with respect to the Products.

16 **6. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and
18 shall be null and void if, for any reason, it is not approved and entered by the Court within ninety
19 (90) days after the Execution Date.

20 **7. SEVERABILITY**

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

24 **8. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the State of California
26 and apply solely to persons or actions within the State of California. In the event that Proposition
27 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the
28 Products, or Wilton determines compliance with another California or federal law requires conduct

1 in violation of this Consent Judgment, then Wilton shall provide written notice to Brimer of any of
2 the foregoing, and shall have no further obligations pursuant to this Consent Judgment with respect
3 to, and to the extent that, the Products are so affected.

4 **9. NOTICES**

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

9 For Wilton:

10 Judith M. Praitis, Esq.
11 Sidley Austin LLP
12 555 W. 5th Street
13 Los Angeles, CA 90013

14 Steven R. Isko, Esq.
15 Executive Vice President and General Counsel
16 Wilton Brands, Inc.
17 2240 West 75th Street
18 Woodridge, Illinois 60517.

For Brimer:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street, Suite 214
Berkeley, CA 94710-2565

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

21 **10. COUNTERPARTS, FACSIMILE SIGNATURES**

22 This Consent Judgment may be executed in counterparts and by facsimile or .pdf signature,
23 each of which shall be deemed an original, and all of which, when taken together, shall constitute
24 one and the same document. A facsimile or .pdf signature shall be as valid as the original.

25 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

28 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

The parties acknowledge that pursuant to Health & Safety Code § 25249.7, a noticed
motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
obtaining such approval, Brimer, Wilton, and their respective counsel, agree to mutually employ
their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval

1 of the Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best
2 efforts shall include, at a minimum, cooperating in the drafting and filing any papers, and
3 asserting at oral argument in the trial court support of the required motion for judicial approval.

4 **13. MODIFICATION**

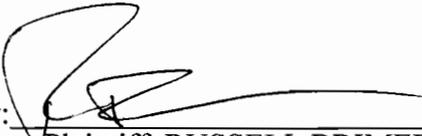
5 This Consent Judgment may be modified only: (1) by written agreement of the parties and
6 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion
7 of any party and entry of a modified consent judgment by the Court.

8 **14. AUTHORIZATION**

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

12 **AGREED TO:**

13 Date: 1-29-10

14
15
16 By: 
17 Plaintiff, RUSSELL BRIMER

AGREED TO:

Date: _____

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25
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27
28 By: _____
Steven R. Isko
Executive Vice President and
General Counsel Wilton Brands Inc.

1 of the Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best
2 efforts shall include, at a minimum, cooperating in the drafting and filing any papers, and
3 asserting at oral argument in the trial court support of the required motion for judicial approval.

4 **13. MODIFICATION**

5 This Consent Judgment may be modified only: (1) by written agreement of the parties and
6 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion
7 of any party and entry of a modified consent judgment by the Court.

8 **14. AUTHORIZATION**

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

12 **AGREED TO:**

13 Date: _____

14
15
16 By: _____
17 Plaintiff, RUSSELL BRIMER

AGREED TO:

13 Date: 11/29/2010

14
15
16 By: 
17 Steven R. Isko
18 Executive Vice President and
19 General Counsel Wilton Brands Inc.

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TOYS "R" US PROMOTION INDEMNIFICATION AGREEMENT

This Promotion Indemnification Agreement ("Agreement") between Toys "R" Us - Delaware, Inc. ("TRU") and WILTON BRANDS ("Sponsor") is effective as of **November 23rd, 2010**.

This will acknowledge the participation of Sponsor in the **Cookie Decoration portion of the Toys"R"Us National Christmas Event** scheduled for **12/4/10 at Toys "R" Us locations** ("Promotion"). The Promotion is more fully described in the attached Exhibit A.

Sponsor hereby represents warrants and covenants that the Promotion will be conducted in compliance with all applicable laws and regulations. Without limiting the foregoing, Sponsor agrees and acknowledges that Sponsor is solely responsible for ensuring the legal and factual adequacy of all promotional and advertising materials related to the Promotion except where such materials are provided by TRU.

Sponsor agrees to defend and indemnify TRU, its affiliated companies, and their respective officers, directors, members, shareholders, employees, agents, representatives, assigns and successors and shall hold them harmless against any damage, claims, suits, actions, liabilities, loss, costs and expenses, including reasonable attorneys' fees, arising out of or alleged to have arisen from (i) the Promotion (including any related act or omission by Sponsor) except to the extent the foregoing is caused by the negligence or the willful misconduct of TRU or (ii) a breach of the representations, warranties or obligations of Sponsor under this Agreement. TRU agrees to give prompt written notice to Sponsor of any such claims or suit. TRU's delay in furnishing notice of any such claims or suits to Sponsor shall not discharge Sponsor from the indemnification obligation hereunder, except to the extent such delay results in actual prejudice to Sponsor. Sponsor shall undertake and conduct the defense of any suit so brought. Sponsor shall keep TRU advised of the progress of any such suit and TRU shall have the right to participate in such suit. If Sponsor shall fail to take timely action to defend any such suit then TRU can defend such suit at Sponsor's reasonable expense. Sponsor shall not have the right to settle, compromise or otherwise enter into any agreement regarding the disposition of any claim of TRU without the prior written consent and approval of TRU other than a claim for monetary damages. This Paragraph shall survive the expiration or earlier termination of this Agreement

Sponsor shall, without expense to TRU, maintain in force from the date of this Agreement and for a period of at least one (1) years after the date of the Promotion, general liability insurance, including product liability/completed operations insurance and contractual liability insurance coverage on an occurrence basis in an amount of at least Three Million Dollars (\$3,000,000), providing for the investigation, defense and satisfaction (by settlement or otherwise) at no cost to TRU, of any liability, claim, loss, cost, expense or fee asserted against, or incurred by TRU (the "Policy" or "Policies"). Such Policy or Policies shall indicate that the insurer provides the primary insurance for any covered claims under this Agreement. All insurers shall have a Best's rating of at least AX. Within fourteen (14) days after the execution of this Agreement, but in no event no later than five (5) days prior to the date of the Promotion, Sponsor shall cause the insurance company issuing such Policy to issue to TRU a certificate acceptable to TRU confirming that such Policy has been issued and is in full force and effect and provides coverage of TRU as an additional insured as required by this Paragraph, and also confirming that before any cancellation, modification or reduction in coverage of such Policy, the insurance company shall give TRU ten (10) days prior written notice of such proposed cancellation, modification or reduction. Both Sponsor and Sponsor's insurance company waive any rights they may have to recover from TRU for any damages arising from claims falling within the scope of the foregoing indemnification. Every Policy carried by Sponsor as required under this Agreement shall include a provision denying to the insurer subrogation rights against TRU. Receipt by TRU of certificates or policies which do not conform to the requirements in this Agreement shall not relieve Sponsor the obligation to provide insurance conforming

to the requirements contained herein. This Paragraph shall survive the expiration or earlier termination of this Agreement.

Each party agrees that it will not infringe or encroach upon the other party's personal, contractual or proprietary rights, including patent, trademark, trade name, service mark, copyright, or any other intellectual property right. Each party agrees to defend, indemnify and hold harmless the other, their subsidiaries, divisions, related entities, officers, directors, employees, agents, successors and licensees from and against any and all claims, losses damages, judgments, liabilities or expenses, including reasonable attorney's fees in favor of third parties arising out of or based upon or alleged to have arisen out of a claim relating to infringement of either party's intellectual property or other rights as described in this paragraph.

This Agreement shall be governed by the laws of the State of New Jersey. Nothing herein contained shall be construed to place the parties in the relationship of partners, joint ventures, agents or employees of one another and no party shall have the power to obligate or bind the other in any manner whatsoever, except to the extent herein provided.

IN WITNESS WHEREOF, the undersigned has executed this Toys "R" Us Promotion Indemnification Agreement on the date set forth below.

TOYS "R" US-DELAWARE, INC.

WILTON BRANDS

By: _____

By: _____

(Print Name and Title)

(Print Name and Title)

(Date)

(Date)

EXHIBIT A

Promotion Title: Toys”R”Us National Christmas Event,
“Decorate your very own cookie!”

Dates and Terms: 12/4/10, 12-3PM All TRU Locations

The Promotion Details:

Wilton Brands will agree to provide:

- Wilton Cookies
- Cookie Decorating Materials
- Nutritional Information & Signage

1 Clifford A. Chanler, State Bar No. 135534
Laralei S. Paras, State Bar No. 203319
2 THE CHANLER GROUP
2560 Ninth Street, Suite 214
3 Berkeley, California 94710
Telephone: (510) 848-8880
4 Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
RUSSELL BRIMER

6
7 Judith M. Praitis, State Bar No. 151303
SIDLEY AUSTIN LLP
8 555 W 5th St
Los Angeles, CA 90013
9 Telephone: (213) 896-6000
Facsimile: (213) 896-6600

10 Attorneys for Defendants
11 WILTON INDUSTRIES, INC. and WILTON BRANDS, INC.

12

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE CITY AND COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION

16

17

RUSSELL BRIMER,

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Plaintiff,

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v.

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WILTON INDUSTRIES, INC.; WILTON
21 BRANDS, INC.; and DOES 1 through 150,
inclusive,

22

Defendants.

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Case No. *RG10549554*

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

Health & Safety Code § 25249.6, *et seq.*