

1 **1. INTRODUCTION**

2 **1.1 The Parties**

3 This Consent Judgment is entered into by and between plaintiff Russell Brimer (“Brimer” or
4 “Plaintiff”) and ICUP, Inc. (“ICUP” or “Defendant”), with Plaintiff and Defendant referred to
5 individually as a “Party” and collectively as the “Parties.”

6 **1.2 Russell Brimer**

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

10 **1.3 ICUP**

11 ICUP employs ten or more persons, and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that ICUP has manufactured, imported, distributed, and/or sold glassware
16 with colored artwork or designs on the exterior containing lead and cadmium, without the requisite
17 Proposition 65 warnings. ICUP disputes these allegations. Lead and cadmium are identified on the
18 Proposition 65 list as chemicals known to the State of California to cause birth defects and other
19 reproductive harm.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: any and all
22 externally-decorated glassware manufactured, imported, or purchased by ICUP for ultimate sale in
23 the State of California, including, without limitation, the following glassware with colored artwork,
24 designs, or markings containing lead and/or cadmium: *ACDC Collector’s Series Pint Glass 4-Pack*
25 (*#6 74449 31116 6*); *ACDC Shotglass 6-Pack, Item #31269* (*#6 74449 31269*); *Rolling Stones*
26 *Collector’s Series Pint Glass 4-Pack* (*#6 74449 30060 3*); and *Lynyrd Skynyrd Gimme Three Shots*
27 *Shotglass 3-Pack, Item #30360* (*#6 74449 30360 4*). The products described in this Section 1.5 are

1 hereinafter referred to as the “Products.”

2 **1.6 Notices of Violation**

3 On November 12, 2010, Brimer served ICUP and various public enforcement agencies with
4 a document entitled “60-Day Notice of Violation” (“Notice”), along with the requisite Certificate of
5 Merit, that provided the recipients with notice of alleged violations of California Health & Safety
6 Code § 25249.6 based on ICUP’s alleged failure to warn consumers that the Products exposed users
7 in California to lead.

8 On October 28, 2011, Brimer served ICUP and various public enforcement agencies with a
9 document entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”), along with
10 the requisite Certificate of Merit, that provided the recipients with notice of alleged violations of
11 California Health & Safety Code § 25249.6 based on ICUP’s alleged failure to warn consumers that
12 the Products exposed users in California to lead and/or cadmium. To the best of the Parties’
13 knowledge, no public enforcer has prosecuted the allegations set forth in either the Notice or
14 Supplemental Notice.

15 **1.7 Complaint**

16 On or about February 14, 2011, Brimer filed a complaint in the Superior Court in and for the
17 County of San Francisco against ICUP and Does 1 through 150 alleging violations of California
18 Health & Safety Code § 25249.6, based on the alleged exposures to lead contained in the Products
19 sold by ICUP. Upon entry of this Consent Judgment, the Complaint shall be deemed amended *nunc*
20 *pro tunc* to include the violations of Proposition 65 alleged in the Supplemental Notice.

21 **1.8 No Admission**

22 ICUP denies the material, factual, and legal allegations contained in Brimer’s Notice,
23 Supplemental Notice, and Complaint, and maintains that all products it is alleged to have
24 manufactured, has sold, imported, and/or distributed in California, including the Products, have
25 been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as
26 an admission by ICUP of any allegation, fact, finding, issue of law, or violation of law, nor shall
27 entry of, or compliance with, this Consent Judgment constitute or be construed as an admission by

1 ICUP of any allegation, fact, finding, conclusion, issue of law, or violation of law. However, this
2 section shall not diminish or otherwise affect ICUP's obligations, responsibilities, and duties under
3 this Consent Judgment.

4 **1.9 Consent to Jurisdiction**

5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
6 jurisdiction over ICUP as to the allegations contained in the Complaint, that venue is proper in the
7 County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of
8 this Consent Judgment.

9 **1.10 Effective Date**

10 For purposes of this Consent Judgment, the term "Effective Date" shall mean December 15,
11 2011.

12 **2. INJUNCTIVE RELIEF: REFORMULATION**

13 **2.1 Reformulation Standards**

14 Reformulated Products are defined as follows:

15 (a) those Products with exterior artwork decorations containing no detectable
16 amount of lead or cadmium (for the purposes of this Consent Judgment, "no detectable amount of
17 lead or cadmium" shall mean with respect to lead, less than or equal to 0.5 ug/ml (ppm), and with
18 respect to cadmium, less than or equal to 4.0 ug/ml (ppm), both based on the ASTM C927-80
19 Standard Test Method) in the lip-and rim area of the glassware (the top 20 millimeters of the
20 Products); and

21 (b) those Products with exterior artwork decorations containing a total lead
22 content of less than or equal to 90 ppm and containing a total cadmium content of less than or equal
23 to 200 ppm, exclusive of the lip-and-rim area, when analyzed pursuant to Environmental Protection
24 Agency testing methodologies 3050B and/or 6010B.

25 **2.2 Reformulation Commitment**

26 As of the Effective Date, all Products obtained from any manufacturer, imported,
27 distributed, sold, or offered for sale in the State of California by ICUP shall be Products that qualify

1 as Reformulated Products as defined in Section 2.1.

2 **3. PAYMENT OF PENALTIES AND ATTORNEY'S FEES**

3 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

4 Subject to Section 5 and in accordance with Section 3.3 herein, ICUP shall make a payment
5 of \$34,000.00 to be apportioned in accordance with Health & Safety Code section 25249.12,
6 subdivisions (c)(1) and (d), with 75% of these funds earmarked for the State of California's Office
7 of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of these penalty
8 monies earmarked for Brimer. This civil penalty reflects a credit of \$20,000.00 based on ICUP's
9 commitment to reformulate the Products pursuant to Sections 2.1 and 2.2 above.

10 **3.2 Reimbursement of Plaintiff's Fees and Costs**

11 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute without
12 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
13 issue to be resolved after the material terms of the agreement had been settled. ICUP then
14 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
15 finalized. The Parties then attempted to, and did, reach an accord on the compensation due to
16 Brimer and his counsel under general contract principles and the private attorney general doctrine
17 codified at California Code of Civil Procedure ("CCP") §1021.5. Subject to Section 5 and in
18 accordance with Section 3.3 herein, ICUP shall reimburse Brimer and his counsel \$78,000.00 for
19 fees and costs incurred as a result of investigating, litigating, enforcing, and bringing this matter to
20 ICUP's attention, and negotiating a settlement in the public interest. This figure includes Brimer's
21 future fees and costs, including attorneys' fees to be incurred in seeking judicial approval of this
22 Consent Judgment as well as any other legal work performed and fees incurred after the execution
23 of this Consent Judgment in an effort to obtain finality of the case. However, in the event a third
24 party were to appeal entry of this Consent Judgment, either party and their respective counsel shall
25 be entitled to seek their reasonable attorney's fees and costs associated with all appellate work
26 defending the entry of judgment pursuant to CCP §1021.5; provided, however, that recourse for
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1 such attorney's fees and costs shall be limited to and against the third party and neither Party shall
2 be entitled to recover such attorney's fees and costs from the other Party.

3 **3.3 Payment Procedures**

4 **3.3.1 Civil Penalty and Fees and Costs Held In Trust:** All payments required
5 by Sections 3.1 and 3.2 shall be delivered on or before the Effective Date to the attorney of record
6 for ICUP, and shall be held in trust pending the Court's approval of this Consent Judgment.

7 Payments delivered to ICUP's attorney of record, Buchanan Ingersoll & Rooney
8 LLP shall be made payable, as follows:

- 9 (a) "Buchanan Ingersoll & Rooney LLP in Trust for OEHHA" in the
10 amount of \$25,500.00;
- 11 (b) "Buchanan Ingersoll & Rooney LLP in Trust for Russell Brimer" in
12 the amount of \$8,500.00; and
- 13 (c) "Buchanan Ingersoll & Rooney LLP in Trust for The Chanler
14 Group" in the amount of \$78,000.00.

15 ICUP's attorney of record shall: (a) confirm in writing within five days of receipt that the
16 funds have been deposited in a trust account; and (b) within two days after the date of the hearing
17 and the entry of an Order on which the Court approves this Consent Judgment, deliver the
18 payments to The Chanler Group in three separate checks, as follows:

- 19 (a) "The Chanler Group in Trust for OEHHA" in the amount of
20 \$25,500.00;
- 21 (b) "The Chanler Group in Trust for Russell Brimer" in
22 the amount of \$8,500.00; and
- 23 (c) "The Chanler Group" in the amount of \$78,000.00.

24 **3.3.2 Issuance of 1099 Forms.** After this Consent Judgment has been approved
25 and the settlement funds required by Sections 3.1 and 3.2 have been transmitted to Brimer's
26 counsel, ICUP shall issue three separate 1099 forms, as follows:

- 27 (a) The first 1099 shall be issued to the Office of Environmental Health

1 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN:
2 68-0284486) in the amount of \$25,500.00;

3 (b) The second 1099 shall be issued to Russell Brimer in the amount of
4 \$8,500.00; Brimer's address and tax identification number shall be
5 furnished upon request; and

6 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-
7 3171522) in the amount of \$78,000.00.

8 **3.3.3 Payment Address:** All payments to the Chanler Group shall be delivered to
9 the following payment address:

10 The Chanler Group
11 Attn: Proposition 65 Controller
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

13 **4. RELEASE OF ALL CLAIMS**

14 **4.1 Full, Final, and Binding Resolution of Proposition 65 Allegations**

15 This Consent Judgment is a full, final and binding resolution between Brimer, on behalf of
16 himself and the public, and ICUP, of any violation of Proposition 65 that was or could have been
17 asserted by Brimer against ICUP, its parents, subsidiaries, affiliated entities that are under common
18 ownership, directors, officers, employees, attorneys, and each entity to whom ICUP directly or
19 indirectly distributes or sells Products, including downstream distributors, wholesalers, customers,
20 retailers, franchisees, cooperative members, licensors, and licensees ("Releasees"), based on their
21 claimed failure to warn about alleged exposures to lead and/or cadmium contained in the Products
22 that were manufactured, imported, distributed, or sold by ICUP.

23 **4.2 Brimer's Public Release of Proposition 65 Claims**

24 In further consideration of the promises and agreements herein contained, Brimer on behalf
25 of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and
26 in the interest of the general public, hereby waives all rights to institute or participate in, directly or
27 indirectly, any form of legal action and releases all claims, including, without limitation, all actions,

1 and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs,
2 fines, penalties, losses, or expenses, including, but not limited to, investigation fees, expert fees, and
3 attorneys' fees, but exclusive of fees and costs on appeal, limited to and arising under Proposition
4 65, including direct or derivative violations and related claims that have or could have been
5 asserted, with respect to lead and/or cadmium in the Products manufactured, imported, distributed,
6 or sold by ICUP (collectively "claims"), against ICUP and Releasees.

7 **4.3 Brimer's Individual Release of Claims**

8 Brimer also, in his individual capacity only and *not* in his representative capacity, provides a
9 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
10 actions, causes of action, direct or derivative claims, obligations, costs, expenses, attorneys' fees,
11 damages, losses, claims, liabilities and demands of plaintiff of any nature, character or kind,
12 whether known or unknown, suspected or unsuspected, or existing now or in the future against
13 ICUP and Releasees, limited to and arising out of alleged or actual exposures to lead and/or
14 cadmium in any and all externally-decorated glassware manufactured, imported, distributed, or sold
15 by ICUP and Releasees; provided, however, that this release shall not include any obligation arising
16 under this Consent Judgment.

17 **4.4 ICUP's Release of Brimer**

18 ICUP on behalf of itself, its past and current agents, representatives, attorneys, successors,
19 and/or assignees, hereby waives any and all claims against Brimer in his individual capacity only,
20 his attorneys and other representatives, for any and all actions taken or statements made (or those
21 that could have been taken or made) by Brimer and his attorneys and other representatives, whether
22 in the course of investigating claims or otherwise seeking to enforce Proposition 65 against them in
23 this matter with respect to the Products; provided, however, that this release shall not include any
24 obligation arising under this Consent Judgment.

25 **4.5 Waiver of Civil Code § 1542**

26 Except as otherwise provided for in this Consent Judgment, it is understood and agreed that
27 the releases in Sections 4.3 and 4.4 hereof shall constitute a general release of all of the claims that

1 the Parties have or may have against each other arising from or related to the subject matter of the
2 releases, and shall be effective as a full and final accord and satisfaction, and as a bar to all actions,
3 administrative proceedings, causes of action, costs, expenses, attorneys' fees, damages, claims and
4 liabilities whatsoever, whether or not now known, suspected, claimed or concealed, with respect to
5 such claims. Each party acknowledges that it is familiar with Section 1542 of the California Civil
6 Code which provides as follows:

7 **A general release does not extend to claims which the creditor does not**
8 **know or suspect to exist in his or her favor at the time of executing the**
9 **Release, which if known by him or her must have materially affected his or**
10 **her settlement with the debtor.**

11 Each Party expressly waives and relinquishes any and all rights and benefits which such
12 Party may have under, or which may be conferred upon such Party by the provisions of Section
13 1542 of the California Civil Code, as well as under any other similar state or federal statute or
14 common law principle, to the fullest extent that he or it may lawfully waive such rights or benefits
15 pertaining to such Party's claims against the other Party.

16 Each Party represents and warrants that it has read and understood the provisions of this
17 Section 4.5, it has had the legal effect of this settlement explained by competent counsel of its
18 choice, and that it executes this settlement of its own free will.

19 **5. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved by entry of Court Order and shall
21 be null and void if, for any reason, it is not approved by the Court by Order and entered within one
22 year after it has been fully executed by all parties. In the event the Consent Judgment is not
23 approved by the Court, any funds deposited with counsel for ICUP, as provided at Section 3.3
24 herein, shall be returned to ICUP within ten (10) days of the entry of the Court's Order denying
25 approval of the Consent Judgment.

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1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California
7 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
8 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
9 Consent Judgment are rendered inapplicable or no longer require as a result of any such repeal or
10 preemption or rendered inapplicable by reason of law generally as to the Products, then ICUP shall
11 provide written notice to Brimer of any asserted change in the law, and shall have no further
12 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
13 are so affected.

14 **8. NOTICES**

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

19 To ICUP:

20 ICUP, Inc.
21 Attn: Steven Trachtenberg, President
22 1152 Marlgress Road, Suite 200
23 Cherry Hill, New Jersey 08003

 To Brimer:

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

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

26 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
27 each of which shall be deemed an original, and all of which, when taken together, shall constitute

1 one and the same document.

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

3 Brimer and his attorneys agree to comply with the reporting form requirements referenced in
4 California Health & Safety Code § 25249.7(f).

5 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

6 Brimer and ICUP mutually agree to employ their best efforts to support the entry of this
7 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
8 timely manner. The Parties acknowledge that, pursuant to California Health & Safety Code §
9 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which
10 Brimer shall draft and file, and ICUP shall join. If any third party objection to the noticed motion is
11 filed, Brimer and ICUP shall work together to file a joint reply and appear at any hearing before the
12 Court. This provision is a material component of the Consent Judgment and shall be treated as such
13 in the event of a breach.

14 **12. MODIFICATION**

15 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
16 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
17 of any party and entry of a modified Consent Judgment by the Court.

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13. **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:

AGREED TO:

Date: 12-2-11

Date: 12/2/11

By: 
Russell Brimer

By: 
Steven Trachtenberg, President
ICUP, Inc.

IT IS SO ORDERED

Date: _____

JUDGE OF THE SUPERIOR COURT